

No. 09-214

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In the

**SUPREME COURT OF THE  
UNITED STATES OF AMERICA**

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MAJOR LEAGUE BASEBALL,  
Petitioner,

v.

KEVIN WILSON;  
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION  
Respondent.

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**ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTEENTH CIRCUIT**

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## **QUESTIONS PRESENTED**

- I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT A MAJOR LEAGUE BASEBALL PLAYER'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING A SUSPENSION UNDER A COLLECTIVELY BARGAINED FOR DRUG POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.
  
- II. WHETHER THE COURT OF APPEALS WAS CORRECT IN SETTING ASIDE AN ARBITRATOR'S AWARD SANCTIONING MAJOR LEAGUE BASEBALL'S REFUSAL TO ISSUE WARNINGS REGARDING THE PRESENCE OF A BANNED SUBSTANCE IN SPECIFIC PRODUCTS BECAUSE SUCH AN AWARD WAS IN VIOLATION OF PUBLIC POLICY.

## STATEMENT OF FACTS

The Respondent, Kevin Wilson, as an employee of the Minnesota Twins, L.L.C. and a member of the Major League Baseball Players Association (the “MLBPA”), which is the other respondent in this suit, is subject to the rules and regulations of Major League Baseball (“MLB”) as a condition of his employment. *Wilson v. Major League Baseball*, No. 09-AC-0213, 1 (S.D.Tul. 2009). In 2007, the MLBPA and the Petitioner, MLB, negotiated and signed a collective bargaining agreement that includes MLB’s Policy on Anabolic Steroids and Related Substances (the “Policy”). *Id.* The Policy states, “players are responsible for what is in their bodies,” and has a strict liability approach that will not consider a player’s intent if they test positive for a prohibited substance. *Id.* Players were informed that a positive test result would be subject to discipline as outlined in the Policy. *Id.* The Policy also provides a hotline that the players can contact in case they have questions about supplements. *Id.* at 2.

If a player is disciplined, there is an arbitration process for the review of any action taken. *Id.* The Policy states that a decision by a neutral arbitrator will be “the full, final, and complete disposition of the appeal and will be binding on all parties.” *Id.*

Dr. John Larson, a licensed physician, directs the Policy as its Independent Administrator. *Id.* Dr. Ray Finkle is the “Consulting Toxicologist” who aids in the implementation of the Policy. *Id.* Neither person has any affiliation with either the Commissioner’s office or any MLB club. *Id.*

In 2007, MLB discovered that SpeedShot, an energy-boosting supplement, contained Clomiphene, a prohibited substance explicitly stated in the Policy. *Id.* at 3. The label does not disclose Clomiphene as an ingredient. *Id.* Dr. Larson was alerted to the possibility that SpeedShot contained Clomiphene and he informed Dr. Finkle. *Id.*

After multiple communications between various people within MLB, MLB notified the MLBPA and the MLBPA responded by notifying all players, through their agents, that the company that “distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies” and, as a result, “players are prohibited from endorsing any of their products.” *Id.* Dr. Larson also sent a memorandum to the players reiterating the dangers posed by energy-boosting supplements. *Id.* The memorandum also restated the strict liability rule and the fact that the players’ intent will not matter in the event of a positive test. *Id.* These communications did not specifically state that SpeedShot contained a banned substance. *Id.*

Wilson disregarded the multiple warnings and took SpeedShot. *Id.* at 4. He was then drug tested, and his results came back positive for Clomiphene. *Id.* He was suspended for fifteen games, in accordance with the Policy. *Id.* Four other players also tested positive for Clomiphene and received the same suspension. *Id.* Wilson, the four players, and the MLBPA appealed the suspensions to an arbitrator pursuant as allowed by the Policy. *Id.*

The arbitrator found in favor of MLB and confirmed the suspensions. *Id.* The arbitrator held, “the Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement.” *Id.* at 5. The arbitrator further stated the “players used SpeedShot at their own risk, did so in the face of repeated warnings about the risks inherent in using supplements in general and energy-boosting supplements in particular, and did so knowing that a positive test would result in a suspension that would not be excused based on a claim of unintentional or inadvertent use.” *Id.*

In response to the arbitration award Wilson filed suit in Minnesota state court. *Id.* The state court granted Wilson a temporary restraining order barring his suspension; although it

applied only to Wilson, as the other four players were not employed in the state of Minnesota. *Id.* MLB then moved the case to federal court and consolidated it with an action brought by the MLBPA. *Id.*

The District Court for the Southern District of Tullahoma found that Section 301 of the Labor Management Relations Act preempts the state claims and that the arbitrator's decision concerning the players did not violate public policy. The Court of Appeals for the Fourteenth Circuit unfortunately reversed the District Court's sound judgment and this Court granted certiorari.

## SUMMARY OF THE ARGUMENT

This Court should reverse the opinion of the United States Court of Appeals for the Fourteenth Circuit, which incorrectly reversed the United States District Court for the Southern District of Tulania, and held that (1) Section 301 of the Labor Management Relations Act did not preempt the plaintiffs' state law claims, and (2) the arbitrator's decision upholding the plaintiffs' suspensions was in violation of public policy.

Section 301 of the Labor Management Relations Act does preempt the plaintiffs' claims. Any relief for the Respondents' claims would be based on the interpretation and application of the collective bargaining agreement that both parties negotiated. State law claims that do not exist independently of a collective bargaining agreement are preempted. Further, if state laws were to govern collective bargaining agreements that affect multiple states, it would be impossible to uniformly enforce the collective bargaining agreement making the agreement ineffective. Therefore, the District Court was correct in holding that Section 301 of the Labor Management Relations Act does preempt the Respondents' claims.

The arbitrator's decision to uphold the Respondents' suspensions was not in violation of public policy. The arbitrator based his decision on the essence of the collective bargaining agreement between the parties and did not violate public policy because the breach of fiduciary duty is not a well-defined and dominant public policy under positive law. Moreover, there was no breach of a fiduciary duty. The Petitioner did not demonstrate nor did it claim that it would take responsibility for what the players put into their bodies. But rather, repeatedly stated that the players, and the players alone were responsible for what they put in their bodies. Further, the Petitioner issued a warning, consistent with previous warnings, energy supplements, which

included SpeedShot, thereby meeting any duty it may have had to the players. Therefore, the District Court was correct in holding that the arbitrator's decision did not violate public policy.

**I. WILSON'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING A SUSPENSION UNDER A COLLECTIVELY BARGAINED FOR DRUG POLICY ARE PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.**

The first claim fails because a state law claim cannot be brought under Section 301 of the Labor Management Relations Act ("LMRA") when relief is based on interpretation and application of the collective bargaining agreement ("CBA"). *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202, 213 (1985). The question of whether a state law claim is sufficiently independent of a CBA is a question of federal law. *See id.* at 214. Such interpretation and application results in preemption because state law rights that do not exist independently of the CBA are preempted. *Id.* at 213. Therefore, the Court of Appeals was incorrect when it held that Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") state claim was not preempted by the CBA between MLB and the MLBPA (the "Agreement").

Additionally, allowing the state claim would disrupt the uniformity Congress intended when it passed the LMRA. *Healy v. Beer Institute*, 491 U.S. 324, 336-37 (1989) ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"). Allowing application of state law claims that arise from the CBA would result in disruption of the "negotiation and administration of collective agreements." *Teamsters v. Lucas Flour Company*, 369 U.S. 95, 103 (1962). Accordingly, this Court should find that application of the DATWA would disrupt the uniformity of the Agreement and hold that Section 301 of the LMRA preempts the state law claim.

**A. Section 301 of the Labor Management Relations Act preempts Wilson’s state law claim because it requires interpretation and application of the collective bargaining agreement.**

Section 301 of the LMRA allows contract disputes between labor organizations representing employees in an industry affecting commerce to bring suit in federal court and grants such federal courts jurisdiction over the disputes.<sup>1</sup> 29 U.S.C. § 185(a). Congress is allowed to regulate these labor disputes under the Commerce Clause and cases or controversies occurring under section 301 are subject to judicial powers defined in Article III of the Constitution. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957). Section 301 has been applied “as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts.” *Allis-Chalmers*, 471 U.S. at 209. As a result, state law claims that are founded on rights a CBA created are preempted under Section 301. *Lucas Flower Co.*, 369 U.S. at 102-03.

Determining state law preemption under section 301 requires a two-part test. *Stringer v. National Football League*, 474 F. Supp. 2d 894, 900 (2007) (Applying a two-step approach used by the Sixth Circuit to determine if a state-law tort claim survives preemption). First, a court must determine if the CBA or state law created the plaintiff’s rights. *Id.* A right created by the CBA will preempt any state law claim; however, when the CBA does not create the right further inquiry is needed. *Id.* Second, if the right was not created by the CBA, a court must determine if interpretation of the CBA terms is needed to provide proof of the state law claim. *Id.* If the state law claim is “substantially dependent” on an analysis of CBA terms or “inextricably intertwined” with the CBA then the state law claim will be preempted. *Allis-Chalmers*, 471 U.S. at 220. Any

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<sup>1</sup> “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in a district court of the United States having jurisdiction of the parties.” 29 U.S.C. § 185(a).

relationship short of the “substantially dependent” or “inextricably intertwined” standard will not result in preemption. *Stringer*, 474 F. Supp. 2d at 900. This two-part test boils down to an inquiry of whether state law requirements can be enforced without interpreting the CBA. *The Trustees of the Twin City Bricklayers Fringe Benefits Funds v. Superior Waterproofing, Inc.*, 450 F. 3d 324, 330 (8th Cir. 2006).

The DATWA does not survive preemption because its requirements cannot be enforced without interpreting the Agreement. The DATWA requires minimum standards to be met by employers to protect employees for testing policies, Minn. Stat. § 181.952 subdiv. 1(1)-(6), and imposes a requirement that all random drug testing of professional athletes be “consistent with the collective bargaining agreement.” *Id.* at § 181.951(4). In order to determine if the Agreement is meeting the minimum standards or if the random drug testing procedures are being followed, the Agreement would need to be interpreted and applied to the DATWA. Such comparison renders the DATWA “substantially dependent” on the Agreement and also “inextricably intertwines” itself with the Agreement. The DATWA does not survive preemption because interpretation of the Agreement is required; section 301 is controlling law over the Agreement and the state law claim cannot go forward.

The Policy would have to be consulted to resolve Wilson’s claim, which involves more than a tangential relationship to the Agreement. *Stringer*, 474 F. Supp. 2d at 900 (quoting *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) “neither a tangential relationship to the CBA, nor [a] defendant’s assertion of the contract as an affirmative defense [can] turn an otherwise independent claim into a claim dependent on the labor contract.”) The analysis required of the CBA is more than the comparison of facts and procedure suggested by the Court of Appeals and the analysis of whether the Agreement is in compliance with the

DATWA is more than a mere factual inquiry. *Wilson v. Major League Baseball*, No. 09-2108, 7 (14th Cir. 2009); see *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994) (“[P]urely factual questions’ about an . . . employer’s conduct . . . do not ‘requir[e] a court to interpret any term of a [CBA].”) (quoting *Lingle*, 486 U.S. at 407). Rather the inquiry of compliance with a state’s law is much deeper than facts and procedure. The bargaining process for the drug policy was the result of giving and taking certain provisions until both parties had a favorable result from the discussions. As a result, the policy is not black-and-white regarding the process and actions of the actors to the Agreement in an attempt to remain in compliance with the provisions.

The Policy is strict liability and does not excuse unintentional uses of banned substances. *Wilson v. Major League Baseball*, No. 09-AC-0213, 8 (S.D.Tul. 2009). The policy also warns players that the use of supplements will be at their own risk and provides a Hotline for players to anonymously inquire about prohibited substances. *Id.* The MLB’s failure to notify the Food & Drug Administration of the banned substances presence in SpeedShot, the action of the MLB notifying MLBPA that SpeedShot was a prohibited company, and the letter notifying players of the dangers of energy boosting supplements without explicitly stating that SpeedShot contained a banned substance would have to be analyzed for compliance with the Agreement. *Id.* at 3. This finding is “inextricably intertwined” with the Agreement and the state law cannot progress without a determination of whether the actions were in compliance with the Agreement and what duty the MLB owed to its players. This determination should be made under Section 301 of the NLRA and not variable state laws.

The DATWA is “inextricably intertwined” with the Agreement because any relief is based on the contents of the employers’ drug policy. See generally Minn. Stat. § 181.952 subdiv. 1. As noted by the district court, “[b]y its plain terms, DATWA predicates relief on

interpretation and application of the CBA and its drug-testing Policy. Because interpretation of the CBA would underlie any finding of statutory liability in this case, the claims are preempted.” *Wilson v. Major League Baseball*, No. 09-AC-0213, 10 (S.D.Tul. 2009). The DATWA’s requirement that CBAs do not conflict with the minimum standard of the act, Minn. Stat. § 181.955(1), demonstrate the substantial reliance on the Agreement. *Wilson v. Major League Baseball*, No. 09-AC-0213, 10 (S.D.Tul. 2009). In order for Wilson’s claim to proceed certain terms of the Agreement would have to be interpreted and as a result the state law claim must be preempted. *Id.*

The state law claim raised by Wilson does not survive preemption. His claim is “inextricably intertwined” with the CBA because it requires an interpretation of the CBA and the duty the MLB owed the players. State law claims that are dependent on the CBA for interpretation cannot proceed. Accordingly, Wilson’s claim is blocked and his relief must be granted under Section 301 of the LMRA.

**B. Wilson’s state law claims are preempted because they will destroy the uniformity of application of the collective bargaining agreement to all players.**

Federal law provides uniformity in instances where inconsistent state law would create problems; in order to allow uniformity to prevail the general rule is “[i]f the state tort law purports to define the meaning of the contract relationship, that law is pre-empted.” *Allis-Chalmers*, 471 U.S. 202 at 213. Using state law to determine the meaning of CBAs will hinder bargaining if state law is allowed to dictate terms and conditions of such agreements. *Id.* at 211 (“The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreements, and disputes as to the nature of the agreement would proliferate”). Section 301’s “substantive principals of federal labor law must be paramount in the area covered

by the statute” and “[m]ore important[ly], the subject matter of s 301(a) ‘is peculiarly one that calls for uniform law.’” *Lucas Flour Co.*, 369 U.S. at 103. Section 301 should be applied and preempt all inconsistent state law to preserve the CBA and bargaining process.

The Commerce Clause has the effect of preventing state’s application of law to commerce that occurs “wholly outside of the State’s borders, whether or not the commerce has effects within the State” and prevents inconsistent regulations from one state reaching into another. *Healy*, 491 U.S. at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982)). The state does not have to intend to exceed its limits in order for the statute to be invalid. *Id.* Essentially a court must determine “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Id.* If the practical effect of the regulation has a controlling effect beyond the State the law must be preempted. *Id.* at 337.

Based on the practical effect of the regulation the state law claim cannot survive preemption. The DATWA has six minimum information requirements that employers must follow to be in compliance with the law in addition to requirements for a testing laboratory to be validly used by an employer. Minn. Stat. §§ 181.952 subdiv. 1(1)-(6) and 181.953 subdiv. 1. The DATWA imposes minimum standards and requirements to protect employees that even parties to a CBA must meet. *Id.* §181.955(1). The DATWA also states that it does not limit agreements that “exceed” or “otherwise conflict with” the imposed minimum standards but essentially has an overreaching effect into uniformity by setting a floor to multistate bargaining. *Id.* Despite the express limiting language of the statute, it has an overreaching effect by applying minimum standards for the Agreement to be in compliance with state law.

If each state set minimum standards for a CBA to follow, the bargaining process would be hindered. *See generally Allis-Chalmers*, 471 U.S. 202. The MLB would be forced to comb

through the laws of each state the member teams are located in and search for minimum standards for every term bargained for to ensure compliance with the law of many states. Section 301 would be undermined because an arduous bargaining process ignoring federal common law and succumbing to state regulations would replace the uniformity section 301 is designed to enforce. Section 301 must be applied as the supreme law over the Agreement and preempt state law in order to avoid the disruptive effect of divergent interpretations of the Agreement based on state law. *Lucas Flour Co.*, 369 U.S. 95, 103 (“The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements”).

The DATWA undermines the collectively bargained for rule of strict liability in the Policy and disrupts the rule set by the Agreement. The Policy expressly states, “a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance.” *Wilson v. Major League Baseball*, No. 09-AC-0213, 8 (S.D.Tul. 2009). The DATWA directly contradicts this rule by creating “the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest.” Minn. Stat. §181.952 subdiv. 1(5). Minnesota cannot remove the collectively bargained for rule of strict liability by state law. The policy of retesting is “inextricably intertwined” with the Agreement and directly contradicts the Agreement’s strict liability requirement. Allowing state law to impose divergent rules of compliance would completely destroy the uniformity of the Agreement and subject players to inconsistent regulation of the Policy.

The DATWA claim reaches beyond the borders of the state and must be preempted to ensure uniformity. The Court of Appeals relies on a Ninth Circuit opinion to support its decision

to allow the state law claim quoting a passage that “the LMRA certainly did not give employers and unions the power to displace any state regulatory laws they found inconvenient.” *Wilson*, No. 09-2108 at 9 (quoting *Cramer v. Consolidated Freightways*, 225 F.3d 683, 695 n.9 (9th Cir. 2001)(en banc). The MLB does not seek to displace an inconvenient regulation in this case. Allowing Wilson’s claim would create the divergent result that the Commerce Clause is set up to prevent. Wilson is seeking to find relief in the state law while the four other players cannot seek such relief for the same infraction because they are not employed in Minnesota. *Wilson*, No. 09-AC-0213 at 4. Unlike claims that exist independent of the Agreement, Wilson is seeking protection in a state law from a claim that is “inextricably intertwined” with the Agreement. Allowing a state law claim that is dependent on the CBA results in inequities for all other players bound by the same CBA in different states; section 301 would ensure all players are granted the same rights and privileges and, therefore, would promote uniformity.

Wilson’s DATWA claims must fail due to preemption by Section 301 of the LMRA. Section 301 must be the controlling law without interference from Minnesota state law for two reasons. First, Wilson’s state law claim requires interpretation of the Agreement, “substantially dependent” on the Agreement, and is therefore preempted due to the claims’ failure to exist independent of the Agreement. Second, the state law claim is preempted because section 301 must be allowed to govern the substantial provisions of labor contracts and promote uniformity; the state law is overreaching and would subject the Agreement to inconsistent state regulations. For the reasons above, Wilson’s state claims must be dismissed due to preemption by section 301.

## II. THE ARBITRATION AWARD SHOULD BE UPHELD BECAUSE THE ARBITRATOR'S DECISION DRAWS ITS ESSENCE FROM THE AGREEMENT AND THE AWARD DOES NOT VIOLATE PUBLIC POLICY.

A federal court must not set aside an arbitrator's interpretation of a CBA except for rare instances. *E. Assoc. Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 62 (2000) (citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)). A court may not overrule an arbitrator's decision simply because the court favors its own interpretation over the arbitrator's. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983) (citing *Steelworkers*, 363 U.S. at 596). Rather, courts must "accord an extraordinary level of deference" when reviewing an arbitral award. *Stark v. Sandberg*, 381 F.3d. 793, 798 (8th Cir. 2004) (citing *Keebler Co. v. Milk Drivers & Dairy Employees Union Local No. 471*, 80 F.3d 284, 287 (8th Cir. 1996)). Under the Federal Arbitration Act (FAA), an award may only be vacated:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators . . . ;
- (3) where the arbitrators were guilty of misconduct . . . ;
- (4) where the arbitrators exceeded their powers or so imperfectly executed them that a[n] . . . award was not made.

Federal Arbitration Act, 9 U.S.C.A. § 10.

Courts recognize only two situations where an arbitration decision is subject to judicial review beyond the statutory grounds for rehearing under the FAA. *See W.R. Grace*, 461 U.S. at 764-66. The arbitration decision must (1) fail to draw its essence from the agreement or (2) violate public policy in order to merit judicial scrutiny. *See id.* If an arbitration decision draws its essence from the agreement, and the award does not violate public policy, a court is bound to enforce the award. *See id.*

So long as an arbitrator acts honestly and construes the contract within his authority, *E. Assoc. Coal*, 531 U.S. at 62, and the award is derived from the agreement’s language and parties’ intentions, *Stark*, 381 F.3d. at 799 (8th Cir. 2004), the decision draws its essence from the agreement. The fact that the court disagrees or even believes the arbitrator committed serious error does not suffice to overturn the decision. *E. Assoc. Coal*, 531 U.S. at 62. The MLBPA concedes that the arbitrator’s decisions draw their essence from the CBA, *Wilson*, No. 09-AC-0213 at 15; as a result, the arbitrator’s award must be treated as an agreement between MLB and MLBPA as to the proper meaning of the contract’s words. *Id.* at 62. Therefore, the following discussion is limited to the fact that the drug-testing policy, as interpreted by the arbitrator, does not violate public policy

An arbitrator’s award will only violate public policy if (a) there is an explicit, well-defined public policy under the laws of that jurisdiction, and (b) that the agreement as interpreted by the arbitrator violates that public policy. *See United Paper Workers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42-44 (1987). If the arbitrator’s interpretation of the agreement does not violate an explicit public policy, the court is obligated to enforce the award. *W.R. Grace*, 461 U.S. at 766.

**A. The Arbitration Award does not violate public policy because protection of a fiduciary duty is not a well-defined and dominant public policy under New York law.**

A court may not overrule an arbitrator’s interpretation of a CBA unless “the contract as interpreted would violate ‘some explicit public policy’ that is ‘well defined and dominant,’” *Misco*, 484 U.S. at 30 (quoting *W.R. Grace*, 461 U.S. at 766 (1983)) and is to be ascertained by

reference to positive law.<sup>2</sup> *E. Assoc. Coal*, 531 U.S. at 63. As a result the public policy may not be formed “from general considerations of supposed public interest.” *Id.* This public policy exception is narrow, *id.* at 62, and may not be applied unless the law provides “the clarity necessary to overcome” the strong presumption and policies in favor of upholding arbitration decisions. *Ace Electrical Contractors, Inc v Int’l Brotherhood of Electrical Workers, Local Union No. 8*, 414 F.3d 896, 908 (8th Cir. 2005) (Murphy, Cir. J. dissenting). *Misco*, 484 U.S. at 43.

A public policy is not well-defined under positive law unless the public policy is required by the courts as a matter of law or statutorily recognized as an important policy. *See W.R. Grace*, 461 U.S. at 767; *Misco*, 484 U.S. at 37. For example, in *W.R. Grace*, a company’s CBA that contained seniority provisions was challenged as violating Title VII of the Civil Rights Act of 1964. *W.R. Grace*, 461 U.S. at 769-61. The district court mandated a conciliation agreement that conflicted with the CBA, and as a result, employees filed grievances against the company for violating the agreement. *Id.* at 761. The arbitrator interpreted the agreement so that the district court’s order did not remove liability for breach of the agreement. *Id.* at 763. Following this award, the company instituted action to overturn the award, arguing that the arbitrator’s interpretation of the agreement violated public policy. *Id.* at 764.

Two important public policies were identified to meet the narrow public policy exception: (1) compliance with the judicial order and (2) voluntary compliance with Title VII. *Id.* at 766-71. First, disobedience to a court order is illegal as a matter of law. *See id.* at 767.

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<sup>2</sup> "Positive law" has not been explicitly defined in the cases before this Court. However, in the cases before this court, the term is only used in reference to statutes, regulations, and court-ordered matters of law. *See W.R. Grace*, 461 U.S. 757; *E. Assoc. Coal*, 531 U.S. 57; *Delta Air Lines, Inc. v. Air Line Pilots Ass’n Int’l*, 861 F.2d 665 (11th Cir. 1988); *Iowa Electric Light & Power Co. v. Local Union 204 of the Int’l Brotherhood of Electrical Worker*, 834 F.2d 1424 (8th Cir. 1987).

Therefore, this Court stated that it is “beyond question” that compliance to a judicial order meets the criteria as a well-defined and dominant public policy. *Id.* Relying on United States Supreme Court precedent, this Court held that an injunction issued by a court must be obeyed as a matter of law, and to interpret an agreement contradictorily is a violation of public policy. *Id.*

Second, voluntary compliance with Title VII is an important public policy because it was clear to this Court that Congress required cooperation for the effective enforcement of Title VII. *Id.* at 771. The Court relied upon federal law and United States Supreme Court precedent to determine that voluntary compliance with Title VII is an important public policy because Congress intended “cooperation and conciliation to be the preferred means” of enforcing this federal law. *Id.* at 770-71 (quoting *Alexander v. Garner Denver Co.* 415 U.S. 36, 44 (1974)).

Therefore, when a public policy is required as a matter of law, such as a judicial order, or explicitly recognized in legislative language, such as voluntary compliance with Title VII. The public policy is sufficiently well-defined, dominant, and ascertained by reference to positive law. *See id.* at 767-70.

A public policy is not well-defined under positive law if the public policy is generated from general considerations of supposed public interest. *Misco*, 484 U.S. at 44. In *Misco*, this Court held that the public policy against the operation of dangerous machinery while under the influence of drugs was not a violation public policy that required judicial review. *Id.* at 4. Although the concern of the worker’s safety was a general public interest, it was not sufficiently well defined in positive law to merit overturning the arbitration award. *See id.* Therefore, the arbitrator’s award reinstating an employee who was fired after the employer found marijuana in his car was not in violation of public policy. *Id.*

This Court specifically stated this standard does not sanction “a broad judicial power to set aside arbitration awards as against public policy.” *Id.* The lower court did not review existing laws and legal precedents to demonstrate that this award was in conflict with a well-defined and dominant policy against the operation of machinery under the influence. *Id.* For this narrow public policy exception to apply, the public policy must be explicitly and dominantly rooted in positive law. *Id.*

Only after a legislature’s codification of the public policy and court reinforcement of the codified public policy is a public policy considered well defined, dominant, and ascertained by reference to positive law. *See Delta Air Lines, Inc. v. Air Line Pilots Ass’n Int’l*, 861 F.2d 665 (11th Cir. 1988); *Ace Elec. Contractors*, 414 F.3d 896; *MidAmerican Energy Co. v. Int’l Brotherhood of Electrical Workers Local 499*, 345 F.3d 616 (8th Cir. 2003); *Iowa Electric Light & Power Co. v. Local Union 204 of the Int’l Brotherhood of Electrical Worker*, 834 F.2d 1424 (8th Cir. 1987). In *Delta Air Lines*, an arbitrator reinstated a terminated pilot after the pilot was found to be intoxicated on the job. 861 F.2d at 668. The court found legislation in nearly every state prohibiting flying while intoxicated, including the states where the pilot was found to be intoxicated. *Id.* at 672-74. In every jurisdiction there was overwhelming court support of these laws, and the courts in every jurisdiction uphold these laws or similarly prohibitive laws, such as those prohibiting reckless flying. *Id.* at 674.

Further, the *Ace Electrical Contractors* court held that, because there was a clearly defined public policy expressed in the Minnesota Human Rights Act (“MHRA”), an arbitration award reinstating employees in compliance with an age ratio requirement provision in a CBA violated a legislatively recognized public policy. 414 F.3d at 899. This Court looked to the MHRA’s statutory definition, clarifying language and textual references throughout the MHRA,

and the CBA, and found that the language of the CBA was “directly contrary to the plain language of the public policy articulated in the MHRA,” which expressly prohibits age discrimination. *Id.* at 902.

Not only must the alleged public policy be statutorily defined, but also the statutory framework must contain “specific and enacting requirements” for an arbitration award to be overturned for violating these laws. *MidAmerican Energy*, 345 F.3d at 621. In *MidAmerican Energy*, an employee at a liquid natural gas storage facility left his post, although he was the only employee on duty and doing so was against company policy. *Id.* at 618. The employee was terminated, but was reinstated per an arbitrator’s award. The *MidAmerican Energy* court held the statutory and regulatory provisions regulating the liquid natural gas industry were not specific enough to demonstrate that a single violation of this requirement merits termination. *Id.* at 621. Therefore, the public policy was not ascertainable by reference to positive law and legal precedent. *See id.*

The *MidAmerican Energy* court distinguished this holding from a similar Eighth Circuit case. *Id.* at 620-21 (distinguishing this ruling from *Iowa Electric Light & Power v. Local Union 204 of the Int’l Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987)). In *Iowa Electric*, the nuclear power industry was regulated to such a significant degree by positive law that an award, which reinstated an employee after violating these regulations, violated an explicit and dominant public policy. *Iowa Electric*, 834 F.2d at 1431. In contrast, the regulatory framework in *MidAmerican Energy* was general and did not contain detailed and enacting requirements that existed in *Iowa Electric*. *MidAmerican Energy*, 345 F.3d at 621. Because of this lack of regulation specificity, the *MidAmerican Energy* court held that there was no well-

defined, dominant public policy ascertained by positive law that could lead it to overrule an arbitrator's award. *Id.*

As a result, a public policy is not well-defined and dominant under positive law unless it is required by the courts as a matter of law or specifically and unambiguously recognized under statutory language as an important policy. Under this standard, a breach of a fiduciary duty is not a well-defined and dominant public policy that is ascertained by reference to New York positive law.

Unlike the judicial order in *W.R. Grace*, a breach of fiduciary duty is not purely a matter of law in New York. Rather, fiduciary duties are established by an examination of fact so that a jury or the court may apply the applicable legal standard to the facts. *Lumbermens Mutual Casualty Co. v. Franey Muha Alliant Insurance Services*, 388 F. Supp. 2d 292, 301 (S.D.N.Y. 2005). The exact standard of a fiduciary duty and precise limits of the fiduciary relationship are “impossible of statement,” *id.* at 302, and require a factfinder, to determine the nature of the relationship, and if a breach of that duty took place. Therefore, a breach of fiduciary duty cannot similarly constitute a categorical “matter of law” violation of public policy.

Further, unlike *W.R. Grace*, *Ace Electrical Contractors*, *Delta Air Lines*, and *Iowa Electric*, there is no legislative codification of the fiduciary duty that makes the fiduciary duty a well-defined and dominant public policy under New York law. There is neither legislative recognition of this public policy nor are there specific and exacting regulations; in fact, there are no legislative regulations of fiduciary duty at all. While violation of fiduciary duty does have roots in common law precedent, and is not simply a matter of general public welfare, it is a general legal principle that does not have the solid foundation of detailed and explicit legislative requirements historically required by courts.

Accordingly, the arbitrator's award affirming Wilson and the other players' suspensions did not violate public policy because the general common law fiduciary duty is not a well-defined, dominant public policy ascertained by reference to positive law and legal precedents.

**B. Even if the breach of fiduciary duty is recognized in New York as a well-defined and dominant public policy, the arbitration award did not violate this public policy because there was no breach of a fiduciary duty.**

A fiduciary relationship does not exist between two persons unless one is under the duty "to act for or give advice for the benefit of another." *United Feature Syndicate v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 218 (S.D.N.Y. 2002) (quoting Restatement 2d of Torts § 874 cmt. a.). A fiduciary relationship will not be recognized unless there is (1) a contractual agreement or (2) the manifestation of an agreement through the ongoing conduct of the parties. *See United Feature Syndicate*, 216 F.Supp.2d 198; *Lumbermens Mutual Casualty Co.*, 388 F. Supp. 2d 292. New York courts typically recognize such a duty may implicitly exist where the parties create their own "relationship of higher trust," such as an agency relationship, *Lumbermens Mutual Casualty Co.*, 388 F.Supp.2d at 304, a trust relationship, *United Feature Syndicate*, 216 F.Supp.2d at 218, or an attorney-client relationship, *Callahan v. Callahan*, 514 N.Y.S.2d 819 (N.Y. App. Div. 1987). A fiduciary relationship will not be implicitly formed without a high degree of confidence between the parties, *United Feature Syndicate*, 216 F.Supp.2d at 218, and reasonable reliance of one party on the others' expertise. *Lumbermens Mutual Casualty Co.*, 388 F.Supp.2d at 305.

A fiduciary relationship is created if a contractual agreement explicitly appoints one party to act as the other's agent. *United Feature Syndicate*, 216 F.Supp.2d at 217. In *United Feature Syndicate*, an agreement explicitly appointed the plaintiff to act as the defendant's agent and act for the benefit of the defendant. *Id.* The court held that the plaintiff did have a fiduciary duty to

the defendant, and denied summary judgment because it was possible for a jury to find a breach of that duty. *Id.* at 219. Even without a formalized written agreement between the two parties, the court held that the ongoing conduct of the parties should be taken into consideration in determining if a fiduciary relationship was established. *Id.*

A fiduciary relationship will not be implicitly created unless the parties “reasonably relied on the other’s superior expertise or knowledge.” *Lumbermens Mutual Casualty Co.*, 388 F.Supp.2d at 305. If the contractual agreement and ongoing conduct between the two parties do not reasonably give rise to such a relationship, there is no fiduciary obligation. *See id.* Therefore, courts may not infer or superimpose such a duty “without the contract and relationship be[ing] plumbed.” *Id.* at 304 (quoting *Northeast Gen. Corp v. Wellington Adver., Inc.*, 624 N.E. 2d 129 (N.Y. 1993)).

In *Lumbermens*, the court denied a motion for summary judgment because the facts could lead a jury to determine a fiduciary duty implicitly arose out of an insurance agent actions and conduct. *Id.* at 306. The plaintiff argued that the agent owed a duty to disclose all material facts regarding specific bonds, because the insurance agent was the sole intermediary for the formation of the two parties, and presented the bond directly under the parties’ agency agreement, even though the insurance agent had no express authority. *Id.* at 300-01. The contractual agreement did not create an express agency relationship; however, the fact that the two parties had an on-going relationship that may be construed as one of trust and confidence may give rise to a fiduciary duty. *Id.* at 306. Therefore, a jury should determine if a fiduciary relationship resulted from the manifestation of consent by one person to the other to act on his behalf. *Id.*

Superior knowledge by one party alone does not create a duty to disclose this information unless a fiduciary relationship exists. *See Callahan*, 514 N.Y.S.2d at 819. The *Callahan* court held that it is possible for an attorney relationship with a non-client, although not officially representing the non-client, to be considered a fiduciary relationship if a level of friendship, trust, and nondisclosure of superior knowledge exists, and the non-client reasonably relied on this relationship. *Id.* This attorney induced a non-client to take action, represented to the non-client that the agreement was fair, and advised her not to seek alternative representation; however, the attorney failed to disclose pertinent information to the non-client. *Id.* The court held that it was possible that this failure to disclose could potentially constitute a breach of fiduciary duty. *Id.* The attorney's relationship and actions, along with his superior knowledge, created a plausible question as to whether a breach of a fiduciary duty occurred. *Id.*

To find a breach of fiduciary duty is a mixed question of law and fact, which requires the "application of a legal standard to a set of historical facts." *Lumbermens*, 388 F.Supp.2d at 301 (quoting *Cabrera v. Jakobovitz*, 24 F.3d 372, 385 (1994)). The question of fiduciary duty is a fact specific inquiry that, if the facts are not in dispute, is a question for the court. *Id.* at 301. Accordingly, based on the facts provided, a fiduciary relationship did not exist between MLB, Dr. Larson, Mr. Birch, and the MLBPA.

First, unlike the trust relationship in *United Feature Syndicate*, there was no contractual agreement establishing a fiduciary relationship. In fact, nature of the relationship between MLB and the Players regarding banned substances is explicitly defined in the Policy as not creating this duty. The Policy, bargained for by the MLBPA and recognized by each player, states that the player alone is responsible for testing positive for a banned substance, and as a result MLB

accepts no responsibility. This manifests the intent of both parties, as both parties bargained for and agreed up these terms. As a result, no fiduciary relationship was created by the Policy.

Further, unlike the insurance in *Lumbermens*, MLB made it clear through its ongoing actions and statements that, although MLB aided in education regarding banned supplements, MLB did not accept responsibility for a player testing positive, and that players alone was responsible for what is put into their bodies. There is no reasonable basis to rely on this information, as MLB has made it very clear that the information provided may not be complete and that the players alone are responsible for complying with the Policy.

And last, unlike *Callahan*, MLB took no affirmative actions to induce the Players into relying on MLB's representations nor did MLB represent that the information that was provided would excuse a positive test result. In fact, MLB affirmatively and explicitly cautioned players that the Hotline is not the exclusive authority and did not excuse a positive test result.

Therefore, under the *United Feature Syndicate*, *Lumbermens*, and *Callahan* standards, no fiduciary relationship was created, as both the contract and the ongoing actions evidence intent to *not* create such a relationship. As a result, Wilson and the other players were not reasonable in relying on this information.

Even if there is a fiduciary relationship, neither MLB, Dr. Larson nor Mr. Birch breached this duty. Unlike *Callahan*, MLB, Dr. Larson, and Mr. Birch did not fail to disclose pertinent information. In fact, players were given multiple warnings against the use of energy-boosting supplements. For example, the League, upon learning of the connection between Clomiphene and SpeedShot, notified the MLBPA that Mega Energy Products, which distributes SpeedShot, had become a banned company. MLB took affirmative steps to disclose this information to the Players', and as a result, satisfied any duty it may have had to the players. Also, under his job

description, Dr. Larson sent out a memorandum to all players reminding them of the dangers of Energy Boosting Supplements, urging players not to take these supplements, and reiterated the strict liability rule of the Policy. Dr. Larson did not “fail to disclose” the information on potentially harmful ingredients nor did he refuse to divulge the information. Rather, Dr. Larsen testified that he would have told any player that inquired about SpeedShot, and Dr. Larsen educated the Players that all energy-boosting supplements, which includes SpeedShot, carried potential risks. Dr. Larson exercised his discretion under the Policy, as his duties were solely to educate the player, and did so reasonably by issuing a general warning, and reminding athletes of the Policy.

As a result, Dr. Larson, Mr. Birch, and MLB did not have a fiduciary relationship with Wilson and the other players, and even if there was a potential fiduciary relationship, this relationship was not breached. The Agreement and MLB’s ongoing conduct in regards to the drug testing Policy did not create an authority in which players could reasonably rely upon. Further, MLB and Dr. Larson took all steps to educate players that were required under the contract and under the general fiduciary relationship standard.

### **CONCLUSION**

The Court of Appeals for the Fourteenth Circuit incorrectly held that Section 301 of the Labor Management Relations Act does not preempt Wilson’s state law claims and that the arbitrator violated public policy when he found that MLB did not have a fiduciary duty to Wilson and the other players. Legal precedent proves that by allowing Wilson’s state law claims to stand it would create a fundamental inconsistency in the way the Agreement is interpreted across states. A fundamental aspect of MLB is the competition of teams and players that originate in different states, allowing state law to govern agreements would allow players from different

states to be treated differently based on each players' state law, which would turn, cause serious problems in the management of MLB and render the Agreement or any CBA useless. Further, the arbitrator did not violate public policy and his decision was drawn from the essence of the Agreement. A fiduciary duty is not a well-defined and dominant public policy under New York law because it has no statutory foundation and it is not a court-mandated matter of law. Moreover, MLB repeatedly informed the players of the risks of supplements, including the specific company in question, all the while, reiterating that the players, and the players alone, were responsible for what they put into their bodies. MLB did not owe the players a fiduciary duty but gave them the information concerning the supplements anyway, even though the players knew that the Policy was a strict liability policy and therefore, they alone were responsible. Therefore, this Court should reverse the Court of Appeals for the Fourteenth Circuit and uphold the District Court of the Southern District of Tulania's decision.