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HOW THE HOLDING IN *DENT V. NATIONAL FOOTBALL LEAGUE* TACKLES COLLECTIVE BARGAINING AGREEMENTS

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In 2014, a group of retired professional football players sued the National Football League ("NFL"), claiming that the league distributed controlled substances and prescription drugs to them in violation of state and federal laws. The trial court ruled that the players' state law claims are preempted by section 301 of the Labor Management Relations Act ("LMRA"), and that the players should instead follow the arbitration procedures set out in the agreed upon collective bargaining agreement. However, the Ninth Circuit reversed the NFL's motion to dismiss on the grounds that the players' claims are not preempted by section 301. Ultimately, the Ninth Circuit Court of Appeals' ruling in *Dent v. National Football League* may place the liability of caring for the health and safety of players directly on the NFL itself rather than individual teams. This essentially ignores the policies set out in the collective bargaining agreement.

This Comment argues that the Ninth Circuit erroneously reversed the trial court's ruling, because the claims brought against the NFL by the retired professional football players should be preempted by section 301 of the LMRA. Furthermore, this Comment argues that the Ninth Circuit's decision interferes with the uniformity of interpretation of collective bargaining agreements. For this reason, the ruling is unfair to not only the league, but to other organizations and companies who also rely on collective bargaining to negotiate with employees.

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I. INTRODUCTION

In the blink of an eye, New England Patriots' wide receiver Julian Edelman saw his season end before it even began. In a preseason game against the Detroit Lions on August 25, 2017, Edelman injured his knee after he planted his foot awkwardly and his leg buckled.[1] An MRI later confirmed that he tore the ACL in his right knee and would miss the entire 2017-2018 season.[2] After having knee surgery shortly thereafter, Edelman, together with the Patriots' team doctors and trainers, began a grueling rehabilitation that lasted close to a year.[3] His recovery was successful and he returned to the field injury free for the start of the 2018-2019 season.[4]

For many professional athletes in the United States, however, injuries are not properly dealt with. More often than not, professional athletes are left with permanent physical and mental damage after their injuries are either improperly treated or go untreated altogether, and are all but forced to resort to the courts to resolve these largely avoidable outcomes.[5] This was the case for Richard Dent ("Dent") and nine other former football players (collectively the "Plaintiffs") who brought suit against the National Football League ("NFL") in 2014 based on injuries they suffered while playing.[6] Unlike Edelman, who received extensive medical care for his injury, Dent and the

1. Jim McBride, *Julian Edelman Out for the Season with Knee Injury*, BOSTON GLOBE (Aug. 26, 2017), https://www.bostonglobe.com/sports/patriots/2017/08/26/patriots-julian-edelman-acl-tear-right-knee/NwPwh43JZ8ULYsdexq3tLM/story.html [https://perma.cc/6RJG-A7RE].

2. *Id.*

3. Hayden Bird, *What Julian Edelman Had to Say About Coming Back from His 2017 Knee Injury*, BOSTON.COM (Aug. 3, 2018), https://www.boston.com/sports/new-england-patriots/2018/08/03/julian-edelman-injury-rehab-update-2018 [http://archive.is/wx1DL].

4. Henry McKenna, *Julian Edelman After Returning from ACL Injury: 'I Feel Like I'm the Best Me'*, PATRIOTSWIRE (Oct. 5, 2018, 6:30 AM), https://patriotswire.usatoday.com/2018/10/05/julian-edelman-after-returning-from-acl-injury-i-feel-like-im-the-best-me/ [https://perma.cc/A2CL-E9RM].

5. Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *1 (N.D. Cal. Dec. 17, 2014).

6. *Id.*

Plaintiffs allege that they were given medications without prescriptions and were rushed back to the field before their injuries properly healed.[7]

Founded in 1920 as the American Professional Football Association, the NFL is an unincorporated association of member clubs that consists of thirty-two teams spread out over two conferences.[8] Like other professional sports, football is a tough, and at times, dangerous sport that can cause injuries. In order to stay at the top of their game, professional athletes need to take good care of their bodies. At the same time, properly taking care of injuries is a necessity that not only needs to be addressed by the athletes themselves, it must also be a priority for the NFL and other professional sports leagues.

The NFL has addressed injury related concerns by imposing duties on teams in its collective bargaining agreement ("CBA"). While the NFL "promotes, organizes, and regulates professional football in the United States," players enter into agreements with individual teams, not the NFL itself.[9] In effect, players are considered employees of the individual teams rather than the NFL,[10] and the CBA places the responsibility of caring for the health and safety of players on the teams and team owners.[11] However, the Ninth Circuit Court of Appeals' ruling in *Dent v. National Football League*, ("*Dent v. NFL*" or "*Dent*"), the Ninth Circuit Court of Appeals made a decision that may potentially place the burden directly on the NFL—and other organizations and companies bound by a CBA—effectively ignoring the policies and procedures stated in the CBA.[12]

On May 20, 2014, Dent and the Plaintiffs filed a putative class action suit against the NFL in the Northern District of California alleging that "since 1969, the NFL has distributed controlled substances and prescription drugs

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7. Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *1 (N.D. Cal. Dec. 17, 2014).

8. Williams v. Nat'l Football League, 582 F.3d 863, 868 (8th Cir. 2009); *National Football League*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/National-Football-League [https://perma.cc/SQZ8-U5ST].

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

10. Dent v. Nat'l Football League, 902 F.3d 1109, 1114 (9th Cir. 2018).

11. *Dent*, 2014 WL 7205048, at *4.

12. *See generally* Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *1 (N.D. Cal. Dec. 17, 2014).

to its players in violation of both state and federal laws."[13] The main issue the court considered was whether the state-law claims against the NFL were preempted by section 301 of the Labor Management Relations Act ("LMRA").[14] The trial court ruled in favor of the NFL and dismissed the case.[15] However, after the players appealed the trial court's decision, the Ninth Circuit reversed the NFL's motion to dismiss on the grounds that the players' claims are not preempted by section 301.[16]

This article argues that the Ninth Circuit erred in reversing the trial court's ruling dismissing the players' case because the claims brought against the NFL by former professional football players are, in fact, preempted by section 301 of the LMRA. If the Ninth Circuit's decision is upheld by the United States Supreme Court, provisions in a CBA may be rendered useless and employers, such as the NFL, who rely on CBAs to conduct their operations will have trouble enforcing its policies. Part II of this Comment discusses the background of the LMRA and explains preemption under section 301. That section also explores the intricacies of the NFL's CBA. Part III discusses the facts and procedural history of *Dent*. Part IV provides an analysis of the Ninth Circuit's decision, explains why the court was incorrect in reversing the decision of the trial court, and provides a possible solution for the players should the Supreme Court reverse the decision of the Ninth Circuit in favor of the NFL. Finally, Part V concludes the article by acknowledging the concerns that players have for their health, while recognizing that section 301 preempts state-law claims that players brought in retaliation to the injuries they suffered.

13. *Dent*, 902 F.3d at 1114–15.

14. *Dent*, 2014 WL 7205048, at *1.

15. *See generally id*.

16. *See generally Dent*, 902 F.3d 1109.

II. BACKGROUND

A. History of Federal Labor Legislation and Collective Bargaining in the United States, and the Enactment of the LMRA

Beginning in the 1930s, the National Labor Relations Act ("NLRA") governed labor laws in the United States.[17] As a result of the economic and social consequences of the Great Depression in the 1930s, newly elected president Franklin D. Roosevelt introduced a plethora of new government programs, including unemployment insurance, job creation, social security, and the minimum wage, to help Americans deal with the hardships that many people faced during this difficult time.[18] This series of government programs became known as "The New Deal."[19]

One critical part of Roosevelt's programs under the New Deal was the enactment of the NLRA in 1935.[20] The NLRA was the first major piece of U.S. labor legislation that gave workers the right to organize, join labor unions, collectively bargain through representatives of their choosing, and strike.[21] In recognition of the lack of employees' rights and the exploitation of employees by employers, the NLRA "was designed to provide [workers] with protection in urging [their] complaints, and to require the employer to listen to them and to try fairly to find a mutually acceptable basis for their correction. . . ."[22]

"The NLRA encouraged collective bargaining and gave employees the right to organize themselves into unions by "[setting] standards for union elections, and . . . [specifying] unfair labor practices of employers."[23] Its

17. HARRY C. KATZ, THOMAS A. KOCHAN & ALEXANDER J. S. COLVIN, AN INTRODUCTION TO U.S. COLLECTIVE BARGAINING AND LABOR RELATIONS 40 (Cornell University Press, ILR Press 2017).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Edwin A. Elliott, *The Labor-Management Relations Act of 1947*, 29 SW. SOC. SCIENCE Q. 107, 109 (1948).

23. *Id.* at 40.

enactment also indicated "a turn towards collective bargaining as the preferred method for labor and management"[24], allowed workers to form labor unions, and required employers to negotiate wages, hours, and working conditions with the unions.[25] This provision of the NLRA allowing employees to form labor unions was expanded with the enactment of the LMRA, which also gave employees the "right to refrain from [organizing and forming labor unions] except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment."[26]

The LMRA was enacted by Congress on June 23, 1947 to "demobilize the labor movement by imposing limits on the ability to strike."[27] The purpose of the LMRA was "to prescribe the legitimate rights of both employees and employers in their relations. . .[and] to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce."[28] Additionally, the LMRA "weakened unions and increased the employers' powers to resist organization and collective bargaining"[29] by including "a series of prohibited union unfair labor practices, an expansion of employer 'free speech' rights, and a provision for the use of injunctions against strikes that imperiled national health and safety."[30]

Overall, the policy of LMRA rests on the assumptions that "[i]ndustrial strife. . .can be avoided. . .if employers, employees, and labor organizations each recognize under law [] one another's legitimate rights in their relations with each other. . . ."[31]

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24. *Id.*

25. *Id.* at 42.

26. *Id.*

27. Morgan Francy, *An Open Field for Professional Athlete Litigation: An Analysis of the Current Application of Section 301 Preemption in Professional Sports Lawsuits*, 70 SMU L. REV. 475, 479 (2017).

28. *Id.*

29. *Id.*

30. JAMES A. GROSS, RIGHTS, NOT INTERESTS: RESOLVING VALUE CLASHES UNDER THE NATIONAL LABOR RELATIONS ACT 25 (Cornell University Press, 2017).

31. Richard Powers, *The Labor-Management Relations Act of 1947: A Topical Digest*, 15.1 S. ECON. J. 67, 67 (1948).

B. Section 301 Preemption Under the LMRA

Collective bargaining agreements typically prevent employees from bringing certain tort and contract claims against their employers based on section 301 of the LMRA. Section 301 states that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[32] The policy behind preemption under section 301 is to encourage "uniformity of interpretation of collective bargaining agreements and prevention of interference with those agreements[,]"[33] as well as "to promote the peaceable, consistent resolution of labor-management disputes."[34]

Preemption under the LMRA is different from preemption under the Constitution of the United States because "it is not driven by substantive conflicts in law."[35] Under Article VI, Clause 2 of the Constitution, the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[36] Based on this clause, "courts have long recognized that state laws that conflict with federal law are 'without effect.'"[37] Therefore, under Article VI, Clause 2 of the Constitution, any state-law claim is "preempted" if it conflicts with a federal law. LMRA preemption instead is "grounded in the need to protect the proper forum for resolving certain kinds of disputes and, by extension, the substantive law applied thereto."[38]

While "Congress has declined to explicitly state whether it intended for [section] 301 to preempt state-law claims," section 301 "has long been interpreted as ousting state-law claims for breach of contract when the contract

32. 29 U.S.C. § 185(a) (2006).

33. Francy, *supra* note 27, at 479.

34. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404 (1988).

35. Alaska Airlines, Inc. v. Schurke, 898 F.3d 904, 922 (9th Cir. 2018).

36. U.S. CONST. art. VI, cl. 2.

37. Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008).

38. *Alaska Airlines Inc.*, 898 F.3d at 943.

involved is a collective bargaining agreement."[39] Additionally, "[w]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a [section] 301 claim or dismissed as preempted by federal labor-contract law."[40] However, in *Cramer v. Consolidated Freightways, Inc.*, the court emphasized that section 301 does not grant the parties to a CBA the ability to contract for illegal activities.[41]

In addition to the preemption for breach of contract claims, the court in *Allis-Chalmers Corp. v. Lueck* ("*Lueck*") discussed section 301 preemption of tort-law claims. In *Lueck*, the court explained how "the preemptive effect of [section] 301 must extend beyond suits alleging contract violations[,]" and that "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort."[42] The court explained that if this were not the case, parties would avoid the requirements of section 301 by claiming that their breach of contract claims are claims for tort-law claims.[43]

1. The Test for Section 301 Preemption

Lower courts have created the following two-step test to define preemption under section 301. First, does the cause of action involve "rights conferred upon an employee by virtue of state-law [and] not by a CBA?"[44] If these rights "exist solely as a result of the CBA, then the claim is

39. Kelly A. Heard, *The Impact of Preemption in the NFL Concussion Litigation*, 68 U. MIAMI L. REV. 221, 227 (2013).

40. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).

41. Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 695 (9th Cir. 2001).

42. *Allis-Chalmers Corp.*, 471 U.S. at 210–11.

43. *Id.*

44. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007).

preempted, and [the] analysis ends there."[45] However, if the right exists independently of the CBA, the question becomes whether it is "substantially dependent on analysis of a collective-bargaining agreement."[46]

To determine whether a claim requires interpretation of a CBA, a "case-by-case analysis of the state-law claim as it relates to the CBA" is required.[47] Additionally, those claims "must be analyzed as they relate to the CBAs under which the Players played.'"[48] As the court in *Dent* explained:

> If the plaintiff's claim cannot be resolved without interpreting the applicable CBA . . . it is preempted. Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA . . . it is not preempted. The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim . . . A state-law claim is not preempted under [Section] 301 unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute.[49]

A defendant cannot invoke preemption "simply because the defendant refers to the CBA in mounting a defense,"[50] and a preemption argument is not credible "simply because the court may have to consult the CBA to evaluate."[51] To prevail on a defense of preemption, "the proffered interpretation argument must reach a reasonable level of credibility."[52] Generally, if the plaintiffs use this two-step test to prove that their state-law claims should be

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45. *Id.*

46. *Id.*

47. Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1855 (2014).

48. *Id.*

49. Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *3 (N.D. Cal. Dec. 17, 2014).

50. *Cramer*, 255 F.3d at 691.

51. *Id.* at 692.

52. *Id.*

preempted, then the "claims will be dismissed and must be pursued through the grievance procedure set out in the controlling CBA . . . ."[53]

2. Significant Cases Prior to *Dent v. NFL*

Recent cases similar to *Dent* demonstrate how section 301 has been interpreted by lower courts. As the outcomes of the following cases and the broadness of the test indicate, preemption under section 301 has been applied several times in cases involving the NFL or NFL teams. Courts have encouraged preemption,[54] as all but two of these recent cases have favored it and concluded that plaintiffs must adhere to the provisions set in the CBA.

a. Evans v. Arizona Cardinals Football Club

In *Evans v. Arizona Cardinals Football Club* ("*Evans*"), the plaintiffs, retired NFL players sued the thirty-two individual NFL teams, rather than the NFL itself, challenging the administration of painkiller drugs.[55] The defendants moved to dismiss, arguing that the claims against them are preempted by section 301 and barred by the statute of limitations because the thirteen named plaintiffs were retired.[56] Moreover, the plaintiffs allege that the teams made intentional misrepresentations to them in violation of the Controlled Substances Act and the Food, Drug, and Cosmetic Act.[57] However, a CBA cannot sanction the illegal distribution of medications in violation of these statutes.[58] Therefore, the terms of the CBA need not be construed and the "prohibition against such conduct stood independently from any CBA."[59]

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53. Francy, *supra* note 27, at 477–78.

54. *Cramer*, 255 F.3d at 690.

55. Evans v. Arizona Cardinals Football Club, LLC, No. CV WMN-15-1457, 2016 WL 759208, at *2 (D. Md. Feb. 25, 2016); Evans v. Arizona Cardinals Football Club LLC, No. C 16-01030 WHA, 2016 WL 3566945, at *4 (N.D. Cal. July 1, 2016).

56. *Id.* at *1.

57. *Id.*

58. *Id.*

59. *Id.*

Because the claims were directed at the individual teams, the court concluded that the claims for relief were grounded in illegal conduct in the teams' violation of state statutes, and denied the defendants' motion to dismiss.[60] Although the players retired years before filing the lawsuit, the teams' motion to dismiss based on the statute of limitations was denied because "the nature of at least some of the injuries was latent and slow in developing."[61]

b. Duerson v. National Football League, Inc.

Duerson v. National Football League, Inc. ("*Duerson*") was about David Duerson, an NFL player for ten years who later committed suicide.[62] Three months after his suicide, doctors examined his brain and he was diagnosed with chronic traumatic encephalopathy.[63] Duerson's estate sued the NFL in state court for wrongful death, alleging that Duerson's suicide was a result of the brain damage he suffered while playing in the NFL.[64] The NFL sought to remove the case to federal court, arguing that the state-law wrongful death claim was preempted by section 301 because it was "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."[65] The court agreed, stating that it would "need to determine whether Duerson's concussive brain trauma was 'significantly aggravated,' within the meaning of the CBA provision, by continuing to play."[66] Additionally, the court concluded that even though the CBA only imposed duties on the NFL teams, not the NFL itself, it would have to interpret the CBA to determine whether the NFL's duty was triggered.[67]

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60. *Id.*

61. *Id.*

62. Duerson v. Nat'l Football League, Inc., No. 12 C 2513, 2012 WL 1658353, at *1 (N.D. Ill. May 11, 2012).

63. *Id.*

64. *Id.*

65. *Id.* at *2.

66. *Id.* at *4.

67. *Id.* at *10.

c. Stringer v. National Football League

In the events leading up to *Stringer v. National Football League* ("*Stringer*"), NFL player Korey Stringer died of heat exhaustion and heat-stroke during the preseason.[68] As a result, his widow sued (1) the NFL, (2) the California corporation responsible for approving, licensing, and promoting equipment used by NFL teams, and (3) the Minnesota Vikings' team physician in state court for negligence.[69] The NFL contended that the CBA, entered into by the National Football League Management Council and the National Football League Players Association, is the only logical source of the duties allegedly breached.[70] In addition, the NFL argued that resolution of the plaintiff's claims would require interpretation of the terms of the CBA because the claims present disputes over "working conditions."[71]

In response, the plaintiff argued that her claims were not preempted "because they were based solely on common law tort principles and could be resolved without interpreting any provisions of the CBA."[72] The court found that the plaintiff's claims do not arise from the CBA, yet resolution of her claim requires interpretation of the terms of the CBA and is intertwined with it.[73]

Another significant issue decided in *Stringer* was whether non-signatories to a CBA can invoke section 301 preemption as a defense to a plaintiff's state-law claims.[74] Citing to several cases, the court found that the "[d]efendants' status as non-signatories to the CBA does not prevent them from raising the preemption defense."[75]

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68. Stringer v. Nat'l Football League, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007).

69. *Id.*

70. *Id.* at 901.

71. *Id.* at 900–01.

72. *Id.* at 901.

73. *Id.* at 908.

74. *Id.* at 901–02.

75. *Id.* at 902.

d. Holmes v. National Football League

In *Holmes v. National Football League* ("*Holmes*"), an NFL player was suspended for four games after he tested positive for a drug test given to him by the Detroit Lions pursuant to the NFL's drug testing program established by the CBA.[76] The player sued, alleging that the imposed punishment mandated by the NFL CBA violated his due process rights.[77] The court held that the labor dispute regarding the propriety of Holmes' enrollment in the drug program could not be separated from his state tort and contract claims, and the claims were preempted by the LMRA.[78]

e. Williams v. National Football League

In *Williams v. National Football League* ("*Williams*"), several football players sued the NFL for fraud, negligence, and negligent misrepresentation after they were suspended for testing positive for a banned substance found in the dietary supplements they took.[79] The players argued that the NFL had duty, separate from the CBA, to provide the players "[an] ingredient-specific warning" for the dietary supplements.[80]

The court concluded that "whether the NFL . . . owed the Players a duty to provide such a warning cannot be determined without examining the parties' legal relationship and expectations as established by the CBA and the [collectively bargained NFL Policy on Anabolic Steroids and Related Substances]."[81] This prevents NFL players from using certain substances and "adopts a rule of strict liability under which '[p]layers are responsible for what is in their bodies.'"[82] Therefore, the Eighth Circuit concluded that the players' claims for fraud, constructive fraud, and negligent misrepresentation were preempted by section 301 because the claims "relating to what the

76. Holmes v. Nat'l Football League, 939 F. Supp. 517, 520 (N.D. Tex. 1996).

77. *Id.* at 522.

78. *Id.* at 527.

79. Williams v. Nat'l Football League, 582 F.3d 863, 880–81 (8th Cir. 2009).

80. *Id.* at 881.

81. *Id.*

82. *Id.* at 868.

parties to a labor agreement agreed. . .must be resolved by reference to uniform federal law."[83] However, they also concluded that the players' claims under the Minnesota Consumable Products Act and the Minnesota Drug and Alcohol Testing in the Workplace Act were not preempted by the LMRA because they did not require interpreting and applying the provisions of the NFL's drug testing program.[84]

C. The NFL's Collective Bargaining Agreements

The NLRA states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[85] Additionally, Section 8(a)(5) of the NLRA prohibits employers from refusing to engage in collective bargaining with employee representatives,[86] ensuring that employers negotiate in good faith.[87]

Since 1968, the NFL, its individual teams, and NFL players have been bound by a series of CBAs.[88] The current CBA went into effect on August 4, 2011, and extends through 2020.[89] The NFL is not a party to this CBA; instead, it is negotiated by the NFL Players Association ("NFLPA") (the players' bargaining unit) and the NFL Management Council (the teams' bargaining unit).[90]

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83. *Id.*

84. *Id.* at 878.

85. National Labor Relations Act, 49 Stat. 449, 452 § 7 (1935).

86. 29 U.S.C. § 158(a)(5) (1982).

87. Noel M.B. Hensley & John V. Jansonius, *The Interaction of Federal Labor and Antitrust Policies: An Analysis of the Legality of Coordinated Collective Bargaining by Employers*, 40 SW. L.J. 967, 973 (1986).

88. Francy, *supra* note 27, at 482.

89. *Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association*, NFL PLAYERS ASSOCIATION 1, 1 (Aug. 4, 2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf [https://perma.cc/8UXP-PK8K].

90. Dent v. Nat'l Football League, 902 F.3d 1109, 1114 (9th Cir. 2018).

Before CBAs governed professional sports, team owners insisted that players were not employees, and therefore were not protected under the NLRA.[91] However, the National Labor Relations Board ("NLRB"), created when Congress passed the NLRA in 1935, changed this, which lead to labor disputes between players and owners in professional sports leagues, including the NFL.[92] In 1956, the NFLPA was created, but despite its existence, a CBA was not actually in place between the players and owners.[93] Instead, some players resorted to hiring their own agents to negotiate contractual terms and provisions.[94] The first CBA was agreed upon in 1968,[95] after the merger of the NFL and the American Football League.[96] Since then, CBAs have changed and developed over time, with negotiations continuing to be held between the NFLPA and the NFL Management Council.

In regard to players' health, CBAs have included provisions concerning players' rights to medical care and treatment since 1982.[97] Generally, these provisions have required teams to employ "a board-certified orthopedic surgeon as one of its club physicians," and that "all other physicians retained by a Club to treat players shall be board-certified in their field of medical expertise."[98] In addition, players are "guaranteed . . . the right to access their medical records, obtain second opinions, and choose their own surgeons."[99]

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91. Michael Lydakis & Andrew Zapata, *Tackling the Issues: The History of the National Football League's 2011 Collective Bargaining Agreement and What it Means for the Future of the Sport*, 10 WILLAMETTE SPORTS L.J. 17, 17–18 (2012).

92. *Id.* at 18.

93. C. P. Goplerud III, *Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 JEFFREY S. MOORAD SPORTS L.J. 13, 14 (1997).

94. *Id.*

95. Lydakis & Zapata, *supra* note 91, at 18.

96. *Id*.

97. *Dent*, 902 F.3d at 1114.

98. NFL PLAYERS ASSOCIATION, *supra* note 89, at 171.

99. *Id.*

There are also several provisions in the CBA that specifically address player health and safety.[100] For example, the 1982 CBA established that "[i]f a Club physician advise[s] a coach or other Club representative of a player's physical condition which could adversely affect the player's performance or health, the physician [shall] also advise the player."[101] In addition, the 1993 CBA added the requirement that "[i]f such condition could be significantly aggravated by continued performance, the physician [shall] advise the player of such fact in writing."[102] Finally, the 2011 CBA established that team physicians "are required to disclose to a player any and all information about the player's physical condition" that the physicians disclose to coaches or other team representatives, "whether or not such information affects the player's performance or health.'"[103]

III. DENT V. NFL LAWSUIT

A. Factual and Procedural Background

On May 20, 2014, Dent and Plaintiffs filed a lawsuit in the Northern District of California against the NFL, seeking class action status for more than 1,000 former players who received narcotic painkillers, anti-inflammatories, local anesthetics, sleeping aids, or other drugs without prescription, independent diagnosis, or warnings about the side effects and dangers of mixing with other drugs.[104] They contend that the way the drugs were distributed left them with severe, long-term injuries.[105] The plaintiffs asserted nine claims: (1) declaratory relief, (2) medical monitoring, (3) fraud, (4) fraudulent concealment, (5) negligent misrepresentation, (6) negligence per se, (7) loss of consortium on behalf of class members' spouses, (8) negligent

100. Kelly A. Heard, *The Impact of Preemption in the NFL Concussion Litigation*, 68 U. MIAMI L. REV. 221, 235 (2013).

101. *Dent*, 902 F.3d at 1114.

102. *Id.*

103. NFL PLAYERS ASSOCIATION, *supra* note 89, at 175.

104. Dent v. Nat'l Football League, 902 F.3d 1109, 1115 (9th Cir. 2018); *Ex-Players: NFL Illegally Used Drugs*, ESPN (May 22, 2014), http://www.espn.com/nfl/story/_/id/10958191/nfl-illegally-supplied-risky-painkilling-drugs-former-players-allege-suit [https://perma.cc/QHK7-CMFM].

105. *Dent*, 902 F.3d at 1115.

hiring of medical personnel, and (9) negligent retention of medical personnel.[106] They sought punitive damages, injunctive relief, declaratory relief, and medical monitoring.[107]

Plaintiffs allege that since 1969 doctors and trainers from NFL teams have supplied injured players with different pain medications that allow them to effectively return to the field rather than allowing them to rest and heal properly from football-related injuries.[108] The medications were given without prescriptions, without consulting the players' medical history, and in ways that violated both federal laws and the American Medical Association's Code of Ethics.[109]

Dent is a NFL Hall of Fame defensive player who claims that throughout his fourteen-year career on four different teams, team doctors and trainers gave him "hundreds, if not thousands" of injections and pills that contained painkillers to keep him on the field, rather than allowing his injuries to heal.[110] According to Dent, he was never warned about the potential side effects or long-term risks of the medications he was given, and he ended his career with an enlarged heart, permanent nerve damage in his foot, and an addiction to painkillers.[111]

Among others, Plaintiffs also include members of the NFL champion 1985 Chicago Bears: Offensive Lineman Keith Van Horne, and Quarterback Jim McMahon.[112] Similar to Dent, Horne and McMahon allege that during their time in the NFL, they were given opioids, non-steroidal anti-inflammatory medications, and local anesthetics without prescriptions.[113] They also allege that "the NFL encouraged players to take these pain-masking medications to keep players on the field and revenues high, even [though]

106. *Id.*

107. *Id.*

108. Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *1 (N.D. Cal. Dec. 17, 2014).

109. *Id.* at *2.

110. *Dent*, 902 F.3d at 1114.

111. *Id.*

112. ESPN, *supra* note 104.

113. *Dent*, 902 F.3d at 1115.

the football season [grew] longer and the time between games [became] shorter . . . ."[114]

According to the players, they "rarely, if ever, received written prescriptions. . .for the medications they were receiving," and instead were handed pills in "small manila envelopes that often had no directions or labeling" and were told to take whatever was in the envelopes.[115] They further allege that during their years of taking these medications, doctors and trainers never warned them about "potential side effects, long-term risks, interactions with other drugs, or the likelihood of addiction."[116] As a result, the plaintiffs claim to suffer from permanent orthopedic injuries, drug addictions, heart problems, nerve damage, and renal failure.[117]

B. Trial Court Rulings

In response to the plaintiffs' suit, the NFL filed two motions to dismiss.[118] First, the NFL argued that the players' claims are preempted by section 301 of the LMRA.[119] Second, the NFL argued that the players not only failed to state a claim, but also that their claims were time-barred under the statute of limitations.[120]

Following an initial hearing on November 6, 2014, the trial court submitted a series of requests for an additional briefing before granting the NFL's motion to dismiss under section 301.[121] In doing so, the court outlined preemption under section 301 following the two-step test described above in Part II.B. It then explained how the essence of the plaintiffs' claim of relief

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1114.

118. *Dent*, 2014 WL 7205048, at *2.

119. *Id.*

120. Dent, 902 F.3d at 1115–16.

121. *Dent*, 2014 WL 7205048, at *6.

is that the "individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment."[122]

While the CBA does not conflict with the common law theories of the complaint, the court concluded that the players' state-law claims are preempted by section 301 because litigating the state-law claim would require interpreting the CBA between the league and the NFLPA.[123] The court came to this conclusion because "it would be necessary to consider the ways in which the NFL has indeed stepped forward and required proper medical care–which here prominently included imposing specific CBA medical duties on the clubs."[124] In one set of findings for the preemption of negligence-based claims, the court described several provisions in different CBAs and the steps the NFL has taken to address the issue of medical care by imposing duties on individual teams:

> As demonstrated by the scope and development of these provisions, this is not a situation in which the NFL has stood by and done nothing. The union and the league have bargained extensively over the subject of player medical care for decades. While these protections do not specifically call out the prescribing of drugs and painkillers, they address more generally medical care, player health, and recovery time, and proper administration of drugs can reasonably be deemed to fall under these more general protections. Put differently, the right to medical care established by the CBAs, moreover, presumably included and still includes proper medical care in accordance with professional standards – including for the administration of drugs and painkillers – or at least a fair question of interpretation in that regard is posed.[125]

For example, the plaintiffs' negligent hiring and negligent retention claims allege that the NFL "had a duty to 'hire and retain educationally well-qualified, medically-competent professionally-objective and specifically-

122. *Id.* at *10–11.

123. *Id.* at *23.

124. *Id.*

125. *Id.* at *19–20.

trained professionals not subject to any conflicts.'"[126] The court explained how the NFL and NFLPA addressed this duty in the CBA by requiring each club to hire physicians that are "board-certified in their field of medical expertise."[127]

The plaintiffs also argued that because they sued the NFL directly and did not sue any of the individual teams, team doctors or trainers, "the interpretation of CBA provisions relating to the individual clubs are unnecessary for resolving the plaintiffs'. . .claims against the league."[128] In response, the trial court stated that "[t]he nub of plaintiffs' claims is that the NFL is responsible for, and acts through, the clubs' medical staffs," and "[t]o determine what the scope of this supervisory duty was, and whether the NFL breached it, the Court would need to determine, to repeat, what the NFL, through the CBAs, required of the individual club and club physicians."[129] Therefore, the court concluded that it would be necessary to interpret the CBA, and that the plaintiffs' claims are preempted by section 301.[130]

The court also concluded that it was necessary to interpret the CBA for the plaintiffs' fraud-based claims and claims for declaratory relief, medical monitoring, and loss of consortium on behalf of the putative class members' spouses.[131] The players timely appealed the trial court's decision to the Ninth Circuit, which reversed the trial court's decision.[132]

C. Reasoning of the Ninth Circuit

The Ninth Circuit, like the trial court, used the two-step test to determine whether the plaintiff's state-law claims were preempted by section 301.[133] However, the Ninth Circuit's reasoning differed from the trial court's interpretation of the players' claims. The trial court stated that "the

126. *Id.* at *21.

127. *Dent*, 2014 WL 7205048, at *16.

128. *Id.* at *23.

129. *Id.* at *24.

130. *Id.* at *39.

131. *Dent*, 2014 WL 7205048, at *38.

132. *Dent*, 902 F.3d at 1113–14.

133. *Id.* at 1116.

'essence' of the plaintiffs' negligence claim 'is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment.'"[134] Unlike the trial court, however, the Ninth Circuit concluded that the players' claims do not comprise a dispute over the rights created by the CBA.[135] Instead, their claims involve whether or not the NFL *itself*, not the individual teams, provided players with prescription drugs.[136]

Here, the Ninth Circuit concluded that because the players are suing the NFL and not the individual teams, the players' claims "do not constitute a dispute over the rights created by, or the meaning of, the CBAs."[137] Additionally, the court emphasized that "[t]heir claim is that when the NFL provided players with prescription drugs, it engaged in conduct that was completely outside the scope of the CBA[]."[138] This is similar to the reasoning used in *Evans*, where the court concluded that the claims for relief were grounded in illegal conduct in violation of statutes by the clubs.[139] The Ninth Circuit contradicted the trial court's reasoning by claiming that "the teams' obligations under the CBA[] are irrelevant to the question of whether the NFL breached an obligation to players by violating the law."[140] Furthermore, the court held that the fact that the CBA has provisions addressing players' injuries and medical conditions "does not address the NFL's liability for injuring players by illegally distributing prescription drugs."[141] Consequently, the Ninth Circuit conducted the analysis with this reasoning in mind.

Therefore, largely because the provisions in the CBA does not directly address the NFL itself, the Ninth Circuit concluded that "no interpretation of the terms of the CBA[] is necessary, and there is no danger that a court will

134. *Id.* at 1118.

135. *Id.* at 1123.

136. *Id.*

137. *Dent*, 902 F.3d at 1126.

138. *Id.*

139. Evans v. Arizona Cardinals Football Club LLC, No. C 16-01030 WHA, 2016 WL 3566945, at *4 (N.D. Cal. July 1, 2016).

140. *Id.* at 1121.

141. *Id.*

impermissibly invade the province of the labor arbitrator."[142] In addition, the court clarified that "[m]erely consulting a CBA…does not constitute 'interpretation' of the CBA for preemption purposes."[143] Instead, the court stated that it should ". . .compare the NFL's conduct with the requirements of state and federal laws governing the distribution of prescription drugs."[144]

IV. ANALYSIS OF NINTH CIRCUIT'S RULING OF DENT V. NFL

A. Contrary to the Ninth Circuit's Ruling, Federal Preemption of the Players' State-Law Claims was Warranted

The Ninth Circuit erroneously reversed the trial court's decision to grant the NFL's motion to dismiss, for two reasons. First, in accordance with the two-step test described above, the plaintiffs' claims are preempted by section 301. Second, the Ninth Circuit's holding interferes with the uniformity of interpretation of CBAs. For these reasons, the players' claims should have been preempted by section 301 and the lower court's decision should not have been reversed. Furthermore, if their claims are preempted by section 301, the plaintiffs still have recourse through the arbitration procedures defined in the CBA.

1. Federal Preemption of the Plaintiffs' Claims was Warranted Because They Adhere to the Two-Step Test for Section 301 Preemption

As mentioned above in Part II.B.1, the following questions are asked when determining whether employees' claims are preempted by section 301: first, does the cause of action involve "rights conferred upon an employee by virtue of state law [and] not by a CBA?"[145] If the rights at issue arise from

142. *Id.* at 1126.

143. *Id.* at 1117.

144. *Id.* at 1120.

145. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007).

the CBA, then the claim is preempted, and the analysis ends there.[146] Second, if the rights do not arise from the CBA, does "litigating the state law claim nonetheless require interpretation of a CBA?"[147] Here, the plaintiffs' claims should be preempted by section 301 because the claims either arise from the NFL CBAs, or required the interpretation of them.

a. The Players' Claims Arise from the CBAs

The first question asks whether the rights at issue arise from the CBA.[148] If the claim at issue is not a relevant issue in the CBA, then it is not considered to arise from the CBA.[149] For example, in *McPherson v. Tenn. Football Inc.* ("*McPherson*"), a player brought a negligence claim against the Tennessee Titans after he was hit by a mascot in a golf cart during halftime.[150] The court held that the player's claim was not preempted because there were no provisions in the CBA "concerning its mascots or field safety for half-time activities."[151] In contrast, the court in *Holmes*, where an NFL player was suspended for failing a drug test, concluded that the player's claims were preempted by section 301 because the CBA contained a provision with an established drug testing program.[152]

Here, there are CBA provisions directly applicable to the relevant claim. Regarding the players' negligence claims, the Ninth Circuit analyzed each claim and concluded that "the players' right to receive medical care from the NFL that does not create an unreasonable risk of harm" does not arise from the CBA.[153] Unlike the district court, the Ninth Circuit concluded that the players' claims do not arise from the CBA because the NFL engaged

146. *Id.*

147. *Id.*

148. Dent v. Nat'l Football League, 902 F.3d 1109, 1118 (9th Cir. 2018).

149. Duerson v. Nat'l Football League, Inc., No. 12 C 2513, 2012 WL 1658353, at *5 (N.D. Ill. May 11, 2012).

150. McPherson v. Tenn. Football Inc., No. 07CV00002, 2007 WL 803970, at *5 (M.D. Tenn. Jan. 3, 2007); *Duerson*, 2012 WL 1658353, at *5.

151. *Duerson*, 2012 WL 1658353, at *5 (citation omitted).

152. Holmes v. Nat'l Football League, 939 F. Supp. 517, 524 (N.D. Tex. 1996).

153. *Dent*, 902 F.3d at 1118.

in conduct outside the scope of the CBA.[154] However, there are several provisions in the CBA that address player health and safety. Unlike the situation in *McPherson*, where the CBA had no relevant provisions regarding mascots and field safety during halftime,[155] current and past CBAs clearly state the numerous duties that the league has imposed on the individual clubs. For example, the 1980 CBA imposed a process for club physicians to document expected player recovery time with the following provision: "[a]ll determinations of recovery time for major and minor injuries must be by the Club's medical staff and in accordance with the Club's medical standards. . .The prognosis of the player's recovery time should be as precise as possible."[156] The 1982 CBA imposed other requirements on clubs regarding chemical abuse and dependency by including a provision that "[t]he Club physician may, upon reasonable cause, direct a player. . .for testing for chemical abuse or dependency problems."[157]

The retired players may again argue, as Judge Kozinski of the Ninth Circuit concluded, that the CBAs exempt the NFL because "the league is not a signatory on six of the seven [CBAs]."[158] "Judge Kozinski compared the NFL to a random third party, such as a player's wife who instructs a team doctor to give her husband more pain medication."[159] The players allege that the NFL doctors and trainers, not the doctors and trainers of individual teams, gave players medications without telling them what they were taking. Therefore, because the CBA only address the duties of the individual clubs and not the NFL itself, the plaintiffs will continue to argue that their claims do not arise from the CBA, nor do they require interpretation from the CBA. However, regardless of whether or not the NFL is a signatory to the contracts, the league is still heavily involved in the agreements, unlike a player's wife, and is not just "a random third party." As a result, the CBA should not exempt

154. *Id.* at 1126.

155. *Duerson*, 2012 WL 1658353, at *5.

156. Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *4–5 (N.D. Cal. Dec. 17, 2014).

157. *Id.* at *4.

158. Morgan Francy, *An Open Field for Professional Athlete Litigation: An Analysis of the Current Application of Section 301 Preemption in Professional Sports Lawsuits*, 70 SMU L. REV. 475, 490 (2017) (citation omitted).

159. *Id.*

the NFL and the players' claims do arise from the CBA. Additionally, as discussed before, the court in *Stringer* found that "[d]efendants' status as non-signatories to the CBA does not prevent them from raising the preemption defense."[160] For these reasons, the fact that the NFL is not a signatory to several of the CBAs does not stop it from using this defense.[161]

The players' and Ninth Circuit's reasoning that the CBA provisions governing players' right to medical care is "irrelevant to the question of whether the NFL's conduct violated federal laws regarding the distribution of controlled substances"[162] is incorrect. There are several provisions in the CBAs that address these issues. For example, the 1993 CBA imposed a right to medical care for injuries and placed the scope of such care in the hands of club physicians.[163] The 2006 CBA provided that each club will have a board-certified orthopedic surgeon as one of its Club physicians,[164] and the 2011 CBA expanded on this by requiring all other physicians to be board-certified in their field of expertise.[165] In addition, the 2011 CBA clarified that "club physicians must comply with all federal, state, and local requirements, including all ethical standards established by any applicable government and/or other authority that regulates the medical profession."[166]

Additionally, if the Ninth Circuit's interpretation prevails and the players' claims are not preempted solely because the CBA addresses the duties of the individual teams rather than the NFL, it would show that "the NFL could reasonably rely on the [individual teams] to notice and diagnose player

160. Stringer v. Nat'l Football League, 474 F. Supp. 2d 894, 902 (S.D. Ohio 2007).

161. Article 2, Section 1 of the 2011 CBA states that "[f]or the avoidance of doubt, the NFL shall be considered a signatory to this Agreement." However, this provision is not included in previous CBAs.

162. *Dent*, 902 F.3d at 1126.

163. *Dent*, 2014 WL 7205048, at *5.

164. *Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association*, NFL PLAYERS ASSOCIATION 1, 197 (Aug. 4, 2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf [https://perma.cc/8UXP-PK8K].

165. *Dent*, 2014 WL 7205048, at *6.

166. *Id.*

health problems arising from playing in the NFL."[167] The NFL could then exercise a lower standard of care, potentially leading to more problems regarding the health and safety of players. Therefore, determining the meaning of the CBA provisions is necessary to resolving these claims.

It is evident that the NFL has produced multiple provisions from the CBA that explicitly address player health and safety and "address in detail issues relating to assessment, diagnosis, and treatment of player injuries."[168] These player health and safety provisions place responsibility on team doctors, through the NFL, "to determine a player's physical condition and recovery time; medical and hospital care for the player after suffering an injury while performing services under the contract; team requirements for board-certified orthopedic surgeons; trainer certification by the National Athletic Trainers Association; and additional doctors and an ambulance on site during games."[169]

Because the players' claims are relevant and related to several provisions in the CBA, the court would have to consider the protections in the prior paragraph that the NFL has imposed on clubs through collective bargaining. Therefore, the players' claims arise from the CBA. If the claims arise from the CBA, the claim is preempted, and the analysis stops here.[170] However, even if the Ninth Circuit correctly determined that the plaintiffs' claims did not arise from the CBA, still, it erroneously concluded that they would not require the interpretation of the CBA.

b. Even if the Players' Claims Did Not Arise from the CBA, They Would Still Require the Interpretation of the CBAs

If the players' claims do not arise from the CBA, then the second question is whether the claims require interpretation from the CBA. Even if the players' claims arose from common law or state law rather than the CBA, the claims would still be preempted under the second step of the test because they require interpretation of the CBA. The situation in *Dent* is similar to the situation in *Stringer*, in that the court was faced with determining whether

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167. Duerson v. Nat'l Football League, Inc., No. 12 C 2513, 2012 WL 1658353, at *11 (N.D. Ill. May 11, 2012).

168. Kelly A. Heard, *The Impact of Preemption in the NFL Concussion Litigation*, 68 U. MIAMI L. REV. 221, 235 (2013).

169. *Id.*

170. *Burnside*, 491 F.3d at 1059.

the plaintiffs' wrongful death claim was based solely on common law tort principles, or if they needed the interpretation of the CBA to be resolved.[171] The court concluded that the plaintiff's wrongful death claim was preempted by section 301 of the LMRA because "resolution of that claim is substantially dependent on, and inextricably intertwined with, an analysis of certain provisions of the CBA."[172] Here, it would also be necessary to interpret the provisions in the CBA to determine whether the plaintiffs can continue with their claims.

One instance in *Dent* where the plaintiffs' claim requires interpretation of the CBA is when the plaintiffs allege that the NFL itself is the cause of the plaintiffs' problems, not individual teams.[173] For example, they claim that NFL doctors and trainers gave players medications without advising them on what they were taking.[174] However, the NFL has clearly addressed the problem of medical care in the CBAs. For example, the 1993 CBA imposed a right to medical care for injuries and placed the scope of that care in the hands of team doctors.[175]

In *Williams*, the court found that "the question of whether the Players can show that they reasonably relied on the lack of a warning that [the dietary supplements] contained bumetanide cannot be ascertained apart from the terms of the policy, specifically section eight, entitled 'Masking Agents and Supplements' and Appendix G, entitled 'Supplements.'"[176] Similar to this situation in *Williams*, here it would be necessary to interpret the CBA provisions on the disclosure of medical information to determine whether plaintiffs reasonably relied on the alleged lack of proper disclosure by the NFL.

This example follows the two-step test for section 301 preemption. Even if this state-law tort claim does not directly arise from the CBA, it nevertheless requires the interpretation of the CBA because the CBA includes provisions that address the claims. Because the plaintiffs' claims either arise from the CBA, or the CBA can be used to interpret the claims, the plaintiffs'

171. *Stringer*, 474 F. Supp. 2d at 901.

172. *Id.* at 911.

173. *Dent*, 902 F.3d at 1118.

174. *Id.* at 1115.

175. *Dent*, 2014 WL 7205048, at *5.

176. Williams v. Nat'l Football League, 582 F.3d 863, 882 (8th Cir. 2009).

claims should be preempted under section 301, and the Ninth Circuit erred in reversing the trial court's decision.

2. The Ninth Circuit's Holding that the Plaintiff's Claims are not Preempted Under Section 301 Interferes with the Uniformity of Interpretation of Collective Bargaining Agreements

For the players to argue that the NFL has not addressed issues involving their health and safety in any of the CBAs is unfair to not only the league, but to other employers who also heavily rely on collective bargaining. As mentioned in Section II, Congress's purpose for passing the LMRA was "to prescribe the legitimate rights of both employees and employers in their relations . . . [and] to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce."[177] In addition, the purpose of section 301 preemption is to encourage "uniformity of interpretation of collective bargaining agreements and prevention of interference with those agreements."[178] Without either of these, collective bargaining serves no legitimate purpose.[179] "To address threats to the federal labor-contract scheme, the Supreme Court has fashioned the [section] 301 preemption rule such that if state law attempts to define the terms of a collective bargaining agreement, federal labor law preempts that state-law claim."[180]

With the Ninth Circuit's holding, the uniformity of interpretation of CBAs is greatly affected, because after the Ninth Circuit's ruling, procedures in the CBAs will be interfered with and plaintiffs will be encouraged to go around the CBA. Similar to the situation in *Williams*, where the court ruled that some of the players' claims were not preempted by section 301, here the Ninth Circuit's decision that the plaintiff's claims are not preempted by section 301 "threatens the competitive balance by which the NFL is characterized, and–on a larger scale–strips employers of their power to collectively bargain with employees[,]"[181] because it leaves employers who rely on a

177. Francy, *supra* note 158, at 479.

178. *Id.*

179. Heard, *supra* note 168, at 227.

180. *Id.*

181. Jaime Koziol, *Touchdown for the Union: Why the NFL Needs an Instant Replay in* Williams v. NFL, 9 DEPAUL BUS. & COM. L.J. 137, 138–39 (2010).

CBA such as the NFL vulnerable, "with no outlet to ensure its policies are uniformly enforced at all levels and locations."[182]

The purpose of the provisions in a CBA are to "enforce a single, uniform standard of player conduct to ensure an even playing field for all players."[183] Allowing the retired players' claims in *Dent* to be heard is unjust to players from states whose statutes would not protect them. Consequently, the NFL will have a hard time enforcing policies in a CBA in future situations similar to *Dent* because players will attempt to follow their respective states' statutes instead. If the Supreme Court upholds the Ninth Circuit's ruling, the holding in *Dent* may extend beyond the NFL to employers outside of professional sports leagues who rely on a CBA in their negotiations. With the Ninth Circuit's decision to disregard the provisions in the CBA, employers from all over the country will now be forced to consult every state's workplace laws where they have employees, along with all other applicable statutes, when negotiating their policies.[184] This will leave employers frustrated and feeling as if they are denied their power to negotiate.[185] For this reason, it would be more equitable for not only the league, but also for other employers and the NFL's other players, if the Ninth Circuit's decision was overturned.

B. Possible Solution for Players

Assuming the Supreme Court overturns the Ninth Circuit's decision and rules in favor of the NFL, the players can then follow the provisions that are set out in the CBA and file grievances to be settled through arbitration. Not only does the Ninth Circuit's decision make employers feel as if their power to negotiate with employees has been stripped, but it also downplays the importance of arbitration, which is "the most widely used dispute resolution mechanism in unionized industries."[186] Any given CBA set forth the procedures for initiating and filing a grievance. For example, Article 15 of

182. *Id.* at 160.

183. *Id.*

184. *Id.* at 161.

185. *Id.*

186. Jeffrey D. Meyer, *The NFLPA's Arbitration Procedure: A Forum for Professional Football Players and Their Agents to Resolve Disputes*, 6 OHIO ST. J. ON DISP. RESOL. 107, 107 (1990).

the 2011 CBA states that "[t]he System Arbitrator shall make findings of fact and determinations of relief including, without limitation, damages…injunctive relief, fines, and specific performance."[187]

In addition, "arbitrators have liberally construed [the] statute of limitations by allowing many complaints to proceed through the system regardless of the time of occurrence and filing."[188] In negotiating these provisions, it is clear that the NFL's representatives and the NFLPA intended for disputes to be handled through arbitration. If the Supreme Court does not overturn the Ninth Circuit's decision, employers who negotiated a CBA are left questioning the effectiveness of including an arbitration clause.

An example of a grievance that has recently gone through the NFL's arbitration process involves current free-agent quarterback Colin Kaepernick.[189] Kaepernick filed a grievance under the 2011 CBA against NFL owners for collusion, claiming that the NFL and its owners "have colluded to deprive Mr. Kaepernick of employment rights . . . ."[190] In August of 2018, the arbitrator hearing Kaepernick's case ruled against the league after the NFL moved to dismiss the case on the grounds that Kaepernick and his legal team had not presented sufficient evidence to proceed.[191] This meant that Kaepernick was able to continue with his collusion grievance and proceed to a hearing with the arbitrator.[192] In February of 2019, however, Kaepernick instead reached a settlement with the NFL.[193]

Arbitration is especially valuable and must be respected in professional sports due to the "availability of a timely resolution, the ability of parties to

187. NFL PLAYERS ASSOCIATION, *supra* note 164, at 116.

188. Meyer, *supra* note 186, at 115.

189. *See generally QB Colin Kaepernick Files Grievance for Collusion Against NFL Owners*, ESPN (Oct. 16, 2017), http://www.espn.com/nfl/story/_/id/21035352/colin-kaepernick-files-grievance-nfl-owners-collusion [https://perma.cc/7E7C-37VP].

190. *Id.*

191. Ryan Nanni, *The NFL was Denied a Summary Judgment Against Colin Kaepernick. Here's What That Means*, SB NATION (Aug. 30, 2018, 6:17 PM), https://www.sbnation.com/nfl/2018/8/30/17801870/colin-kaepernick-nfl-collusion-lawsuit-summary-judgement [http://perma.cc/52MV-WVC8].

192. *Id.*

193. Kevin Seifert, *Colin Kaepernick, Eric Reid Settle Grievances Against NFL*, ESPN (Feb. 16, 2019), http://www.espn.com/nfl/story/_/id/26004715/colin-kaepernick-eric-reid-settle-grievance-case-nfl [https://perma.cc/FMS6-KXCW].

rely on the finality of the decision, and the arbitrator's specialized knowledge of league rules and customs."[194] Furthermore, the Supreme Court has repeatedly encouraged courts to respect and refer to arbitration decisions.[195] This process may initially seem unfair to the plaintiffs in *Dent*, because although NFL owners, coaches and executives will likely face more intense questioning and cross-examinations from the arbitrator,[196] there will be less public exposure due to the private nature of arbitrations.[197] However, these procedures merely follow what the players and the NFL's Management Council agreed upon in a CBA.

V. CONCLUSION

Football is a rough, and at times, dangerous sport. NFL players work long hours, put their bodies through a great deal of stress and harm, and are at risk for serious career and life-threatening injuries. For example, recent studies have shown that playing professional football may increase the risk of neurological problems, premature death, and suffering from brain disease.[198] Given the intensity of their workloads and the stress they put on their bodies and minds on a daily basis, it is only natural that NFL players are concerned about the steps taken to address their health and safety. The NFL should, and does, address these concerns by imposing duties on individual teams through the CBA, the provisions of which address the plaintiffs' claims in *Dent*.

This is precisely why the state-law claims brought against the NFL by former professional football players in *Dent* should be preempted by section 301 of the LMRA. The Ninth Circuit's decision to allow the players' case to proceed may leave employers, such as the NFL, with no way to ensure

194. Koziol, *supra* note 181, at 162.

195. *See generally* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

196. Jon Becker, *Win for Kaepernick: Arbitrator Sends His Collusion Case Against NFL to Full Hearing*, MERCURY NEWS (Aug. 31, 2018, 2:00 PM), https://www.mercurynews.com/2018/08/30/arbitrator-agrees-with-kaepernick-his-case-against-nfl-going-to-trial/ [https://perma.cc/8NT8-YY4Q].

197. Francy, *supra* note 158, at 478.

198. *See generally* Karen Weintraub, *NFL Players Could Have a Higher Risk of Death and Brain Disease, Study Indicates*, USA TODAY (Feb. 1, 2018, 3:20 PM), https://www.usatoday.com/story/news/nation/2018/02/01/nfl-players-could-have-higher-risk-death-and-brain-disease-study-indicates/1087352001/ [https://perma.cc/7U7G-WWHK].

that the provisions collectively agreed upon in the CBA are enforced. This ultimately will interfere with the uniformity of interpretation of any given CBA. Resolution of this preemption question may not only determine the future of provisions in CBAs in professional football, but also may impact the future of collective bargaining provisions in professional sports overall. The Supreme Court should overturn the Ninth Circuit's decision to ensure that the procedures set forth in the NFL's current (and future) CBA are carefully followed.