PAINKILLERS AND PREEMPTION: "DENT"-ING THE NFL'S PREEMPTION DEFENSE

In lawsuits brought by professional athletes against their respective sports leagues, one of the leagues' most effective defenses has been preemption. This defense comes from federal labor law—Section 301 of the Labor Management Relations Act ("LMRA")—which effectively prevents any state-law claims that arise from or involve interpretation of the organization's collective bargaining agreement ("CBA"). In 2014, when a group of retired professional football players sued the National Football League ("NFL") for its handling and distribution of dangerous painkillers, it appeared that the preemption defense would once again prevail. However, in Dent v. National Football League*, the Ninth Circuit held that the players' claims were not preempted by Section 301 because, as pleaded, the claims did not "arise from," nor were they "intertwined" with, the collective bargaining agreement. This Note analyzes the players' pleading in* Dent*, specifically examining why the players were able to avoid preemption in this case. Further, this Note looks at the history of the "preemption defense" often used by the NFL and its gradual erosion. This Note argues that the* Dent *case, whether or not it succeeds on the merits, will have long-lasting effects for professional sports leagues and their players, both in future lawsuits and future CBAs.*

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I. INTRODUCTION

Richard Dent, a hall-of-fame defensive end who played for the Chicago Bears and three other teams, sacked the quarterback over 137 times during fifteen seasons in the National Football League.[1] He made four Pro-Bowls and was the MVP of the 1985 Chicago Bears' Super Bowl XX victory.[2] Dent was an impact player on the 1985 Chicago Bears team, which some contend was the best team ever.[3] However, several players from the 1985 Chicago Bears team, and many other retired players, have since been the victim of numerous tragedies.[4] Dent, like many other former players, continues to struggle with the lingering consequences of his playing days.[5] He dealt with many injuries throughout his career and still feels the effects from both the injuries and the reckless treatment he received.[6]

To sustain playing such a physically-taxing sport at a high level, former players speak to the excessive use of alcohol and painkillers that were copiously provided to help them cope with the pain that comes with the game.[7] The negative effects from the reckless use of prescription narcotics have stayed with these players since their careers have ended. This story, along with many other similar stories that can be told by other retired NFL players, has led to a lawsuit against the NFL—headlined by Richard Dent.[8]

1. *Defensive End Richard Dent*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/richard-dent (last visited Dec. 18, 2018).

2. *Id.*

3. Matt Reagan, *1985 Chicago Bears: The Greatest Team Ever*, BLEACHER REP. (Mar. 10, 2009), https://bleacherreport.com/articles/136752-1985-chicago-bears-the-greatest-team-ever.

4. *See, e.g.*, Atwater v. Nat'l Football League Ass'n, 626 F.3d 1170, 1174 (11th Cir. 2010); Nate Dusek, *Monsters No More: 1985 Bears Talk Brain Damage and Suicide in HBO Documentary*, SPORTS MOCKERY (Jan. 19, 2015), http://sportsmockery.com/2015/01/monsters-no-1985-bears-talk-brain-damage-suicide-hbo-documentary.

5. Dusek, *supra* note 4.

6. *See id.*; Ed Sherman, *Mike Ditka, 1985 Bears Players Detail Team's Excessive Painkiller Use*, CHI. TRIB. (Jan. 17, 2015, 8:14 PM), https://www.chicagotribune.com/sports/bears/chi-1985-bears-pain-killers-real-sports-20150117-story.html.

7. Sherman, *supra* note 6.

8. Rick Maese, *Appeals Court Resurrects Ex-players' Painkiller Lawsuit Against the NFL*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/news/sports/wp/2018/09/06/appeals-court-resurrects-ex-players-painkiller-lawsuit-against-the-nfl/?utm_term=.6e5718a5803e. Other well-known players who are plaintiffs in the lawsuit include Jim McMahon (former Chicago Bears quarterback), Marcellus Wiley (former defensive end and current ESPN personality), and Keith Van Horn (former Chicago Bears offensive lineman). *Judge Dismisses Ex-players' Painkiller Lawsuit Against NFL*, SPORTS

Historically, courts have dismissed player lawsuits by finding that players' claims were preempted by Section 301 of the LMRA.[9] Section 301 of the LMRA, and the Supreme Court's interpretation of it, mandates that courts apply "a body of federal common law to be used to address disputes arising out of labor contracts."[10] Courts must apply federal labor standards to any claims arising from contracts between an employer and a labor organization, even those that do not allege a breach of contract.[11]

However, the Ninth Circuit recently revived Dent and his fellow plaintiffs' ability to sue the NFL. *Dent v. National Football League*[12] was originally ruled to be preempted by Section 301 of the LMRA because it required an interpretation of the agreement between the NFL and the National Football League Players Association ("NFLPA").[13] Nonetheless, the Ninth Circuit reversed this ruling, and this lawsuit became one of the few instances where NFL players were able to avoid their claims being dismissed as preempted.[14] Preemption under Section 301 of the LMRA is one of the most effective defenses used by the NFL and other professional sports leagues.[15] The preemption defense effectively prevents courts from analyzing any claims that arise or involve interpretation of the organization's CBA. However, the Ninth Circuit's decision in *Dent* struck a blow to the effectiveness of the defense. This was the first notable case involving athletes to hold that the plaintiffs' common law claims were not preempted by Section 301.[16] While the *Dent* plaintiffs have not succeeded on the merits thus far,[17] this decision is significant

ILLUSTRATED (Dec. 14, 2014), https://www.si.com/nfl/2014/12/17/nfl-painkiller-lawsuit-dismissed-richard-dent; Sherman, *supra* note 6.

9. *See* CHRISTOPHER DEUBERT ET AL., PROTECTING AND PROMOTING THE HEALTH OF NFL PLAYERS: LEGAL AND ETHICAL ANALYSIS AND RECOMMENDATIONS-PART 3: THE NFL, NFLPA, AND NFL CLUBS 221–22 (2016), https://footballplayershealth.harvard.edu/wp-content/uploads/2016/11/12_Pt3_NFL_NFLPA_Clubs.pdf; Tyler V. Friederich, Note, *The Boogeyman: Derek Boogaard and the Detrimental Effects of Section 301 Preemption*, 95 WASH. U. L. REV. 727, 731–33 (2017).

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

11. *Id.*

12. 902 F.3d 1109 (9th Cir. 2018).

13. *Id.* at 1114.

14. *See* William B. Gould IV, *Football, Concussions, and Preemption: The Gridiron of National Football League Litigation*, 8 FIU L. REV. 55, 64–69 (2012) (detailing the frequency that NFL players lawsuits are preempted).

15. *See* DEUBERT ET AL., *supra* note 9, at 221.

16. *See Dent*, 902 F.3d at 1121.

17. *See* Dent v. Nat'l Football League, 384 F.Supp.3d 1022, 1025 (N.D. Cal. 2019) (granting the NFL's motion to dismiss for a failure to state a claim). After losing the motion to dismiss in April, the players filed a timely appeal, which is still pending. Zachary Zaggar, *Ex-NFLers Ask 9th Circ. To Save Painkiller Suit Once Again*, LAW360 (Aug. 23, 2019), https://www.law360.com/articles/1192040/ex-nflers-ask-9th-circ-to-save-painkiller-suit-once-again.

as it provides a viable path for current and former NFL players to litigate against the NFL and to avoid one of the easiest and most effective defenses the NFL has in its toolbox.

This Note will begin by discussing the history of the LMRA and Section 301 preemption. Then, this Note will discuss and analyze the Ninth Circuit's decision in *Dent v. National Football League*. Next, this Note will analyze the distinctions that allowed for the players to avoid preemption in *Dent* but not in other noteworthy preemption cases involving NFL players. Last, this Note will analyze the potential impacts of the *Dent* holding, most notably whether this case has created a path that future cases will follow to avoid preemption.

II. LMRA SECTION 301 PREEMPTION

The practical effect of Section 301 is that a common law claim, regardless of the type of claim (contract, tort, etc.), that stems from or requires an interpretation of a labor relationship contract will be preempted, and courts will be required to apply federal labor law.[18] The difference in which law applies is vitally important to the players' claims. Not only does it affect the likelihood of success of the claims on the merits but it can affect the players' potential remedies.[19] Generally, the remedies afforded to players under CBAs include injunctive relief, contract damages, fines, and specific performance.[20] California tort law would allow for the recovery of compensatory damages and, potentially, large punitive damages.[21] While the preemption issue is the lynchpin of the *Dent* plaintiffs' case, its analysis depends on the court's interpretation of Section 301 of the LMRA. The evolution of the law over time, and how it is currently being applied, shows why the Ninth Circuit was able to rule the way it did.

A. History of LMRA

Section 301 of the LMRA states: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."[22] The text of Section 301 provides that these actions may be brought in state or federal

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

19. *See* Michael Telis, Note, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1846 (2014).

20. *See* NFL & NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. 15, at 113 (2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf; Telis, *supra* note 19, at 1846.

21. *See* Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 67 (Cal. 2005) (overturning a punitive damage award of $1.7 million dollars); Telis, *supra* note 19, at 1846.

22. 29 U.S.C. § 185(a) (2012).

courts.[23] Initially, courts viewed this as simply a jurisdictional statute.[24] However, in 1957, "the Supreme Court rejected the view that Section 301 was simply a grant of jurisdiction to the federal courts"[25] and instead determined that Section 301"authorize[d] the federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."[26] The Supreme Court then held that the differences in applicable law (depending on if the claim was brought in state or federal court) must give way to principles of federal labor law.[27] The application of a federal labor law would be the only way to protect "the federal labor-contract scheme" that the LMRA envisioned.[28] Thus, the policy behind Section 301 preemption encourages "uniformity of interpretation of collective bargaining agreements and prevention of interference with those agreements."[29]

As courts held that Section 301 preempted state law contract claims, plaintiffs began bringing common law tort claims such as tortious breach of contract.[30] In response, the Supreme Court extended Section 301 preemption to state law tort actions.[31] The Court reasoned that a different holding "would elevate form over substance and allow parties to evade the requirements of [Section] 301 by relabeling their contract claims as claims for tortious breach of contract."[32] In order to have the intended effect, Section 301 had to also apply to state common law claims that arose out of the agreement.

Over time, the Supreme Court expanded the analysis of Section 301 claims, finding that state common law tort claims are preempted by Section 301 if the "duties" arise out of or required an interpretation of the CBA.[33] On the other hand, claims are not preempted where the rights at issue are conferred by state law, independent of CBAs, and the substance of the claims can be resolved without interpreting the CBA.[34] However, the Court simultaneously held that claims that are "inexplicably intertwined" with the CBAs would ultimately require

23. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

24. Rebecca Hanner White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 380 n.10 (1990).

25. *Id.* at 379–80.

26. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455–56 (1957).

27. *See Lucas Flour*, 369 U.S. at 102–04; White, *supra* note 24, at 379–80.

28. Heard, *supra* note 18, at 227.

29. Morgan Francy, Note, *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).

30. *See* Telis, *supra* note 19, at 1864.

31. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218–19 (1985).

32. *Id.* at 211.

33. *See, e.g.*, United Steelworkers of Am. v. Rawson, 495 U.S. 362, 368 (1990); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988); Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 859 (1987); Francy, *supra* note 29, at 477.

34. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1058 (9th Cir. 2007).

the agreement's interpretation.[35] Thus, to be consistent with the purpose of Section 301, such claims were also preempted.[36]

B. The Current Process for Section 301 Analysis

The ever-winding evolution of Section 301 claims has led courts to apply a two-prong test to determine if a claim is preempted: the court must determine whether the plaintiff's claim arises from the CBA and if not, whether establishing the elements of the claim will require interpretation of the CBA.[37] If the claim fails one of the prongs, the claim will be preempted and the court cannot apply the substantive law the plaintiff alleges.[38] These two steps are often intermingled by courts; while similar, each step analyzes a different interaction between the claims and the CBA.[39]

First, the court will determine "whether the cause of action involves 'rights conferred upon an employee by virtue of state law'" not by a CBA.[40] If the rights in dispute "exist[] solely as a result of the CBA," then the plaintiff's claim is preempted and must be dismissed.[41] In order to succeed on their common law tort claims, a plaintiff must establish that a defendant owed them a "duty."[42] Often, that "duty" arises from contractual language giving one party a right and placing an obligation on the other party to act.[43] If the basis of a party's "duty" comes from a right that arose in a CBA, this will fail the first prong of the Section 301 preemption analysis, and the claim will be preempted.

Second, if the right exists independently of the CBA, a court will ask whether litigating the state law claim is *intertwined* with the CBA. In other words, whether the right requires an *interpretation* of a CBA.[44] If a claim's substantive analysis requires an interpretation of a CBA, it is preempted.[45] For example, a tort claim might require a showing that a plaintiff "reasonably" relied on a defendant's statement or action. Courts may have to analyze the CBA to

35. *See id.* at 1066.

36. *Allis-Chalmers Corp.*, 471 U.S. at 218–19.

37. *See Lingle*, 486 U.S. at 410; Dent v. Nat'l Football League, 902 F.3d 1109, 1116 (9th Cir. 2018).

38. *See Lingle*, 486 U.S. at 409–11.

39. Other analyses within court opinions and articles have the steps in reverse order. However, this process seems more proper analytically: first, find if the rights arise from the CBA, and then if not, determine if they would require the "interpretation" of the CBA. This is the approach the Ninth Circuit applies in *Dent*. 902 F.3d at 1116.

40. *Id.* (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).

41. *Id.*

42. *Id.* at 1118.

43. *See id.*

44. *Id.* at 1116.

45. *Burnside*, 491 F.3d at 1059–60.

determine if a particular provision made the reliance "reasonable" or not.

The "interpretation" in the second prong of the test is construed narrowly by courts.[46] An interpretation does not arise from a mere "look to" or reference to the CBA, nor from "a *hypothetical* connection between the claim and the terms of the CBA."[47] To be considered an "interpretation," a court must actually analyze the substance of the contractual terms.[48] This narrow construction of "interpretation" has been crucial to plaintiffs in avoiding preemption and was one of the key distinctions noted by the Ninth Circuit in *Dent*.[49] Additionally, when analyzing a preemption defense, the court will only look at the plaintiff's claim and will not find a claim preempted solely because the defendant raises a defense that is based on the CBA.[50]

This two-prong inquiry is a challenging one that can be applied by different courts in different ways. More and more, courts are able to play with the two prongs and the narrow definition of "interpret" to rule either way on the preemption issue.[51] However, courts have consistently found that athletes' common law claims against their respective sports leagues relied on a "duty" that arose expressly from the respective CBA, or required an "interpretation" of the respective CBA.[52] That is, however, until the Ninth Circuit applied a looser interpretation of "interpret" to hold that the *Dent* plaintiffs' claims were not preempted.[53]

III. THE *DENT* COMPLAINT AND ITS WINNING ARGUMENT

The plaintiffs in *Dent* pleaded nine causes of action.[54] Four of these claims involved a common law "negligence" claim and two

46. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 406 (1988).

47. *Dent*, 902 F.3d at 1116 (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018)); *see* Livadas v. Bradshaw, 512 U.S. 107, 125 (1994).

48. *Dent*, 902 F.3d at 1116.

49. *Id.*

50. Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001) ("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. If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense.").

51. *See, e.g.*, Robert M. Sagerian, *A Penalty Flag for Preemption: The NFL Concussion Litigation, Tortious Fraud, and the Steel Curtain Defense of Section 301 of the Labor Management Relations Act*, 35 T. JEFFERSON L. REV. 229, 237 (2013) (detailing that the Ninth Circuit defines "interpret" narrowly, perhaps more narrowly than other circuits).

52. *See id.*

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

54. Second Amended Complaint Demand for Jury Trial Class Action at 65–86, Dent v. Nat'l Football League, No. C 14-2324 WHA (N.D. Cal. Dec. 17, 2014) [hereinafter Second Amended Complaint]. The players had nine causes of action, six of which the court needed to analyze for preemption. *See Dent*, 902 F.3d at 1117–25; Second Amended Complaint, *supra* at 65–86. The other three claims—the players' loss of consortium claim and claims for declaratory judgement and

alleged common law "fraud" claims.[55] The Ninth Circuit analyzed each element of each claim, ultimately holding that the claims neither stemmed from the CBAs[56] nor required the interpretation of the agreement to determine any element of the claims.[57] Subpart A of this Part discusses the facts of *Dent* and the CBAs that were entered into by the NFL, NFL Teams, and the NFLPA. Subpart B of this Part analyzes the Ninth Circuit's holding and rationale.

A. Facts that the Players Alleged

The plaintiffs in *Dent* consisted of ten retired NFL players who sought to represent a class of more than 1000 former NFL players.[58] Together, these players alleged that the NFL "intentionally, recklessly, and negligently created and maintained a culture of drug misuse, putting profit in place of players' health."[59] These players detailed the perils of playing in the NFL such as playing while injured—often without a choice—and being administered many different types of painkillers[60] in excessive and irresponsible doses.[61] In addition, the players alleged the NFL knew and encouraged this practice, placing emphasis on profits with little to no regard for player health.[62]

Specifically, Richard Dent alleged that he "received hundreds, if not thousands, of injections from doctors and pills from trainers" and was never told of the risks associated with taking these medications or mixing different medications.[63] Dent became addicted to painkillers; he had a continual supply of them while playing and spent an excessive amount of money purchasing them after his

medical monitoring—were "derivative" of the other six claims. *Dent*, 902 F.3d at 1125.

55. Second Amended Complaint, *supra* note 54, at 71–86.

56. The class of plaintiffs represented by the *Dent* plaintiffs played in the NFL for different periods between 1969 and 2012. *See id.* at 23. During that time, the NFL and NFL players were bound by a series of CBAs. *Dent*, 902 F.3d at 1114. Thus, the Ninth Circuit's analysis looks at the players' claims alongside *multiple* CBAs.

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

58. *Id.* at 1114.

59. Second Amended Complaint, *supra* note 54, at 2.

60. The plaintiffs' complaint focuses on different types of painkillers given to them by the NFL. They include opioids, nonsteroidal anti-inflammatory medications (NSAIDs), and local anesthetics. The drug mentioned most often is Toradol, an NSAID that doctors have deemed more dangerous than other over-the-counter painkillers. *See id.* at 5; Louis Bien, *Comfortably Numb: The NFL Fell in Love with a Painkiller it Barely Knew*, SB NATION (Aug. 3, 2016), https://www.sbnation.com/2016/8/3/12310124/comfortably-numb-the-nfl-fell-in-love-with-a-painkiller-it-barely-knew.

61. *See, e.g.*, Bien, *supra* note 60 (describing the practice by one team doctor of "prescrib[ing] Toradol before kickoffs even if players weren't injured, as a prophylactic to the pain they hadn't yet experienced").

62. Second Amended Complaint, *supra* note 54, at 4, 6.

63. *Id.* at 7.

playing days were over.[64] Additionally, he alleged that he suffered nerve damage in his foot stemming from the NFL's negligent treatment of his injuries.[65]

Similar to Dent, the other nine named plaintiffs in the case alleged being administered extreme amounts of medications, including injections of Vicodin, Codeine, and Novocain, all without prescriptions.[66] None of them were warned of the dangers of such treatment, yet were consistently supplied pills so that they could continue playing.[67] Each plaintiff gave detailed accounts of the alleged abuse, when and in what nature it occurred, and how they have suffered since.[68] All of the plaintiffs alleged they suffered from harsh side effects, including renal failure, opioid addition, and other illnesses that typically stem from excessive painkiller use.[69]

The players' complaint pointed out that the NFL is an "*unincorporated association* of thirty-two independently owned and operated football 'clubs,' or teams."[70] In other words, the NFL is its own entity, with its own responsibilities and actions; it is distinct and separate from the individual NFL teams.[71] The players relied heavily on this distinction in the complaint, alleging that the NFL *itself* was negligent for its role in distributing the controlled substances—not the individual teams.[72] This proved to be significant as the CBAs placed responsibilities on the individual teams regarding player treatment and team doctors but did not place any of the responsibilities on the NFL.[73]

Further, the complaint alleged that the NFL itself held and controlled all substances at its NFL Security Office in New York.[74] Since the preemption issue was decided through a motion to dismiss, the court had to take the plaintiffs' "allegations as true and construe

64. *Id.*

65. *Id.*

66. *See* Dent v. Nat'l Football League, 902 F.3d 1109, 1126 (9th Cir. 2018); Second Amended Complaint, *supra* note 54, at 7–13; Bien, *supra* note 60. The prevalence of opioids has increasingly been an issue in the United States and was just declared a national public health emergency. The opioid crack down is beginning, and many wonder if the NFL will get blamed for contributing to NFL players' addictions. *See* Neil Howe, *America's Opioid Crisis: A Nation Hooked*, FORBES (Nov. 30, 2017, 1:42 PM), https://www.forbes.com/sites/neilhowe/2017/11/30/americas-opioid-crisis-a-nation-hooked/.

67. Second Amended Complaint, *supra* note 54, at 7–13.

68. *Id.*

69. *Id.*

70. *Dent*, 902 F.3d at 1114 (emphasis added).

71. Each individual NFL team is its own entity, such as the Arizona Cardinals Football Club, LLC. The NFL itself is its own entity, albeit unregistered. Each individual team has its own rights and obligations that are distinctly different from the rights and obligations owed by the NFL. The players are actually employees of each individual team, not the NFL itself.

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

73. *Id.* at 1114, 1118.

74. *Id.* at 1115.

them in the light most favorable to the plaintiffs."[75] Additionally, the plaintiffs directly alleged that the NFL was negligent or fraudulent in its actions.[76] This was ultimately important because the Ninth Circuit relied on this distinction in its decision, finding that the claims were not preempted.[77] It was the NFL, not the individual clubs, as the named defendant in this case.[78] While the NFL, its own entity, was a signatory party to the CBAs in 2011,[79] specific provisions of the CBAs placed duties and responsibilities on the individual teams. For example, the 2011 CBA requires medical professionals to be provided by "[e]ach Club," and for the "Club physician" to advise a player in writing if he or she discloses a player's threatening physical injury to a coach or other Club representative.[80] The 2011 CBA places these responsibilities on the "Club" and not directly on the NFL.[81] Further, the *Dent* plaintiffs alleged the NFL was negligent in "hiring and retaining unqualified persons," but the CBAs created no requirement that the NFL hire anybody relating to the players' medical treatment.[82]

The plaintiffs' theory in this case was direct liability, not vicarious liability via the NFL Clubs, so any duties owed to the players by the NFL Clubs due to the CBAs were irrelevant to this specific case.[83] This strategic pleading by the plaintiffs was vital to prevailing in this case. Further, in the complaint, the players did not mention the CBAs at all.[84] This naturally helped any plaintiff's claim avoid preemption, as it supported the argument that the rights in the complaint did not involve the CBAs.

75. *Id.* at 1117.

76. *Id.* at 1115.

77. *See id.* at 1121 ("But the *teams*' obligations under the CBAs are irrelevant to the question of whether the *NFL* breached an obligation to players by violating the law.").

78. The Ninth Circuit noted that, at times, the players' complaint seemed to use the NFL and the NFL teams interchangeably. *Id.* However, the court noted that the players took action against the individual teams in separate litigation, thus holding that these claims arose from the NFL's alleged conduct—not the conduct of the individual teams. *See id.*

79. Some confusion may arise because the NFL *itself* was not a signatory of the CBAs prior to 2011, and most of the allegations in *Dent* arose prior to 2011. However, as the Court noted in footnote two, "prior to 2011, the CBAs were binding on all the relevant entities, including the NFL." *Id.* at 1114 n.2.

80. *See* NFL & NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 20, art. 39, at 171.

81. *See id.*

82. *See id.*; Second Amended Complaint, *supra* note 54, at 84.

83. *See Dent*, 902 F.3d at 1120–21.

84. *See* Second Amended Complaint, *supra* note 54. This is not an uncommon move by plaintiffs to avoid preemption issues, but one that seems intuitively necessary for their case; if the complaint references the CBA (for anything more than a passing reference), how can the court avoid it?

B. The Ninth Circuit's Analysis

The district court originally held that these claims required an analysis of the CBAs, and thus were preempted under Section 301.[85] On appeal, the Ninth Circuit analyzed the players' claims under the two-step inquiry required for a Section 301 preemption analysis, ultimately holding that the plaintiffs' negligence claim was not preempted by the CBAs since the plaintiffs did not rely on the CBAs in making their allegations.[86] In doing so, the Ninth Circuit became the first court to hold that former NFL players' state *common law claims* against the NFL were not preempted by a CBA.[87] How the Ninth Circuit reached this conclusion is noteworthy.

The court analyzed the claims under California common law to determine if there was any collision with the CBAs.[88] It properly analyzed each element of the claims to determine if there were grounds for preemption. First and most extensively, the court analyzed the plaintiffs' negligence per se claim.[89] Negligence per se allows for a statute to set the standard of care owed by a party.[90] The plaintiffs argued that "the NFL's provision and administration of controlled substances" was in violation of the Controlled Substances Act, leading to negligence per se.[91] Still, a party must establish that another owes them a duty in order to prevail on negligence per se.[92] The district court read the plaintiffs' claim as alleging "that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment."[93] However, the Ninth Circuit found from its reading of the players' complaint that the plaintiffs alleged "the NFL *itself* illegally distributed controlled substances."[94] The different reading allowed for the players to avoid preemption because the CBAs did not contain a provision that addressed the NFL *itself* distributing controlled substances or the NFL *itself* providing any medical care directly to players.[95] Rather, the CBAs placed those obligations on

85. *Dent*, 902 F.3d at 1114, 1121.

86. *See id.* at 1121.

87. *See id.* at 1125–26; Friederich, *supra* note 9, at 737–39 (discussing NFL claims that were preempted by the CBA).

88. *See Dent*, 902 F.3d at 1117 n.4. (explaining why California common law was applied).

89. *See id.* at 1117–18. The plaintiffs stated one cause of action as "negligence per se," but the Ninth Circuit, applying California law, analyzed the claim as a negligence cause of action, applying the "negligence per se" doctrine. *Id.*

90. *Id.* at 1118.

91. *Id.*

92. *Id.*

93. Dent v. Nat'l Football League, No. C 14-02324 WHA, 2014 WL 7205048, at *10–11 (N.D. Cal. Dec. 17, 2014).

94. *See Dent*, 902 F.3d at 1118.

95. *See id.*; NFL & NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 20, art. 39, at 171–74.

the individual teams. Thus, the claim against the NFL passed the first of the two prongs for a Section 301 analysis because the issue did not arise directly from the CBAs.

Further, under the second prong of the preemption analysis, the Ninth Circuit held that each element of the plaintiffs' claims could be established without any interpretation of the CBAs. California tort law independently imposes a duty of reasonable care on anyone involved in the handling, distribution, and administration of controlled substances.[96] Thus, the Ninth Circuit found that the plaintiffs could establish a duty owed by the NFL without any interpretation of the CBAs.[97] Similarly, the plaintiffs' negligence per se theory in determining if the NFL breached such duty did not require any analysis of the CBAs.[98] The negligence per se theory only required the plaintiffs to show that the NFL did not meet the minimal standards required by the statute, the Controlled Substances Act, which would not require any analysis of the CBAs.[99] Further, the "causation" element of the plaintiffs' claims was a "purely factual question" that did not require the court to interpret the CBAs.[100]

The Ninth Circuit dismissed the NFL's argument that interpretation of the CBAs would be required to determine the scope of the duty owed. The court said, "[r]egardless of what (if anything) the CBAs say about those issues, if the NFL had any role in distributing prescription drugs, it was required to follow the laws regarding those drugs. . . . [T]heir claims can be assessed without any interpretation of the CBAs."[101] Additionally, the district court held that analyzing the CBAs would be necessary to see how the NFL has indeed stepped forward and required proper medical care.[102] The Ninth Circuit disagreed and instead noted that the CBAs required "*team* doctors to advise players" of dangers, which "does not address the *NFL's* liability for injuring players by illegally distributing prescription drugs."[103] Effectively, the Ninth Circuit held that because the players were alleging that the NFL itself was responsible for the handling and distributing of the painkillers, and the CBAs really only addressed the individual NFL Clubs' responsibilities, the players' claims could proceed without any interpretation of the CBAs.

The Ninth Circuit reached the same conclusion regarding the players' negligent hiring and negligent retention claims. The players

96. The Ninth Circuit relied on the "foreseeability of risk" factors set forth in California tort law, established by a well-known California tort case, *Rowland v. Christian*, to find that there was an independent duty placed on the NFL. *See Dent*, 902 F.3d at 1118–19.

97. *Id.* at 1119.

98. *Id.*

99. *Id.*

100. *Id.* at 1119–20.

101. *Id.* at 1121.

102. *See id.*

103. *Id.*

alleged in their complaint that the NFL hired individuals "charged with overseeing, evaluating and recommending changes to distribution of Medications."[104] The court found that this statement, if true, coupled with the "reasonable foreseeability" of injury stemming from potential negligence by such employees, would create a common law duty of reasonable care in hiring and retaining such employees.[105] Nothing in the CBAs required that the NFL hire these employees. Thus, as pleaded, any duty would arise outside any analysis of the CBAs, as would the "breach" analysis question if the NFL breached the duty of reasonable care. The Ninth Circuit again noted that the provisions specifically involved requirements that the *individual NFL teams* took some action and placed no duty or responsibility on the NFL itself.[106] Thus the claims against the NFL were based entirely in state common law and required no analysis of the CBAs. The same duty and breach of duty analysis was applied to the players' negligent misrepresentation claim alleging that the NFL made false assertions to the players regarding medical treatment.[107] While there were provisions in the CBAs giving players the "right to access medical facilities, view their medical records, and obtain second opinions," the Ninth Circuit found that "these provisions do not relate to the *NFL's* duty to use reasonable care when making representations about the safety of medications."[108]

Many of the players' claims included a "reasonable reliance" element. This element provides that each plaintiff must have been reasonably justified in relying on the NFL's statements and representations without asking further questions or conducting their own investigation.[109] The NFL felt these claims were more vulnerable to a preemption defense because the merits of the "reasonable reliance" element are often disputed by provisions of a CBA.[110] If there was a provision in the NFL's CBA that made it unreasonable to rely on the NFL's representations, the negligent misrepresentation claim would have been preempted.[111] However, the Ninth Circuit went through the CBAs and found no such provision.[112]

For many courts, going through each provision to find if there is something to undercut "reasonable reliance" would likely include an "interpretation" or "analysis" of the CBA.[113] Yet, the Ninth Circuit treated this process as if it was merely looking to the CBA. Merely

104. Second Amended Complaint, *supra* note 54, at 85.
105. *Dent*, 902 F.3d at 1121–22.
106. *Id.*
107. *Id.* at 1123.
108. *Id.*
109. *See, e.g.*, *id.* at 1123–24; Second Amended Complaint, *supra* note 54, at 75, 77; *see also* 37 AM. JUR. 2D *Fraud and Deceit* § 240 (2019).
110. *See Dent*, 902 F.3d at 1123.
111. *See id.*
112. *Id.* at 1124.
113. *See id.* at 1116.

looking to a CBA is not considered the same as "interpreting" it; thus, it does not lead to preemption.[114] This is where the Ninth Circuit's analysis most notably illustrated its narrow definition of "interpreting."[115] Following this approach, if a court were to analyze each provision of a CBA and find nothing that undercuts the reliance, it would then act as if no interpretation was needed.

It may seem like a fallacy—it appears interpretation is required to determine if an interpretation is needed—but the Ninth Circuit's holding is consistent with other Section 301 preemption decisions. If it were to rule otherwise, any claim that arose with "reasonable reliance" as an element would be preempted because a CBA can undercut any reasonableness element. In other words, the Ninth Circuit clearly defined the notion that "merely consulting" a CBA and finding nothing relevant to the claim is not an "interpretation" under Section 301's analysis.[116] Although this is consistent with precedent, *Dent* provided a clear application of this rule of law.

Ultimately, none of the *Dent* plaintiffs' claims were found to be preempted.[117] The holding hinged on two major factors: (1) the distinction that the complaint alleged the NFL (as its own entity) acted wrongly, while the CBAs addressed only the individual teams' obligations, and (2) the Ninth Circuit's narrow definition of "interpreting" prevailed, holding that merely consulting the CBAs without finding a provision that undercut the "reasonable reliance" was not an "interpretation" for the purposes of a Section 301 preemption claim. The Ninth Circuit stressed that preemption is a defense meant "to protect the role of labor arbitration in resolving CBA disputes."[118] Here, the players alleged the NFL, by providing players with prescription drugs and making misrepresentations about those drugs, "engaged in conduct that was completely outside the scope of the CBAs."[119]

IV. COMPARING *DENT* WITH TWO PRIOR NFL CASES: *ATWATER* AND *WILLIAMS*

The Ninth Circuit's holding came after two prior cases brought by retired NFL players were held to be mostly preempted in other circuits.[120] Both the Eighth and Eleventh Circuits heard claims by

114. *Id.* at 1124–25.
115. *See* discussion *infra* Part IV.
116. *See Dent*, 902 F.3d at 1117.
117. *Id.* at 1126.
118. *Id.* at 1125–26.
119. *Id.* at 1126.
120. *See* Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1174 (11th Cir. 2010) (holding plaintiffs' state law claims were preempted because they arose from or were "substantially dependent upon" interpretation of a CBA); Williams v. Nat'l Football League, 582 F.3d 863, 881–82 (8th Cir. 2009) (holding that plaintiffs' negligence, fraud, and intentional infliction of emotional distress claims were preempted by the LMRA).

current and former NFL players alleging state common law claims against the NFL, attempting to bring them outside of the scope of the CBA.[121]

A. Background of Williams *and* Atwater

In *Williams v. National Football League,*[122] the plaintiffs were all suspended for violating the NFL's drug policy.[123] All the suspensions came after the players took a dietary supplement, StarCaps, that contained bumetanide, a banned substance under the drug policy.[124] Bumetanide was not listed as an ingredient in StarCaps, so the players alleged they did not know that taking the dietary supplement would cause them to ingest a banned substance.[125] Further, they alleged the NFL knew that StarCaps contained bumetanide.[126] The players alleged, among other claims, that the NFL was negligent in not advising the players that the dietary supplement contained a banned substance and would lead to their suspension.[127] The Eighth Circuit dealt a blow to the NFL by holding that the players' state *statutory* law claims were not preempted.[128] However, the Eighth Circuit also held that all of the players' common law claims were preempted by Section 301.[129] The court found that the players could not establish the "reliance" element without an interpretation of the CBA.[130]

Similarly, in *Atwater v. National Football League Players Association*,[131] retired NFL players suffered a loss of around $20 million after investing their money with two financial advisors that were running a Ponzi scheme.[132] The players claimed they invested their money with two crooked financial advisors because those advisors were listed in the "Financial Advisors Program," which was a program the NFL and NFLPA set up to inform NFL players of how

121. *Atwater*, 626 F.3d at 1174; *Williams*, 582 F.3d at 872. Notably, the Eighth Circuit did hold that the players' state statutory claims were not preempted by the CBA. *See* Jaime Koziol, Note, *Touchdown for the Union: Why the NFL Needs an Instant Replay in Williams v. NFL*, 9 DEPAUL BUS. & COM. L.J. 137, 138–40 (2010). But the players' state *common law* claims were preempted. *Williams*, 582 F.3d at 872.

122. 582 F.3d 863 (8th Cir. 2009).

123. *Id.* at 870.

124. *Id.* at 869.

125. *Id.* at 869, 871.

126. *Id.* at 871.

127. *Id.* at 881.

128. Koziol, *supra* note 121 ("[T]he NFLPA did not prevent the Minnesota players from challenging the NFL's drug-testing regime under Minnesota state laws.").

129. *See Williams*, 582 F.3d at 881, 883.

130. *Id.* at 881.

131. 626 F.3d 1170 (11th Cir. 2010).

132. *Id.* at 1174.

to handle their finances.[133] The players claimed that the NFL and the NFLPA were negligent in conducting background checks of the crooked financial advisors.[134] The players alleged that while the NFLPA's duty related to the Financial Advisors Program was explicitly in the CBA, the NFL's duty to use reasonable care arose independently.[135] The Eleventh Circuit rejected that argument and stated that if so, it would "still have to consult the CBA to determine the scope of the legal relationship between Plaintiffs and the NFL and their expectations based upon that relationship."[136] It held the players' common law claims to be preempted by Section 301.[137]

B. Is Dent *Consistent with* Williams *and* Atwater*?*

From a first glance, it is hard to see how the Ninth Circuit's holding in *Dent* is consistent with the Eighth and Eleventh Circuits' holdings in *Williams* and *Atwater*. All three courts considered state common law negligence claims that contained elements of "duty" and "reliance."[138] Each case required the court to at least "look at" the CBA, but only the *Williams* and *Atwater* courts found the claims and the CBAs to be "inexplicably intertwined."[139] However, the players' claims in both *Williams* and *Atwater* involved issues that arguably arose from the CBAs and were explicitly addressed in the agreement. While there are key differences in the players' claims that allowed the court to distinguish the cases, the Ninth Circuit's holding in *Dent* is a larger blow to the NFL's preemption defense than *Williams* or *Atwater*.

In *Williams*, the plaintiffs had to prove that there was "reasonable reliance" on the NFL to provide players with a warning about StarCaps.[140] The Eighth Circuit held that whether the players could show they "reasonably relied" could not be "ascertained apart from the terms of the Policy" found in the CBA.[141] Specifically, the court held that the NFL's drug policy, which had been incorporated into the CBA, had to be analyzed to determine the merits of the players' claims.[142] The drug policy stated that "if you take these products, you do so AT YOUR OWN RISK" and that "a positive test

133. *Id.* at 1174–75.
134. *See id.* at 1174.
135. *Id.* at 1181–82.
136. *Id.* at 1182.
137. *See id.* at 1185.
138. *See, e.g.*, Dent v. Nat'l Football League, 902 F.3d 1109, 1123 (9th Cir. 2018); *Atwater*, 626 F.3d at 1182; Williams v. Nat'l Football League, 582 F.3d 863, 881 (8th Cir. 2009).
139. *Atwater*, 626 F.3d at 1177 n.8; *Williams*, 582 F.3d at 881.
140. *Williams*, 582 F.3d at 881.
141. *See id.* at 882.
142. *Id.* at 881.

result will not be excused because a player was unaware he was taking a Prohibited Substance."[143]

In *Atwater,* the Eleventh Circuit pointed to the language in the CBA regarding the Career Planning Program, stating that, "the NFL . . . shall [not] be responsible for any investment decisions."[144] Further, the CBA stated that, "[P]layers . . . will bear sole responsibility for any investment or financial decisions that are made."[145] The court held that this provision in the CBA directly contradicted the reasonableness of the plaintiffs' reliance on the NFL.[146] Regardless of the provision's effects on the outcome of the merits case, the claim would require the "interpretation" of that provision.

The Ninth Circuit made this point in differentiating the *Dent* case from *Williams* and *Atwater*. The court stated that in both cases, "specific provisions in the CBAs arguably rendered the players' reliance on the NFL's representations unreasonable, which meant that interpretation of the CBAs would be required."[147] While the Ninth Circuit read and searched the CBAs for any relevant provision, it found no provision that even remotely mentioned the NFL handling player prescriptions or drug distribution.[148]

Dent appears to result in a different holding than the other cases because the court did not find any provision precisely addressing the distribution of controlled substances. Yet, it is not clear that the precise provision was the ultimate reason that the common law claims in *Atwater* and *Williams* were preempted. In the view of the Ninth Circuit, the process of searching for a provision does not make a claim "intertwined" with the agreement such that an interpretation is needed; only once a possible provision is found will there need to be an interpretation.[149] Meanwhile, the Eleventh Circuit's holding was not so clear. It stated that it would need to more generally "consult the CBA to determine the scope of the legal relationship between Plaintiffs and the NFL and their expectations based upon that relationship."[150] While the Eleventh Circuit would consider any explicit provision undercutting the reasonableness of the reliance, the court never held that finding such a provision was a requirement. It seemed to consider the need to consult the agreement to determine the legal relationship sufficient to require an "interpretation." While the Eleventh Circuit may hold the same views as the Ninth Circuit,

143. *Id.* at 868–69.

144. NFL & NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 20, art. 51, at 217; *see also Atwater*, 626 F.3d at 1175.

145. NFL & NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 20, art. 51, at 217.

146. *Atwater*, 626 F.3d at 1183.

147. Dent v. Nat'l Football League, 902 F.3d 1109, 1124 (9th Cir. 2018).

148. *Id.*

149. *See* discussion *infra* Subpart III.B.

150. *Atwater*, 626 F.3d at 1182.

the Eleventh Circuit appears to search harder to find that the claim is "inextricably intertwined" with the CBA.

Similarly, the Eighth Circuit stated in *Williams* that it could not determine if the NFL owed the players a duty "without examining the parties' legal relationship and expectations as established by the CBA and the Policy."[151] The general analysis of the CBA to determine "the parties' legal relationship" would be enough to constitute "inextricably intertwined" in the Eighth Circuit,[152] but the Ninth Circuit would potentially require the finding of a specific provision. It is unknown whether the Eighth Circuit or the Eleventh Circuit would have rendered the same decision regarding the *Dent* plaintiffs' common law claims—they may have held that merely consulting the CBAs to see if reliance was reasonable preempted the players' claim. But for the Ninth Circuit, unless a specific provision is found, the claims are not preempted.

The Ninth Circuit also justified and differentiated its holding by describing the types of duties owed in the cases.[153] Both the *Williams* and *Atwater* cases involved claims based on an "affirmative duty" or a duty that arose from the agreement itself.[154] The plaintiffs would have to show that the NFL owed them a certain duty due to the nature of their relationship.[155] Effectively, the courts held they would have to use the CBAs to establish such a duty.

The Ninth Circuit reasoned that, as pleaded, the *Dent* plaintiffs were alleging only an ordinary duty, not one that arose from any agreement.[156] The duty arose if and when the NFL administered drugs to the players.[157] They had an ordinary duty, outside of the CBAs, to use reasonable care in administering drugs.[158] The nature of the *Dent* plaintiffs' complaint alleging that the NFL *itself* distributed the drugs and provided the negligent medical care—rather than claiming the individual teams were responsible, and the NFL vicariously liable—created the alleged ordinary duty outside of the CBA.[159] The Ninth Circuit held that there was no question that "distributing controlled substances is an activity that gives rise to a duty of care."[160] Because the plaintiffs alleged the NFL *itself* distributed the controlled substances, it "is completely independent of the CBAs."[161] The duty to non-negligently handle prescription drugs

151. Williams v. Nat'l Football League, 582 F.3d 863, 881 (8th Cir. 2009).
152. *See id.*
153. *See Dent*, 902 F.3d at 1119.
154. *See Atwater*, 626 F.3d at 1182; *Williams*, 582 F.3d at 881.
155. *See Atwater*, 626 F.3d at 1182; *Williams*, 582 F.3d at 881.
156. *Dent*, 902 F.3d at 1122.
157. *Id.* at 1119.
158. *See id.*
159. *See* Second Amended Complaint, *supra* note 54.
160. *See Dent*, 902 F.3d at 1120.
161. *Id.*

by the NFL arose outside of the CBAs. This careful pleading may have paved a path for future plaintiffs to avoid preemption.

V. THE POTENTIAL EFFECTS OF *DENT*

The Ninth Circuit's decision in *Dent* was the first notable case in the realm of professional sports litigation that held that players' state common law claims were not preempted by Section 301. While the players' claims in *Dent* did not ultimately prevail on the merits of *their* case,[162] the Ninth Circuit's holding could have other, long-term effects.[163] This ruling may actually force the NFL to defend its actions on the merits by going through discovery or addressing its involvement in the handling and distribution of controlled substances such as addictive opioids.[164] Beyond the substance of the case, this ruling illustrates the Ninth Circuit's approach to Section 301 analysis, creating a path for future NFL players' suits against the NFL and potentially affecting the NFL's strategy in negotiating the next CBA in 2021.

A. Illustrating the Ninth Circuit's Approach to Preemption

First, this holding continues to demonstrate the Ninth Circuit's narrow construction of "inexplicitly intertwined" or "interpreting" in analyzing Section 301 preemption claims. After the Supreme Court's holding in *Livadas v. Bradshaw*,[165] the Ninth Circuit narrowly defined what level of "interpretation" of a CBA was required to trigger preemption.[166] The court noted that "the distinction between 'looking to' a CBA and 'interpreting' it is not always clear or amenable to a bright-line test."[167] The Ninth Circuit enforced the notion that merely looking to the CBA to see if any of its terms are "reasonably in

162. *See* Dent v. Nat'l Football League, No. C 14-02324 WHA, 2019 WL 1745118, at *1 (N.D. Cal. Apr. 18, 2019) (granting the NFL's motion to dismiss on the merits of the case). The plaintiffs have filed an appeal of the district court's decision. *Id.* While the plaintiffs did not prevail for a multitude of reasons, the Ninth Circuit's holding that the claims were not preempted under Section 301 still has lasting effects well beyond the scope of this one case.

163. The Ninth Circuit recognized as much, stating, "they may be susceptible either to a motion for a more definite statement under Rule 12(e) or a motion to dismiss for failure to state a claim under Rule 12(b)(6), and they may not survive summary judgment under Rule 56." *Dent*, 902 F.3d at 1126; *see also* Kyle Olson, *NFL Forced to Play More Defense: Ninth Circuit Holds That Collective Bargaining Agreements Do Not Preempt NFL From Former Players' Claims Brought Under Theory of Direct Liability*, LEXOLOGY (Sept. 13, 2018), https://www.lexology.com/library/detail.aspx?g=ede95b51-b9ed-45b4-84dd-fcf219aea43a (recognizing the remaining skepticism of the merits of the case but also noting the significance that the NFL may even have to mount a defense on the merits).

164. *See* Olson, *supra* note 163.

165. 512 U.S. 107 (1994).

166. Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001).

167. *Id.*

dispute" does not result in preemption.[168] Relying on the Supreme Court's decision and its own precedent in *Cramer*, the Ninth Circuit required a higher level of "interpretation" before finding a claim preempted.[169]

While this approach is consistent with some other circuits' decisions,[170] the Ninth Circuit's decision in *Dent* clearly sets forth the precedent that preemption analysis requires an explicit provision to be analyzed in order to find that the claim is "inexplicitly intertwined" with the agreement.[171] Other circuits may follow in the Ninth Circuit's footsteps and find that similar common law claims are not preempted, but until there are holdings that do so, the Ninth Circuit is the most favorable circuit for athletes attempting to bring common law claims against their respective leagues.

B. Future Suits by NFL Players

Second, this holding could open up a potential avenue for future NFL players, or players in other leagues structured like the NFL, to sue the NFL. A plaintiff can follow this structure and allege that the NFL *itself* took negligent actions, while the CBA only addresses the issue regarding the *individual teams*. Thus, the agreement did not explicitly discuss the NFL and its obligations regarding these claims. While the claims would have to survive motions to dismiss and other procedural hurdles, this holding seems like a step in the right direction for these claims to avoid preemption.

It is too easy to say that all claims can follow this path—complaints must be based on much more than a favorable reading of the CBA—but there is a path forward for some NFL players looking to recover against the NFL. In planning their claims, harmed NFL players could examine the CBA and attempt to find a common law claim based on any provisions where obligations are put solely on the NFL *teams* (but where the NFL *itself* actually acted). Then, in pleading, these players could sue only the NFL for acting negligently regarding the obligation that is set forth in the claim. If a court were to follow the Ninth Circuit's analysis, such a claim would not be preempted because the CBA does not provide any obligation for the NFL itself to act, nor would it undercut a player's reliance on the NFL

168. *Id.* at 692.

169. *See, e.g.*, Dent v. Nat'l Football League, 902 F.3d 1109, 1117 (9th Cir. 2018); Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921–22 (9th Cir. 2018); Humble v. Boeing Co., 305 F.3d 1004, 1010 (9th Cir. 2002).

170. *See, e.g.*, Bogan v. Gen. Motors Corp., 500 F.3d 828, 833 (8th Cir. 2007); Bartholomew v. AGL Res., Inc., 361 F.3d 1333, 1338 (11th Cir. 2004) (holding that "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement" is preempted); Meyer v. Schnucks Mkts., Inc., 163 F.3d 1048, 1051 (8th Cir. 1998) ("For there to be complete preemption, we believe that the claim must require the interpretation of some specific provision of a CBA.").

171. *See Dent*, 902 F.3d at 1118.

to take such action.[172] While the NFL would always argue it is the wrong party being sued, it would at least be forced to defend itself on the merits.

This strategy would not work for every claim, especially for players whose harm is directly related to an express provision of the CBA. For example, the strategy would not have worked for the plaintiffs in *Williams* or *Atwater* as even the Ninth Circuit likely would have held that an interpretation was required because there was an explicit provision covering those issues.[173] However, other claims—that are only tangentially touched in the CBA or those whose duties are placed exclusively on NFL teams—could be a different story.

The Ninth Circuit's ruling could also open up an avenue for players' negligence per se claims. The Ninth Circuit, as well as other circuits, has previously ruled that claims asserting rights and violations arising under state laws are not preempted.[174] The *Dent* ruling extends this holding, stating that those types of violations may be brought as a negligence per se claim. The plaintiffs alleged that the NFL violated federal law and thus was "negligent as a matter of law."[175] The *Dent* plaintiffs were able to prevail because the court found that the duty arose from a statute and thus required no analysis of the CBAs.[176]

For the handling of prescription drugs, it is fairly easy to find a statute around which to formulate a negligence per se claim. However, if players were to pursue other common law claims, they could search for a state or federal statute that the NFL violated. Players would then need assurance that the CBA does not have any provision addressing the NFL's responsibility to handle the obligation. At the very least, the provision should not look like the provisions from *Atwater* and *Williams* that expressly disclaim liability. If the players were able to do that, a court following the Ninth Circuit's analysis could hold that the claim is not preempted because there is no need to analyze the CBA as the duty already existed due to the statute.[177]

172. *See* discussion *supra* Part III.

173. *See* discussion *supra* Part IV.

174. *See, e.g.*, Alaska Airlines, 898 F.3d at 920; Williams v. Nat'l Football League, 582 F.3d 863, 874, 877 (8th Cir. 2009).

175. *See* Second Amended Complaint, *supra* note 54, at 81.

176. *See* discussion *supra* Part III.

177. *See* Dent v. Nat'l Football League, 902 F.3d 1109, 1119 (9th Cir. 2018) ("Therefore, under the plaintiffs' negligence per se theory, whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at issue. There is no need to look to, let alone interpret, the CBAs.").

C. Impact on Future CBA Negotiations

The holding in *Dent* may affect how the NFL will approach its negotiations in the 2020–2021 season for the new CBA. The *Williams*, *Atwater*, and *Dent* cases all examined the CBAs for language that undercut the players' "reasonable reliance" on representations by the NFL. The former two cases found such language, while the latter case did not.[178] This may incentivize the NFL to add this kind of language into the agreement. In *Atwater*, all it took for the court to find a need for "interpreting" the agreement was the phrase, "it being understood that players shall be solely responsible for their personal finances."[179] Thus, even after explicitly creating a program aimed to help NFL players, the NFL effectively blocked any state common law claims alleging negligence in that undertaking. While that process may or may not be the purpose of, and the intent behind, Section 301,[180] the NFL has an incentive for providing liability disclaimers in the CBA addressing many issues.

For example, to avoid a repeat of the *Dent* case, the NFL could attempt to include language in the CBA such as "the NFL bears no responsibility for the day-to-day treatment or medication of players." Even the Ninth Circuit, if faced with such express language, would likely hold that evaluating the players' claims would involve an "interpretation" of that provision of the CBA. When the next round of collective bargaining comes around, the NFL could attempt to implement this strategy. During the negotiation process, the NFL could implement a positive program for the players (such as the Career Planning Program at issue in *Atwater*) while simultaneously preempting any state common law claims that could be brought regarding the program.

This strategy would not necessarily be to the detriment of the NFL players.[181] In drafting a more extensive and expansive CBA, the NFL (as its own entity) could be taking responsibility for more duties and responsibilities and may be providing more explicit procedures for player recovery.[182] As the NFL may wish to negotiate more such disclaimers into the CBA, the NFLPA should be weary of such language—or at least use it as an opportunity to get better express remedies into the CBA. Preemption doesn't automatically absolve the NFL of liability as there may be internal grievances, but it does take away the players' ability to get state common law remedies. If NFL players are willing to allow the NFL to have greater preemption protection, perhaps they could use that as leverage for better express remedies or grievance procedures.

178. *See* discussion *supra* Part IV.

179. *See* Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1175, 1183 (11th Cir. 2010).

180. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218–19 (1985).

181. *See* Friederich, *supra* note 9, at 752.

182. *See id.*

Additionally, the *Dent* holding could force the NFL to assume more responsibilities regarding player health and safety. Currently, there are many provisions in the CBA that impose rights and obligations on the individual NFL teams but do not impose any obligations on the NFL as its own entity—especially those regarding player treatment.[183] With this holding and the continuing concern about player concussions and long-term effects of football, the NFL may wish to take on more responsibilities. While taking on more responsibilities might place more liability on the NFL, addressing those responsibilities in the CBA would likely shield them from state common law liability.

VI. CONCLUSION

Section 301 of the LMRA has served as an effective defense for professional sports leagues and other employers in fending off state common law claims. In one sense, Section 301 properly limits any dispute between the NFL and its players to the collective bargaining process. On the other hand, Section 301 often prohibits current and former professional sports athletes from being able to recover any claims based on state common law, sometimes leading to unconscionable results. For example, the National Hockey League's CBA provided a six-month statute of limitations for claims, while the common law provided a two-year period.[184] Section 301 preemption applied, and the former player's estate's claim was barred completely.[185] The players association could potentially bargain for a better process in the next CBA, but currently, this case demonstrates the harsh effects that preemption can have on players' claims.

Players have found more and more hope in avoiding preemption over the past decade or so after rulings that state statutory claims were not preempted.[186] This may require the NFL and other professional sports leagues to comply with every state's actual laws (or at least those in which the NFL teams reside).[187] This result has been criticized, potentially stripping unions and industries of being able to truly contract for a universal policy because it does not comply with every state's laws.[188] The NFL could face a large burden in assuring its policy is compliant and could begin to face litigation in every state alleging a violation of that state's laws.[189] Similarly in

183. *See, e.g.*, Dent v. Nat'l Football League, 902 F.3d 1109, 1114 (9th Cir. 2018); NFL & NFL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 20, art. 39, at 171–74.

184. *See* Friederich, *supra* note 9, at 750 n.190.

185. *See id.* at 749–50.

186. *See, e.g.*, Williams v. Nat'l Football League, 582 F.3d 863, 876 (8th Cir. 2009) (holding that a court would not need to consult the CBA to resolve the players' state law claim); Koziol, *supra* note 121, at 138, 140.

187. *See* Koziol, *supra* note 121, at 157–60.

188. *See id.* at 157.

189. *See id.* at 160.

Dent, the Ninth Circuit held that the players' statutory claims (*Dent* involved federal statutory claims) were not preempted.[190] But the Ninth Circuit went further in *Dent*. The *Dent* case gives a glimmer of hope to athletes attempting to recover common law claims against the sports leagues.

While ultimate recovery will depend on many factors, *Dent* provides a path for players to avoid preemption. By pleading their claims carefully, alleging negligence against the NFL itself rather than the teams, and basing the action on rights and obligations the NFL has not expressly assumed under the CBA, players may be able to avoid preemption. Whether the players can succeed on the merits is an entirely different question, but at the very least the NFL may be forced to actually defend the allegations made in the complaint rather than relying on a procedural protection.

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190. Dent v. Nat'l Football League, 902 F.3d 1109, 1126 (9th Cir. 2018).

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