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# An Open Field for Professional Athlete Litigation: An Analysis of the Current Application of Section 301 Preemption in Professional Sports Lawsuits

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# AN OPEN FIELD FOR PROFESSIONAL ATHLETE LITIGATION: AN ANALYSIS OF THE CURRENT APPLICATION OF SECTION 301 PREEMPTION IN PROFESSIONAL SPORTS LAWSUITS

*Morgan Francy\**

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## I. INTRODUCTION

ON Monday, January 10, 2017, some twenty-six million viewers tuned in to watch the Clemson Tigers beat the Alabama Crimson Tide with a last-second touchdown to clinch the title of National Champions for the first time since 1981.<sup>1</sup> The world watched as those players' dreams came true on national television, which certainly led to millions of young viewers longing to be the next Deshaun Watson on their way to the NFL Draft, regardless of the numerous “[m]onster [h]it[s]” he took during the game.<sup>2</sup> On February 5, 2017, more dreams became a reality, and more young viewers were inspired, as the New England Patriots were named Super Bowl LI Champions.<sup>3</sup>

While football is certainly the main topic of conversation in the winter months, the National Hockey League is just ramping up. Fans, both young and seasoned, are beginning to make their predictions for the Stanley Cup playoffs and secure their seats to see unbelievable goals and

1. Derek Volner, *More than 26 Million Viewers Watched the College Football Playoff National Championship*, ESPN MEDIA ZONE (Jan. 10, 2017), <http://espnmediazone.com/us/press-releases/2017/01/26-million-viewers-watched-college-football-playoff-national-championship/> [https://perma.cc/M8CM-2PN3]; Travis Waldron, *Clemson Scores with 1 Second Left to Beat Alabama, Win National Championship*, HUFFINGTON POST (Jan. 10, 2017), [http://www.huffingtonpost.com/entry/clemson-alabama-national-championship\\_us\\_587475d0e4b02b5f858adf9e](http://www.huffingtonpost.com/entry/clemson-alabama-national-championship_us_587475d0e4b02b5f858adf9e) [https://perma.cc/3PEZ-98XY].

2. Steve Wright, *Deshaun Watson Takes Monster Hit in the National Title Game*, HERO SPORTS (Jan. 9, 2017), <http://herosports.com/news/deshaun-watson-huge-hit-college-football-highlights-fbs-football> [https://perma.cc/8RUA-2SPP].

3. Benjamin Hoffman, *Here's How the Patriots Won Their Fifth Super Bowl*, N.Y. TIMES (Feb 5, 2017), <https://www.nytimes.com/2017/02/05/sports/super-bowl-score-patriots-falcons.html> (Perma link unavailable).

grueling fights, which are said to be “part of the fabric” of the game.<sup>4</sup> Today, many of those enthusiastic fans anticipating the severe brawls will not even be old enough to vote, as participation in hockey in the United States has risen 44% among six to seventeen-year-olds since 2010.<sup>5</sup>

After seeing these players glorified in the media and paid enormous salaries, millions of parents will be forced to make the inevitable decision of whether to let their children play these dangerous sports. This decision must be made under the pressure of a society that idolizes these players for their physical and mental toughness, while increased studies have made society undeniably aware of the immediate and long-term side effects of these high contact sports.

The influx of information in the last decade on these risky and life-threatening side effects has put a major spotlight on the leagues and teams as to their role in encouraging players to play through the pain and concealing pertinent information on the risks of their job.<sup>6</sup> Plaintiff’s lawyers have likely lined up to represent players, and even relatives of players, in the recent years with the hopes of holding the leagues and teams accountable for their decisions.

However, there has been a major procedural hurdle for almost all plaintiffs bringing a state law tort claim against a professional league or team: Section 301 preemption.<sup>7</sup> Section 301 of the Labor Management Relations Act (Section 301) grants jurisdiction to federal courts over any litigation arising from violations of collective bargaining agreements (CBA(s)) and completely preempts state law claims “founded directly on rights created by collective-bargaining agreements and claims substantially dependent on analysis of such agreements.”<sup>8</sup> While at first glance whether a claim is preempted or not may seem like a relatively simple decision for courts, Section 301 preemption, especially in the realm of professional sports, “has been one of the most confused areas of federal court litigation.”<sup>9</sup>

Understanding how courts interpret and apply Section 301 preemption is crucial, as it is likely the first obstacle that plaintiffs bringing state law claims against the leagues or teams will encounter. If the defendants successfully argue the claims should be preempted, the state court claims will be dismissed and must be pursued through the grievance procedure set

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4. DJ Gallo, *Sorry, NHL Fans: Fighting Is Here to Stay*, THE GUARDIAN (Nov. 6, 2015), <https://www.theguardian.com/sport/2015/nov/06/nfl-fighting-hockey-study> [https://perma.cc/747J-ZGSN].

5. Bill King, *Are the Kids Alright?*, SPORTS BUSINESS DAILY GLOBAL JOURNAL (Aug. 10, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/08/10/In-Depth/Lead.aspx> [https://perma.cc/R3GN-6HLY].

6. See generally Robert M. Sagerian, Note, *A Penalty Flag for Preemption: The NFL Concussion Litigation, Tortious Fraud, and the Steel Curtain Defense of Section 301 of the Labor Management Relations Act*, 35 T. JEFFERSON L. REV. 229 (2013).

7. See *id.* at 266.

8. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 387 (1987).

9. See Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members State Law Claims*, 99 YALE L.J. 209, 209 (1989).

out in the controlling CBA, which is typically mandatory arbitration.<sup>10</sup> This potentially leads to a reduction in damages and availability of certain awards such as punitive damages, and it typically allows the defendant to keep all information in the hearing private as to avoid any public scrutiny.<sup>11</sup>

In the pivotal case, *Turner v. NFL (In re NFL Players' Concussion Injury Litigation)*, a group of retired NFL players brought action against the NFL alleging the league breached its duties by failing to protect its players from risks that occur as a result of concussive head injuries and by concealing those risks.<sup>12</sup> After the judge in *Turner* avoided ruling on the preemption issue of those claims by mandating mediation, confusion on the subject has grown.<sup>13</sup> This comment argues that, as a result of recent publicity and awareness on the lack of protection and vulnerability of professional athletes to immediate and long-term injury, the courts are adding to the confusion of Section 301 preemption by reining in the applicability of the doctrine, which has increasingly expanded over time. Judges are narrowing the use of Section 301 preemption in these cases to ensure that the victims are sufficiently remedied, and the defendants are not able to evade liability by using this doctrine. Furthermore, this shift in the preemption analysis will have great effects on future agreement negotiations, settlement negotiations, insurance premiums for the defendants, and plaintiffs looking to bring new lawsuits in this area.

Part II of this comment provides a background on Section 301 preemption and its application in the lawsuits brought by professional athletes. Part III discusses the applicable cases in professional sports in which courts have recently dealt with a Section 301 preemption defense, as well as the cases that are pending based on preemption. Part IV analyzes the reasoning in the recent cases and whether the doctrine is being correctly applied. Part V gives predictions for the pending cases, discusses the impact of the courts analyses, and argues a need for clarification by the Supreme Court on Section 301 preemption.

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10. John Guccione, *Moving Past A "Pocket Change" Settlement: The Threat of Preemption and How the Loss of Chance Doctrine Can Help NFL Concussion Plaintiffs Prove Causation*, 22 J.L. & POL'Y 907, 925 (2014).

11. *See id.* at 925–26; Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1846 (2014).

12. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 362–64 (E.D. Pa. 2015), amended by No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), and *aff'd sub nom. In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), as amended (May 2, 2016), *cert. denied sub nom. Gilchrist v. Nat'l Football League*, No. 16-283, 2016 WL 4585281 (U.S. Dec. 12, 2016), and *cert. denied sub nom. Armstrong v. Nat'l Football League*, No. 16-413, 2016 WL 7182246 (U.S. Dec. 12, 2016).

13. *See id.* at 363.

## II. BACKGROUND OF SECTION 301 PREEMPTION AND ITS APPLICATION IN PROFESSIONAL SPORTS

### A. SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT

The Labor Management Relations Act (LMRA), also known as the Taft-Hartley Act, was enacted in 1947.<sup>14</sup> The Act was a way to demobilize the labor movement by imposing limits on the ability to strike.<sup>15</sup> The purpose of the Act 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.”<sup>16</sup> Section 301 of the LMRA reads, “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .”<sup>17</sup> The policy behind Section 301 preemption is to encourage “uniformity of interpretation of collective bargaining agreements and prevention of interference with those agreements.”<sup>18</sup>

Section 301 may completely preempt state law claims, but also, “the LMRA may supersede a plaintiff’s claims under *ordinary* preemption principles, in which case those claims must be construed as § 301 claims, or dismissed and pursued through the grievance procedure set out in the controlling CBA.”<sup>19</sup> The Supreme Court stated that Section 301 authorizes federal courts to enforce CBAs, including “specific performance of promises to arbitrate grievances under collective bargaining agreements.”<sup>20</sup>

Moreover, in 1985, the Supreme Court, in *Allis-Chalmers Corp. v. Lueck*, went further to extend Section 301 preemption to state-law tort actions, which expanded the doctrine dramatically.<sup>21</sup> Writing the majority opinion, Justice Blackmun expressed concern that “[a]ny other result 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.”<sup>22</sup>

### B. THE TEST FOR SECTION 301 PREEMPTION

Unfortunately, the Supreme Court has been less than clear in defining the Section 301 preemption doctrine. Although the Supreme Court has

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14. See Telis, *supra* note 11, at 1847 (citing LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 33–34 (2d ed. 2005)).

15. *Id.*

16. 29 U.S.C. § 141(b) (2012).

17. 29 U.S.C. § 185(a) (2012).

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

19. *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d 856, 865 (D. Minn. 2016) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219–20 (1985)).

20. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

21. 471 U.S. 202, 219–20 (1985).

22. *Id.* at 211.

never expressed its prior opinions as creating a two-prong test to determine preemption, many lower courts articulate it as such: “a state-law claim is preempted by Section 301 if either (1) resolution of that claim would substantially depend upon analysis of the terms of the CBA, or (2) the alleged duty arises from the CBA.”<sup>23</sup>

The first prong is essentially the test the Court developed in *Allis-Chalmers* and *Lingle*.<sup>24</sup> In *Allis-Chalmers*, the Supreme Court stated that whether a claim is preempted is determined by whether resolution of the state-law claim is “inextricably intertwined with consideration of the terms of the labor contract.”<sup>25</sup> Then, in *Lingle*, the Court held the state-law claim was preempted because “[n]either of those elements [of the state law claim] requires a court to interpret any term of a collective-bargaining agreement.”<sup>26</sup> Thus, the Court implied that a claim is only preempted under Section 301 if the resolution of the claim requires interpretation of the CBA.

The second prong can be said to be a subset of the first prong as the Supreme Court conveyed in *International Brotherhood of Electrical Workers*: if the duties alleged in the complaint are duties that only exist because of the CBA, then the CBA must be interpreted to examine the nature and scope of those duties.<sup>27</sup> The Court held that the plaintiff’s state-law tort claim was preempted because the alleged duty of care arose from the CBA rather than state tort law.<sup>28</sup> Three years later in *Rawson*, the Court used the same test to find that the state-law tort action was preempted because the alleged duties arose from the collective bargaining contract rather than from common law tort principles.<sup>29</sup>

The majority of issues with Section 301 preemption have arisen when dealing with the first prong of the test. These issues include what exactly “interpretation” of the CBA means, what “inextricably intertwined” means, and what “substantially dependent upon” means. In *Allis-Chalmers*, the Court advised that mere reference to a provision in a CBA would not qualify as “interpretation” for preemption purposes.<sup>30</sup> Thus, the Court cautioned in 1957 that the preemption doctrine was to be defined narrowly and not used to dismiss otherwise valid claims.

In *Livadas*, the Supreme Court stated that merely “look[ing] to” a CBA when determining if a claim is preempted is not the equivalent to

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23. Telis, *supra* note 11, at 1850.

24. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 399 (1988); *Allis-Chalmers Corp.*, 471 U.S. at 220.

25. *Allis-Chalmers Corp.*, 471 U.S. at 213.

26. *Lingle*, 486 U.S. at 400.

27. *Int’l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 851 (1987).

28. *Id.* at 851–52.

29. *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 373–84 (1990).

30. *Allis-Chalmers Corp.*, 471 U.S. at 220 (noting that its holding did not require that “every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement . . . necessarily is pre-empted by § 301.”)

interpretation.<sup>31</sup> Moreover, the Eighth and Ninth Circuit Courts of Appeals have both emphasized the term “interpret” in the preemption context must be defined narrowly—something more than consider, refer to, or apply.<sup>32</sup> Otherwise, as the *Balcorta* panel noted, all actions brought by a unionized employee would be preempted because the court will always be required to look at the underlying elements of the state claims, as well as the CBA, to determine if the state action is dependent upon an analysis of the CBA.<sup>33</sup>

As a leading sports law expert stated, “[I]f the state law creates a right separate and apart from the rights created by the [CBA], the state law claim will not be preempted, even if the analysis of the state law claim would overlap with the analysis of a claim brought under the terms of the [CBA].”<sup>34</sup> Thus, the most relevant consideration for the court is how closely tied the state law at issue is to the CBA.<sup>35</sup> However, another important exception to the preemption doctrine was articulated in *Allis-Chalmers* when the Court explained that state laws that “proscribe conduct, or establish rights and obligations, independent of a labor contract” are not preempted.<sup>36</sup> Thus, Section 301 does not allow parties to a collective bargaining agreement to rewrite state law.

As the various outcomes of the preemption cases demonstrate, Section 301 preemption has created confusion, and the standard for determining preemption is vulnerable to differing applications. Some commentators have opined that Section 301 preemption has been expanded far beyond what the language of the section demands and has been abused by defendants.<sup>37</sup> However, the Court has long defended that approach arguing the need for uniform federal law in labor disputes and to ensure specific performance of arbitration clauses.<sup>38</sup>

### C. APPLICATION OF SECTION 301 PREEMPTION TO THE NFL AND NHL

Both the players in the National Hockey League (NHL) and the National Football League (NFL) are represented by player’s associations

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31. *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994).

32. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000); *Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998).

33. *Balcorta*, 208 F.3d at 1108.

34. Dana A. Gittleman, *Home Field Advantage: Determining the Appropriate Turf for Williams v. National Football League and Clarifying Preemption Precedent*, 19 VILL. SPORTS & ENT. L.J. 203, 219 (2012) (citing *The NFL StarCaps Case: Are Sports’ Anti-Doping Programs at a Legal Crossroads? Before the Subcomm. on Commerce, Trade & Consumer Prot. of the HR Comm. on Energy & Commerce*, 111th Cong. 1 (2009) (testimony of Gabriel A. Feldman, Associate Professor of Law and Director of Tulane Sports Law Program, Tulane University School of Law), available at <http://democrats.energycommerce.house.gov/Press111/20091103/feldmantestimony.pdf> [herein referred to as “Feldman”]).

35. *Id.*

36. 471 U.S. 202, 212 (1985).

37. *Preemption Is the Focus*, NFL CONCUSSION LITIGATION (Dec. 7, 2014), <http://nfl-concussionlitigation.com/?p=1722> [<https://perma.cc/2UT9-RHC6>].

38. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).



which negotiate CBAs on their behalf.<sup>39</sup> The National Hockey League Players' Association (NHLPA) represented the NHL players in the CBA ratified in January of 2013, which describes the conditions of employment for all players as well as the rights of the NHL, NHLPA, and the NHL Clubs.<sup>40</sup> This current CBA is effective until September 15, 2022.<sup>41</sup>

The current NFL CBA went into effect August 4, 2011, and extends through 2020.<sup>42</sup> Unlike in the NHL CBA, the NFL is not a party to this agreement.<sup>43</sup> The NFL CBA is an agreement entered into by the National Football League Management Council (NFLMC) and the National Football League Players Association (NFLPA) which represents all present and future employee players in the NFL.<sup>44</sup> The NFLMC is a multi-employer bargaining association that represents all present and future employer member Clubs of the NFL.<sup>45</sup>

Notably, if the plaintiff is a retired player, the defendant must determine whether the retired player was subject to a CBA, which means they must demonstrate when the cause of action accrued.<sup>46</sup> Furthermore, the defendant must make this determination in order to know which CBA may be applicable, as different versions of the CBA may have disparate language.<sup>47</sup> For example, the NFLPA and the NFLMC have negotiated seven different agreements since 1968.<sup>48</sup> The NHL and the NHLPA have negotiated four different agreements since 1994.<sup>49</sup>

Thus, when a current or former NHL or NFL player brings a state-law claim against the league or the clubs, the application of Section 301 preemption to the claim will be of great significance. The players' associations are an important tool for professional athletes as they create established entities and a formidable bargaining force for the players who otherwise may be seemingly powerless in negotiations. Collective bargaining has increased benefits, stability, and uniformity for professional athletes, and has allowed them to have a voice while working for some of

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39. See *Collective Bargaining Agreement*, NFL PLAYERS' ASSOCIATION (2011), available at <https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/QMK8-EDML>]; *Collective Bargaining Agreement*, NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION (2012), <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement> [<https://perma.cc/6WPW-ZLDT>] (last visited Jan. 29, 2017).

40. *Collective Bargaining Agreement*, NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION (2012), *supra* note 39.

41. *Id.*

42. *Collective Bargaining Agreement*, NFL PLAYERS' ASSOCIATION, *supra* note 39.

43. *See id.*

44. *See id.*

45. Oral Argument at 21:31, *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014), <https://www.youtube.com/watch?v=0gvVpIviwKw> [<https://perma.cc/UB7D-AY66>].

46. *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 189 F. Supp. 3d 856, 860 (D. Minn. 2016).

47. *Id.*

48. *NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), [http://www.espn.com/nfl/news/story?page=nfl\\_labor\\_history](http://www.espn.com/nfl/news/story?page=nfl_labor_history) [<https://perma.cc/LL2R-FKDB>].

49. Braden Shaw, *The Solution to NHL Collective Bargaining Disputes: Mandatory Binding Arbitration*, 10 DEPAUL J. OF SPORTS L. & CONTEMP. PROBS. 53, 58-61 (2014).

the most powerful employers in the world. However, these agreements have raised an incredible impediment for players who seek to hold the leagues and teams accountable for actions or non-actions that they believe fall outside of these agreements.

### III. RECENT CASE LAW REGARDING PROFESSIONAL ATHLETE INJURY

#### A. SIGNIFICANT CASE LAW PRIOR TO *TURNER v. NFL*

##### 1. Stringer v. NFL

In 2006, the widow of Korey Stringer, a former Minnesota Viking, sued the NFL for negligence after Korey died of heat exhaustion and a heat-stroke that he suffered during the preseason.<sup>50</sup> The claim alleged the NFL breached its duty “to use ordinary care in overseeing, controlling, and regulating practices, policies, procedures, equipment, working conditions and culture of the NFL teams . . . to minimize the risk of heat-related illness.”<sup>51</sup> The NFL moved to dismiss, arguing the claims were preempted under Section 301, and the Southern District of Ohio agreed, finding that resolution of the claim would require interpretation of the CBA.<sup>52</sup>

The court held the NFL owed a duty to all NFL players when it voluntarily published Hot Weather Guidelines as part of its 2001 Games Operations Manual, and because the CBA “places primary responsibility” for treating player health on the club physicians, the CBA provisions doing so “must . . . be taken into account in determining the degree of care owed by the NFL.”<sup>53</sup> The court held that “[t]he question of whether the NFL was negligent in publishing the Hot Weather Guidelines . . . is inextricably intertwined with certain key provisions of the CBA.”<sup>54</sup> Thus, the duties alleged did not arise out of the CBA, but the court held that the CBA necessarily had to be interpreted to determine the scope of any duties and therefore, the claim was preempted.<sup>55</sup>

##### 2. Duerson v. NFL

David Duerson played in the NFL for ten years, and in 2011, just three months after his death, Duerson’s brain was diagnosed with chronic traumatic encephalopathy.<sup>56</sup> Duerson’s estate then sued the NFL for wrongful death alleging that Duerson’s suicide was a result of the brain damage he incurred while playing in the NFL.<sup>57</sup> The NFL moved to remove the case to federal court, arguing that evaluating the reasonableness of the

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50. Stringer v. NFL, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007).

51. *Id.* at 899.

52. *Id.* at 911.

53. *Id.* at 910–11.

54. *Id.* at 910.

55. *Id.* at 903–11.

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

57. *Id.*

NFL's conduct would require interpretation of provisions from the CBAs during Duerson's time, which imposed duties on the NFL clubs to protect player health and safety.<sup>58</sup>

Thus, even though the CBA only imposed duties on the NFL clubs, not the league itself, the court held they would have to interpret the CBA to determine whether the club's duty was triggered.<sup>59</sup> After the club's duty to protect Duerson was established, it would then "be one factor tending to show that the NFL's alleged failure to take action to protect Duerson from concussive brain trauma was reasonable."<sup>60</sup>

### 3. Maxwell v. Nat'l Football League, Inc.

In July 2011, seventy-five former players filed suit against the NFL alleging the league concealed data about the dangers of concussions.<sup>61</sup> Judge Real stated, "[t]he plaintiffs' complaints allege a failure to ensure accurate diagnosis and recording of concussive brain injuries so that the condition can be treated in an adequate . . . manner."<sup>62</sup> The court noted that under the CBA, the NFL club doctors assumed primary responsibility for physical care and thus, "[t]he provisions of the [CBA] must be taken into account in determining the degree of care owed by the NFL."<sup>63</sup> The plaintiff's attorney noted his disappointment "that the NFL made a little headway in using the collective bargaining agreement to try to escape liability to former NFL players."<sup>64</sup>

### 4. Green v. Arizona Cardinals Football Club, LLC

In May 2014, plaintiff's lawyers received good news when Judge Perry remanded to state court a suit brought by three former NFL players against the Arizona Cardinals Football Club, holding that "the merits of the plaintiffs' claims can be evaluated without interpreting any of the [CBAs'] terms."<sup>65</sup> The plaintiff's claims were based on common law duties to maintain a safe working environment, not to expose employees to unreasonable risks of harm, and to warn employees about the existence of dangers of which they could not reasonably be expected to be aware.<sup>66</sup> Judge Perry held that the applicable CBAs did not have any bearing on these claims.<sup>67</sup>

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58. *Id.* at \*4.

59. *Id.* at \*6.

60. *Id.* at \*4.

61. Ashley Hayes & Michael Martinez, *Former NFL Players: League Concealed Concussion Risks*, CNN (July 20, 2011), <http://www.cnn.com/2011/HEALTH/07/20/nfl.lawsuit.concussions/> [<https://perma.cc/87LA-ESQR>].

62. Zach Winnick, *NFL Head Injury Suits Remain in Calif. Federal Court*, LAW360 (Dec. 5, 2011), <https://www.law360.com/articles/290719/nfl-head-injury-suits-remain-in-calif-federal-court> [<https://perma.cc/C2TT-XFPK>].

63. *Id.*

64. *Id.*

65. *Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1023 (E.D. Mo. 2014).

66. *Id.* at 1024.

67. *Id.* at 1030.

Judge Perry also held the CBA did not have any bearing on the players' negligent misrepresentation and fraudulent concealment claims, as they arose from common law duties of an employer "to inform himself of those matters of scientific knowledge' that relate to the hazards of his business and to relay that knowledge to his employees."<sup>68</sup> Thus, this case was an enormous win for the plaintiffs and future plaintiffs, as Judge Perry neglected to continue expanding the reach of Section 301 preemption.

#### 5. Dent v. NFL

Also in May 2014, more than 500 former players filed suit against the NFL claiming that team physicians withheld injury information and routinely, and illegally, gave the players dangerous painkillers so they would remain on the field despite their injuries.<sup>69</sup> These serious allegations likely weighed heavy on the public because they claimed the teams used opioids, anti-inflammatories, and anesthetics without required prescriptions and with little or no regard for a player's medical history or potentially fatal interactions with other medications.<sup>70</sup> However, these claims were dismissed shortly after, in December 2014, due to Section 301 preemption.<sup>71</sup>

Judge Alsup stated that it would be impossible to apply the state common law duties on the league without considering the parties' CBA.<sup>72</sup> The plaintiff's counsel argued the CBA applied only to current and future players, not former ones, and accused the NFL of trying to shield itself by arguing it was the duty of the individual clubs, not the league, to inform about these risks and ensure players were medicated properly.<sup>73</sup> The plaintiffs argued that their claims were based on illegal conduct of the defendant and that "[Section] 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law."<sup>74</sup> Judge Alsup dismissed that argument by distinguishing a claim brought based on a violation of a federal statute with a claim based on negligence in which a federal statute may be implicated.<sup>75</sup>

While *Green* was an exciting victory in 2014 for plaintiffs and professional athletes, Judge Alsup's decision to dismiss the claims in the *Dent* case disparaged that victory. Judge Alsup noted in his opinion that the claims certainly do address an "underlying societal issue . . . [p]roper care of [player] injuries is likewise a paramount need."<sup>76</sup> He continued by stating, "[t]he main point of this order is that the league has addressed these

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68. *Id.* (citing *Marsanick v. Luechtefeld*, 157 S.W.2d 537 (Mo. Ct. App. 1942)).

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

70. *Id.*

71. *Id.*

72. *Id.* at \*7.

73. *Id.* at \*7, \*10.

74. *See id.* at \*10.

75. *Dent*, 2014 WL 7205048, at \*10.

76. *Id.* at \*12.

serious concerns in a serious way — by imposing duties on the clubs via collective bargaining and placing a long line of health-and-safety duties on the team owners themselves.”<sup>77</sup>

B. *TURNER V. NFL (IN RE NFL PLAYERS’ CONCUSSION INJURY LITIGATION)*

In 2012, the NFL was hit with what was referred to as the “mega-lawsuit”<sup>78</sup> as former NFL players consolidated over eighty pending lawsuits comprised of over one thousand former NFL players into one complaint that accused the NFL of multiple state law tort claims, including medical monitoring, negligent hiring and retention, negligent misrepresentation, fraud and fraudulent concealment, and wrongful death.<sup>79</sup>

As predicted by many, the NFL’s first play was a motion to dismiss all state-law claims under Section 301 of the LMRA.<sup>80</sup> They argued that Section 301 preempts the claims because their resolution substantially depends upon analysis of the terms of the CBA.<sup>81</sup> If successful, the former player’s claims would have had to be brought pursuant to the mechanism set forth in the CBA, which was arbitration.<sup>82</sup> The plaintiffs’ attorneys argued back that their claims were all independent of the CBA and thus, were properly justiciable in federal court.<sup>83</sup>

Judge Anita Brody heard oral arguments on the league’s motion to dismiss, but before ruling on the motion, she ordered the parties to mediate.<sup>84</sup> Just under two months later, in August 2013, the league entered into a tentative settlement agreement with the players for \$765 million to provide medical benefits and injury compensation for retired NFL players, fund medical and safety research, and cover litigation expenses.<sup>85</sup> However, Judge Brody denied approval of this settlement out of concern “that not all retired NFL football players who ultimately receive a qualifying diagnosis or their [families] . . . will be paid.”<sup>86</sup>

Finally, in April 2015, Judge Brody approved a settlement between the parties spanning over the next sixty-five years and figuring to cost the

77. *Id.*

78. *The NFL Is Facing a Mega-Lawsuit on Concussions*, CSNPHILLY (June 7, 2012), [www.csnphilly.com/nfl-facing-mega-lawsuit-concussions?amp](http://www.csnphilly.com/nfl-facing-mega-lawsuit-concussions?amp) [https://perma.cc/H596-UU6F].

79. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. 2015), *amended by* No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *and aff’d sub nom. In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), *as amended* (May 2, 2016), *cert. denied sub nom. Gilchrist v. Nat’l Football League* (U.S. Dec. 12, 2016), *and cert. denied sub nom. Armstrong v. Nat’l Football League* (U.S. Dec. 12, 2016).

80. *Id.* at 362–63.

81. *Id.*

82. Telis, *supra* note 11, at 1844–45.

83. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 361.

84. *Id.* at 363.

85. *Id.* at 364.

86. *\$765M NFL Concussion Settlement May Not Be Enough, Judge Says*, CBS NEWS (Jan. 14, 2014), <http://www.cbsnews.com/news/765m-nfl-concussion-settlement-may-not-be-enough-judge-says/> [https://perma.cc/J6NU-ZWUD].

NFL an estimated \$900 million or more.<sup>87</sup> Brody described the settlement as “fair, reasonable, and adequate.”<sup>88</sup> While there may be disagreement on the adequacy of that settlement, one thing is certain—Judge Brody avoided an incredibly tough legal question of whether these claims should have been dismissed based on Section 301 preemption, which may have left the plaintiffs with a lower amount of damages.<sup>89</sup>

### C. CASE LAW FOLLOWING *TURNER V. NFL*

#### I. *Evans v. Arizona Cardinals Football Club LLC*

In May 2015, just one month after *Turner* was settled, the same plaintiffs in *Dent* sued again.<sup>90</sup> This time, they sued the thirty-two NFL teams individually, claiming their doctors, trainers, and medical staffs obtained and provided dangerous painkillers, often illegally, as a part of a conspiracy to keep players on the field without regard to their long-term health.<sup>91</sup>

Reprising many of the same allegations in *Dent*, the complaint asserts the teams and their staffs withheld information from players about the seriousness of their injuries, while at the same time, handing out prescription painkillers to mask their pain and maximize playing time.<sup>92</sup> The players assert that “prescriptions were filled out in their names without their knowledge.”<sup>93</sup>

The defendant’s motion to transfer to Judge Alsup was granted in order to conserve judicial resources, as Judge Alsup was already familiar with the facts of the claims.<sup>94</sup> As expected after Judge Alsup’s ruling in *Dent*, the defendant moved to dismiss based on Section 301 preemption.<sup>95</sup> However, Judge Alsup delivered an unexpected opinion as he denied the motion to dismiss in July 2016, allowing the case to proceed to the discov-

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87. Gary Mihoces & Rachel Axon, *Judge Approves Settlement – at Least \$900M – to NFL Concussion Lawsuits*, USA TODAY (Apr. 22, 2015), <http://www.usatoday.com/story/sports/nfl/2015/04/22/concussion-related-lawsuits-judge-settlement-nfl/26199011/> [https://perma.cc/C4NX-M5H6].

88. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 361.

89. See Sarah James, *Ring the Bell for the Last Time: How the NFL’s Settlement Agreement Overwhelmingly Disfavors NFL Players Living with Chronic Traumatic Encephalopathy (CTE)*, 11 J. HEALTH & BIOMEDICAL L. 391, 395 (2016).

90. *Evans v. Arizona Cardinals Football Club, LLC*, No. CV WMN-15-1457, 2016 WL 759208, at \*1 (D. Md. Feb. 25, 2016).

91. *Id.*

92. *NFL Players’ Medications Use Suit Against Clubs Is Transferred to California*, LEXIS LEGAL NEWS (Mar. 1, 2016), <http://www.lexislegalnews.com/articles/6422/nfl-players-medications-use-suit-against-clubs-is-transferred-to-california> (Perma link unavailable).

93. *Hundreds of Former Players Sue the NFL Accusing Team Officials of Conspiring to Push Painkillers on Them in a Bid to Keep Them on the Field*, DAILY MAIL (May 21, 2015), <http://www.dailymail.co.uk/news/article-3091646/Former-players-NFL-teams-conspired-push-painkillers.html> (Perma link unavailable).

94. *Evans*, 2016 WL 759208, at \*3.

95. *Id.* at \*1.

ery phase.<sup>96</sup>

In denying the motion to dismiss, Judge Alsup attempted to distinguish this case from *Dent* in two ways.<sup>97</sup> First, he stated that the claims in *Dent* were directed at the NFL and here, the plaintiffs are alleging misconduct on the part of the clubs.<sup>98</sup> Second, he stated the *Evans* claims are grounded in intentional illegal conduct on the part of the clubs and therefore, they fall under the illegality exception, whereas, the thrust of the complaint in *Dent* was under negligence.<sup>99</sup>

The clubs argued, unsuccessfully, that the players were attempting to evade preemption by simply referencing the Food, Drug and Cosmetic Act and the Controlled Substances Act, but they were still merely asserting state law claims just as in *Dent*.<sup>100</sup> In allowing the case to move forward, Judge Alsup stated, “this Court is unwilling to categorically immunize defendant clubs’ illegal and indiscriminate distribution of painkillers as alleged in the complaint.”<sup>101</sup>

## 2. Bush v. St. Louis

In January 2016, Reggie Bush sued the St. Louis Convention and Visitors Commission and the St. Louis Rams over a season-ending knee injury he suffered when he slipped on uncovered concrete.<sup>102</sup> Bush alleged claims of premises liability and negligence against the Rams in allowing the exposed concrete at the stadium to be uncovered.<sup>103</sup> The team removed the case to federal court, arguing that “both parties were bound by a collective bargaining agreement (CBA) governing the terms and conditions of employment of NFL players,” and thus, the claims were preempted by Section 301.<sup>104</sup> The Rams argued that an analysis of the CBA and its documents was necessary to determine the scope of the team’s duty to the players.<sup>105</sup>

The Missouri federal court sent the lawsuit back to state court, citing *Allis-Chalmers*: “[S]ection 301 does not preempt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job.”<sup>106</sup> The court held “the Rams’ duty to warn [the players] exists independently of the Committee’s responsibility to develop a standardized preseason and postseason physical examina-

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

97. *Id.* at \*3.

98. *Id.*

99. *Id.*

100. *Id.* at \*4.

101. *Id.*

102. *Bush v. St. Louis Reg’l Convention*, No. 4:16CV250 JCH, 2016 WL 3125869, at \*1 (E.D. Mo. June 3, 2016).

103. *Id.*

104. Joseph M. Hanna, *Reggie Bush’s Stadium Slip Suit Will Go Back to State Court*, SPORTS LAW INSIDER (June 8, 2016), <http://sportslawinsider.com/reggie-bushs-stadium-slip-suit-will-go-back-to-state-court/> [<https://perma.cc/ZUB7-SWFN>].

105. *Bush*, 2016 WL 3125869, at \*1.

106. Hanna, *supra* note 104.

tion, and to develop an educational protocol to inform players of the primary risks associated with playing professional football.”<sup>107</sup>

The court noted that the strongest argument the Rams made was that there is a provision in the CBA which requires the establishment of a Joint Committee for the purpose of discussing the players safety and welfare aspects of playing equipment, playing surfaces, and stadium facilities.<sup>108</sup> Following the narrow application used by Judge Perry in *Green*, the court held, “[m]ere reference to part of a CBA is insufficient,” and the Rams did not demonstrate how the court would have to interpret the CBA to resolve their claim.<sup>109</sup> Thus, the court allowed Bush to maintain his state-law claims and move forward with the case.<sup>110</sup>

### 3. Boogaard v. NHL

Derek Boogaard played in the NHL for six seasons before he was found dead of an accidental overdose of prescription painkillers and alcohol in May 2011.<sup>111</sup> In 2012, the Boogaard family filed a lawsuit against the NHLPA, but the case was dismissed based on the statute of limitations.<sup>112</sup> In 2013, the Boogaard family then filed a wrongful-death lawsuit against the NHL claiming the NHL is responsible for the physical trauma and brain damages Boogaard sustained in his time in the league and for his addiction to prescription painkillers.<sup>113</sup>

The Boogaard family alleged the NHL “allowed and encouraged Derek Boogaard, after suffering [a] concussion, to return to play and fight in the same game and/or practice.”<sup>114</sup> The suit alleged Boogaard was given at least thirteen injections of a masking agent for pain in the last two years of his career, by doctors of at least seven NHL teams.<sup>115</sup> The NHL moved to dismiss the claims by arguing Section 301 preemption, and the motion was granted in December 2015.<sup>116</sup>

In September 2016, the Boogaard family moved to file a second amended complaint, and the NHL opposed the filing on the grounds that the new claims would all be preempted just as the claims in the first complaint.<sup>117</sup> However, Judge Feinerman found that the first four claims of the second amended complaint were not preempted because the “NHL [did] not attempt to explain how claims alleging active misdeeds would

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107. *Bush*, 2016 WL 3125869, at \*4.

108. *Id.*

109. *Id.* at \*5.

110. *Id.*

111. *Boogaard v. Nat’l Hockey League*, 126 F. Supp. 3d 1010, 1015 (N.D. Ill. 2015).

112. *Boogaard’s Lawsuit Tossed Out of Court*, NFL CONCUSSION LITIGATION (April 24, 2013), <http://nflconcussionlitigation.com/?p=1436> [<https://perma.cc/84XG-63EB>].

113. John Branch, *In Suit Over Death, Boogaard’s Family Blames the N.H.L.*, N.Y. TIMES (May 12, 2013), <http://www.nytimes.com/2013/05/13/sports/hockey/derek-boogaards-family-sues-nhl-for-wrongful-death.html> (Perma link unavailable).

114. *Id.*

115. *Id.*

116. *Boogaard*, 126 F. Supp. 3d at 1027.

117. *Boogaard v. Nat’l Hockey League*, No. 13 C 4846, 2016 WL 5476242, at \*2 (N.D. Ill. Sept. 29, 2016).



require interpretation of the CBA,” but rather, the league merely argued the counts were “‘repackaged’ versions of the other preempted claims.”<sup>118</sup>

The first four claims of the second amended complaint allege the NHL increased the risk of Boogaard’s brain damage, addiction, and depression by promoting violence in spite of the obvious dangers, and that the NHL negligently and fraudulently concealed evidence from Boogaard about the dangers of head injuries, even though it had studies on how the injuries would affect the players.<sup>119</sup> The judge held they would need to interpret the CBA to determine whether the NHL had a duty to eliminate violence, but they would not need to interpret the CBA to determine if the NHL acted unreasonably in a way that injured others.<sup>120</sup>

#### D. PENDING CASES

##### 1. Dent v. NFL

After Judge Alsup granted the NFL’s motion to dismiss in *Dent* in December 2014, the plaintiffs filed an appeal.<sup>121</sup> Recently, on December 8, 2016, the Ninth Circuit Court of Appeals heard oral arguments on the appeal.<sup>122</sup> The plaintiffs argued that the district court erred in finding that the CBA preempts the claims, and the NFL reiterated its position that the court will have to interpret the agreement in order to resolve the case.<sup>123</sup>

Judge Kozinski questioned the NFL extensively on why the labor contracts exempt the NFL, especially since the league is not a signatory on six of the seven collective bargaining agreements.<sup>124</sup> 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 medicine.<sup>125</sup> The NFL responded that the league acts as a “super employer” and is “integrally involved” in the collective bargaining process, so even though it is not a signatory, it is not a random third party.<sup>126</sup>

Judge Bybee questioned the holding by the district court after Judge Alsup’s opinion in *Evans*.<sup>127</sup> He was perplexed on how preemption would not apply to the clubs in *Evans*, but would apply to the league.<sup>128</sup> Counsel for the NFL had no option but to reply that Judge Alsup got it wrong in

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118. *Id.* at \*3.

119. *Id.* at \*1–3.

120. *Id.* at \*3.

121. Cara Bayles, *NFL Players Take Claim League Pushed Pills to 9th Circ.*, LAW360 (Dec. 15, 2016), <https://www.law360.com/articles/873334/nfl-players-take-claim-league-pushed-pills-to-9th-circ> [<https://perma.cc/KZ4X-T4WW>].

122. *Id.*

123. Oral Argument at 12:08, *Dent v. Nat’l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*1 (N.D. Cal. Dec. 17, 2014), <https://www.youtube.com/watch?v=0gvVpIviwKw> [<https://perma.cc/UB7D-AY66>].

124. *Id.* at 21:20.

125. *Id.* at 18:26.

126. *Id.* at 19:15.

127. *Id.* at 27:34.

128. *Id.*

*Evans*.<sup>129</sup> Plaintiff's counsel argued the illegality argument Judge Alsup accepted in *Evans*, urging the court to not allow the NFL to hide behind the CBA.<sup>130</sup> Plaintiff's counsel ended by stating, "We're asking simply for discovery . . . the plaintiffs and 1,300 players who signed up to part of the putative class have a right to know who did this to them."<sup>131</sup> The Ninth Circuit's decision will be of great significance in Section 301 preemption going forward.

## 2. *Reconsideration of Boogaard v. NHL*

On November 4, 2016, the NHL asked Judge Feinerman of the Northern District of Illinois to reconsider its decision to allow the second amended complaint, insisting the claims fell under the CBA.<sup>132</sup> The NHL argued any communications with players about concussions was governed by contract.<sup>133</sup> The NHL explained the plaintiffs' complaint as alleging that the NHL breached their duty to Boogaard by failing to protect him from the risk that it allegedly created by allowing fighting to continue.<sup>134</sup> The NHL argued that Boogaard must show that the league violated a duty of care by failing to change the playing rules to eliminate the risk to which he was exposed, and the question of the league's authority to change the rules are at the front and center of the second amended complaint.<sup>135</sup> Thus, the claims are preempted, as they must interpret the CBA, even if the duty is created independently.<sup>136</sup>

## 3. *Ryans v. Houston*

After Reggie Bush successfully defended a preemption defense, another personal injury lawsuit was filed by an NFL player over an injury suffered because of the condition of the playing field.<sup>137</sup> NFL Philadelphia Eagles player, DeMeco Ryans, filed suit in October 2016 in Texas state court against the Houston Texans after he suffered a career-ending Achilles tendon injury in a November 2014 game against the Texans.<sup>138</sup> Ryans claims his injury was caused by the "seams" in the removable, natural-grass playing surface at the Texans' stadium.<sup>139</sup>

As expected, the Texans removed the case to federal court arguing the

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129. *Id.* at 28:18.

130. *Id.* at 5:17.

131. *Id.* 34:13.

132. Rick Archer, *NHL Wants Reconsideration on Wrongful Death Suit*, LAW360 (Nov. 7, 2016), <https://www.law360.com/articles/860091/nhl-wants-reconsideration-on-wrongful-death-suit> [<https://perma.cc/RTB2-HY9T>].

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Alex Wolf, *Ex-Linebacker Sues NFL, Former Team over Achilles Injury*, LAW360 (Oct. 17, 2016), <https://www.law360.com/articles/852255/ex-linebacker-sues-nfl-former-team-over-achilles-injury> [<https://perma.cc/S8VH-TKJK>].

138. *Id.*

139. *Id.*

claims are preempted by the CBA.<sup>140</sup> In January 2017, Ryans urged the Texas federal court to send his claims back to state court arguing his complaint specifically disclaimed any remedy under the CBA, and his claims are state tort claims that do not require interpretation of the CBA, citing to *Bush*.<sup>141</sup>

#### 4. In re National Hockey League Players' Concussion Injury Litigation

In November 2013, over a dozen former NHL players first filed suit against the NHL alleging the NHL failed to warn its players of the short and long-term effects of repeated concussions and head trauma, failed to adequately care for its players after the injuries, and promoted and glorified unreasonable and unnecessary violence leading to head trauma.<sup>142</sup>

The NHL moved to dismiss, arguing Section 301 preemption.<sup>143</sup> The motion referenced four decades of collective bargaining between the NHL and the NHLPA.<sup>144</sup> The league argued that “because an evaluation of the existence and extent of those duties would require interpretation of the terms of the CBAs,” all claims are preempted.<sup>145</sup> In May 2016, Judge Nelson of the District of Minnesota denied the motion allowing the case to go to discovery.<sup>146</sup> Nelson stated that if discovery reveals that the plaintiffs’ claims “accrued while they were subject to a CBA, and that those claims are substantially dependent on interpretation of the CBA, then the court could properly determine that the claims are preempted by labor law preemption.”<sup>147</sup> The NHL filed a motion to stay discovery, which was determined moot by the denial of the motion to dismiss.<sup>148</sup> Thus, the plaintiffs were granted access to reams of the NHL’s private documents.<sup>149</sup>

### IV. ANALYSIS OF SECTION 301 PREEMPTION APPLICATION

After Judge Brody avoided the essential question of Section 301 preemption in *Turner* by mandating mediation, Section 301 preemption has been the highlight of almost all claims brought by professional athletes.

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140. Zachary Zager, *Ex-NFLer Says Texans Turf Injury Suit Belongs in State Court*, LAW360 (Jan. 3, 2017), <https://www.law360.com/articles/876895/ex-nfler-says-texans-turf-injury-suit-belongs-in-state-court> [<https://perma.cc/8BRN-G9AV>].

141. *Id.*

142. *Case Information*, NHL CONCUSSION LITIGATION, <http://www.nhlconcussionlitigation.com/information.html> [<https://perma.cc/3A3W-MVSH>] (last visited Jan. 29, 2017).

143. *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 189 F. Supp. 3d 856, 863 (D. Minn. 2016).

144. *Id.* at 859.

145. *Id.* at 868.

146. *Id.* at 881–82.

147. Brian Amaral, *NHL Concussion Suit Needs More Discovery, Judge Rules*, LAW360 (Mar. 18, 2016), <https://www.law360.com/articles/797701/nhl-concussion-suit-needs-more-discovery-judge-rules> [<https://perma.cc/N4GM-2JF4>].

148. *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 189 F. Supp. 3d at 882.

149. *See id.*

Just as before *Turner*, preemption is the first hurdle most players will face.<sup>150</sup> However, Judge Brody's decision in the mega-lawsuit, along with a shift in public opinion, has arguably changed the way courts have applied Section 301 preemption.<sup>151</sup> Courts now apply the doctrine narrowly—the way some argue it was always meant to be applied—to allow the victims to be remedied adequately and to hold the appropriate defendants liable.

#### A. REINING IN THE PREEMPTION DOCTRINE

##### 1. *Turner v. NFL Set the Stage*

While there may be some argument as to whether the settlement in *Turner* was an adequate remedy for the former players, there is no disagreement that the estimated \$900 million settlement was better than forcing each player to file individual grievances to be settled via arbitration, which would have been the result had Judge Brody granted the league's motion to dismiss based on preemption.<sup>152</sup> Judge Brody's decision to mandate mediation before ruling on preemption sparked countless discussions among the community.<sup>153</sup> Scholars noted that, regardless of the settlement, the resolution of the preemption question was still relevant for future lawsuits not only in the NFL but also in other professional sports, such as the NHL.<sup>154</sup>

While some scholars opined that the claims in *Turner* would not have been preempted by Section 301, the stronger arguments have concluded that the former players' claims would have been preempted by Section 301 based on the precedent leading up to the case.<sup>155</sup> Relying on *Stringer*, *Deurson*, and *Maxwell*, scholars have noted the broad protection Section 301 preemption gave teams and leagues in similar lawsuits.<sup>156</sup> These scholars argue that the broad application of whether “interpretation” of the CBA is required to resolve the claim would have caused the court to preempt all of the claims under Section 301, even though the duties the plaintiffs rely on in their complaint are concededly independent of the CBA.<sup>157</sup>

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150. See Sagerian, *supra* note 6.

151. See *supra* text accompanying note 84.

152. See James, *supra* note 89.

153. See Ken Belson, *Judge Orders N.F.L. Concussion Case to Mediation*, N.Y. TIMES (July 8, 2013), <http://www.nytimes.com/2013/07/09/sports/football/judge-orders-nfl-concussion-case-to-mediation.html> (Perma link unavailable); Gary Mihoces, *Judge Orders Mediation on NFL Concussion Suits*, USA TODAY (July 11, 2013), <http://www.usatoday.com/story/sports/nfl/2013/07/11/nfl-players-concussions-lawsuits/2510275/> [https://perma.cc/78E4-TV6L].

154. Telis, *supra* note 11, at 1845–46.

155. Compare Telis, *supra* note 11, at 1867–68 (arguing the claims in *Turner* should have been preempted) with Guccione, *supra* note 10, at 939 (holding Section 301 preemption should not apply in *Turner*).

156. See Telis, *supra* note 11, at 1856–60; Heard, *supra* note 18, at 233.

157. See Telis, *supra* note 11, at 1867–68.

Thus, Judge Brody's decision was arguably a victory for the players, as many noted that the NFL was much more likely to settle once Brody mandated mediation, not to mention the cost and threat of public discovery.<sup>158</sup> Perhaps Judge Brody, like much of the public, wanted to see these players adequately remedied, and did not want the league to escape liability merely because the Section 301 preemption doctrine had expanded greatly since its establishment.

Following the notion that Judge Brody could have easily granted the league's motion to dismiss by simply citing precedent, it seems that Judge Brody did not want to continue to allow professional leagues and teams to easily hide behind Section 301 preemption and evade accountability in a world that is demanding the defendants take responsibility for their actions.

## 2. *Adding to the Confusion of Section 301 Preemption—the Narrow Application After Turner v. NFL*

As set out above, professional athletes have brought several new lawsuits since the *Turner* settlement in 2015.<sup>159</sup> Judge Brody's decision undoubtedly influenced many of these new lawsuits, as the defense of Section 301 preemption was no longer a sure-fire win for defendants. In fact, after *Turner*, there has arguably been a shift in the way courts are handling cases brought by professional athletes. It seems judges are no longer applying Section 301 broadly and allowing defendants to quickly be shielded by the doctrine. There is no better example of this than the *Evans* decision.<sup>160</sup>

Once the motion to transfer *Evans* to Judge Alsup was granted, hope was slim for the plaintiffs because Judge Alsup had recently dismissed *Dent* on preemption grounds.<sup>161</sup> Even the plaintiff's attorneys seemed surprised when Judge Alsup denied the league's motion to dismiss, stating, "[i]t's a historic decision to have a class-action case such as this overcome the NFL's tried and true preemption argument."<sup>162</sup> He continued, "[t]hey [the league] rely on the fact that there's a collective bargaining agreement under labor law to avoid having to face the music in class-action suits by former players and to answer to allegations of wrongdoing."<sup>163</sup>

While this decision was a victory for the plaintiffs and will hopefully answer many unknown questions on the NFL teams' involvement in

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158. See Guccione, *supra* note 10, at 923.

159. See Mihoces & Axon, *supra* note 87.

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

161. See *Evans v. Arizona Cardinals Football Club, LLC*, No. CV WMN-15-1457, 2016 WL 759208, at \*4 (D. Md. Feb. 25, 2016).

162. Rick Maese, *Judge Allows Former NFL Players' Suit over Drug Use to Proceed*, WASH. POST (July 1, 2016), [https://www.washingtonpost.com/sports/redskins/judge-allows-former-nfl-players-suit-over-drug-use-to-proceed/2016/07/01/64bb4d3a-3fcc-11e6-a66f-aa6c1883b6b1\\_story.html?utm\\_term=.90b904dcf891](https://www.washingtonpost.com/sports/redskins/judge-allows-former-nfl-players-suit-over-drug-use-to-proceed/2016/07/01/64bb4d3a-3fcc-11e6-a66f-aa6c1883b6b1_story.html?utm_term=.90b904dcf891) [https://perma.cc/9K36-AQFU].

163. *Id.*

these serious charges, the decision undeniably confused the application of Section 301 preemption once more. Judge Alsup, presumably knowing the inconsistency and confusion he was creating, attempted to distinguish *Evans* from his prior decision in *Dent*.<sup>164</sup>

The first difference he stated is that the claims in *Dent* were directed at the NFL, whereas the *Evans* claims were directed at the individual clubs.<sup>165</sup> However, after stating this difference was one of the reasons the case did not require the same result as *Dent*, he failed to explain what bearing that has on Section 301 preemption.<sup>166</sup> Since one of the objectives of preemption is to prevent interference with CBAs, it seems inconsistent that almost identical claims against the NFL, who is not even a signatory to the CBA, are preempted while claims against the NFL clubs, who are a direct party to the CBA, are not preempted.<sup>167</sup> Judge Alsup failed to explain how the change in defendant alters the analysis, which left a massive hole in his opinion, especially when it seems the opposite of his opinion is more consistent with the objectives of the law.<sup>168</sup>

The second difference he cited is that in *Evans*, the claims were directed at intentional conduct of the clubs, whereas the *Dent* claims were focused on negligent conduct.<sup>169</sup> This distinction is simply untrue. While there were claims of negligence alleged in *Dent*, Judge Alsup also dismissed intentional tort claims based on Section 301 preemption.<sup>170</sup>

The last point Judge Alsup made is that because the claim in *Evans* alleged violations of the Controlled Substances Act and the Food, Drug, and Cosmetic Act, the terms of the CBA do not have to be interpreted since the CBA “could not have validly sanctioned the indiscriminate distribution of medications in violation of these statutes,” and thus, the illegality exception applied.<sup>171</sup> However, as the NFL clubs argued, the statutes do not allow for a private cause of action and thus, alleging a violation of the statutes is merely a way for plaintiffs to avoid Section 301 preemption.<sup>172</sup> Judge Alsup’s only attempt to explain this confusion was to say that even though plaintiffs’ claims are anchored in common law, “those types of claims can look to statutes to define standards of conduct.”<sup>173</sup>

Yet, Judge Alsup could have arguably come to the same conclusion just a couple of years earlier in *Dent*. In the *Dent* opinion, he wrote:

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164. *See supra* text accompanying notes 97–101.

165. *See supra* text accompanying note 98.

166. *See Evans v. Arizona Cardinals Football Club LLC*, No. C 16-01030 WHA, 2016 WL 3566945, at \*3–5 (N.D. Cal. July 1, 2016).

167. *See Heard, supra* note 18, at 227.

168. *See Evans*, 2016 WL 3566945, at \*3–5.

169. *Id.* at \*3.

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

171. *Evans*, 2016 WL 3566945, at \*4.

172. *Id.*

173. *Id.*

To be sure, the operative complaint here alleges violations of federal and state statutes-but only as an antecedent and predicate for follow-on *state common law claims*. No right of action is allowed or asserted under the statutes themselves. Those statutes creep into our picture only as a step in an ordinary negligence theory.<sup>174</sup>

Accordingly, both the claims in *Evans* and *Dent* rely on state common law claims and not on a right of action under a statute itself.<sup>175</sup> Nonetheless, Judge Alsup established a distinction between the claims and allowed *Evans* to proceed with the illegality exception.<sup>176</sup>

As demonstrated, there seems to be no appropriate legal distinction between *Evans* and *Dent*. Thus, Judge Alsup's statement in *Evans* that the "Court is unwilling to categorically immunize defendant clubs' illegal and indiscriminate distribution of painkillers as alleged in the complaint" may help shed some light on the motivation of the decision.<sup>177</sup> Perhaps, after dismissing *Dent*, the court was as appalled as the public by the thought of the NFL team doctors and trainers "giving [painkillers] out like candy" to the players with no regard to the long-term health risks in order "to get players 'back on the field' as quickly as possible."<sup>178</sup> As Judge Bybee of the Ninth Circuit stated, "It makes me wonder if Judge Alsup didn't have the courage of his conviction in the *Dent* case."<sup>179</sup>

Similarly, many legal experts saw the decision in *Bush* as a surprise and success for Bush as he overcame the threshold CBA issue.<sup>180</sup> While the court relied on Judge Perry's language in *Green*, the Rams arguably had a solid claim that the CBA, to which the Rams and Bush are both parties, addresses the parties' responsibilities to monitor and protect player safety and provide players with medical care, compensation, and other benefits if they are injured during a game.<sup>181</sup> Moreover, the CBA established a committee tasked with making recommendations regarding player safety and welfare aspects of playing surfaces and stadium facilities.<sup>182</sup>

When evaluating the claim, it seems that, based on *Stringer*, *Duerson*, and *Maxwell*, the court could have certainly kept the case in federal court based on Section 301 preemption.<sup>183</sup> Just as in *Stringer* and *Maxwell*, the

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174. *Dent*, 2014 WL 7205048, at \*10.

175. *Id.*; *Evans*, 2016 WL 3566945, at \*4.

176. *Evans*, 2016 WL 3566945, at \*4.

177. *Id.*

178. Des Bieler, *Calvin Johnson Says Painkillers Were Handed Out 'Like Candy' to NFL Players*, WASH. POST (July 6, 2016), [https://www.washingtonpost.com/news/early-lead/wp/2016/07/06/calvin-johnson-says-painkillers-were-handed-out-like-candy-to-nfl-players/?utm\\_term=.0e8d48cd2a26](https://www.washingtonpost.com/news/early-lead/wp/2016/07/06/calvin-johnson-says-painkillers-were-handed-out-like-candy-to-nfl-players/?utm_term=.0e8d48cd2a26) [<https://perma.cc/V5DP-MXCG>].

179. Oral Argument at 27:34, *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*1 (N.D. Cal. Dec. 17, 2014), <https://www.youtube.com/watch?v=0gvVpIviwKw> [<https://perma.cc/UB7D-AY66>].

180. Zachary Zagger, *Pro-Athlete Personal Injury Liability Claims Taking Hold*, LAW360 (Oct. 31, 2016), <https://www.law360.com/articles/857101/pro-athlete-personal-injury-liability-claims-taking-hold> [<https://perma.cc/DSX9-2CBG>].

181. *Bush v. St. Louis Reg'l Convention*, No. 4:16CV250 JCH, 2016 WL 3125869, at \*2 (E.D. Mo. June 3, 2016).

182. *Id.* at \*3.

183. See *supra* text accompanying notes 50–64.

court could have held that because the CBA places primary responsibility on the teams and the committee, the CBA provisions doing so “must . . . be taken into account in determining the degree of care owed by the [Rams].”<sup>184</sup> Moreover, since the CBA actually addressed the team’s role in monitoring and protecting players during games, this is arguably a much stronger case for preemption than in *Duerson*, where the court had to use a multi-step argument to apply Section 301 preemption.<sup>185</sup>

Furthermore, in the recent victory for the Boogaard family,<sup>186</sup> it seems Judge Feinerman leniently gave the plaintiff a second chance for a remedy. Judge Feinerman distinguished the new claims, which are not preempted, by noting “they allege that the NHL *actively* harmed Boogaard.”<sup>187</sup> Judge Feinerman dismissed the defendant’s argument that the new counts were “‘repackaged’ versions of the other, preempted claims” very quickly, considering he also cited the Seventh Circuit, which stated, “[p]reemption under § 301 ‘covers not only obvious disputes over labor contracts, but also any claim masquerading as a state-law claim that nevertheless is deemed “really” to be a claim under a labor contract.’”<sup>188</sup>

In his memorandum originally dismissing Boogaard’s claims, Judge Feinerman emphasized that the court must evaluate the *substance* of the plaintiff’s claims when determining if they are preempted.<sup>189</sup> However, in allowing these new counts to go forward, Judge Feinerman, perhaps, was too quick to reject the defendant’s argument, as the new claims merely went from alleging that the NHL failed to eliminate violence to alleging that the NHL actively promoted violence.<sup>190</sup> The *substance* of the claims seem unaffected. Judge Feinerman likely could have relied on *Stringer* or *Duerson* to preempt the claims, as those cases also dealt with an active role by the defendant but nonetheless required interpretation of the CBA to determine the relationships between the parties.<sup>191</sup> While action versus failure to act has been an important legal distinction in many areas of the law, this decision arguably gives plaintiffs a way around Section 301 preemption by merely alleging that the league or team actively harmed the player instead of alleging that they failed to protect the player. Moreover, from a policy standpoint, if the purpose of the LMRA was “to provide orderly and peaceful procedures for preventing the interference by either

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184. See *supra* text accompanying notes 50–55, 61–64; *Stringer v. NFL*, 474 F. Supp. 2d 894, 911 (S.D. Ohio 2007).

185. *Duerson v. Nat’l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at \*4–6 (N.D. Ill. May 11, 2012) (holding the court would have to determine if the clubs’ duty was imposed by the CBA and then establish if the NFL’s duty was violated based on whether the club’s duty was triggered).

186. *Boogaard v. Nat’l Hockey League*, No. 13 C 4846, 2016 WL 5476242, at \*3 (N.D. Ill. Sept. 29, 2016).

187. *Id.*

188. *Id.* at \*2–3 (quoting *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 797 (7th Cir. 2013)).

189. *Boogaard v. Nat’l Hockey League*, 126 F. Supp. 3d 1010, 1017 (N.D. Ill. 2015).

190. See *Boogaard*, 2016 WL 5476242, at \*3.

191. See *Duerson v. Nat’l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at \*1, \*6 (N.D. Ill. May 11, 2012); *Stringer v. NFL*, 474 F. Supp. 2d 894, 914 (S.D. Ohio 2007).



[employee or employer] with the legitimate rights of the other,” the distinction does not seem to be of great significance.<sup>192</sup> Notably, while Judge Feinerman did not state it as a reason for allowing the amended complaint, the six-month limit on bringing claims to arbitration under the CBA passed for the Boogaard family, and thus, litigation is the only remedy for the family.<sup>193</sup>

Finally, the former NHL players had great success when Judge Nelson denied the NHL’s motion to dismiss in May 2016.<sup>194</sup> One of the lawyers representing the players stated, “Judge Nelson’s order denying the NHL’s motion to dismiss on preemption grounds is a[ ] historic decision in American sports [and] labor law.”<sup>195</sup> Judge Nelson’s decision was imperative for the plaintiffs, as the outcome was quite uncertain after Judge Brody did not rule on preemption in *Turner*.<sup>196</sup> The decision means the NHL will be forced to turn over hundreds of private documents, which may be an incentive for the NHL to come to the settlement table.<sup>197</sup> While Judge Nelson stated that she would reevaluate the preemption issue after discovery, it undoubtedly puts pressure on the league as to whether they want to risk going to trial or settling.<sup>198</sup>

Just as many legal scholars opine that Judge Brody could have easily dismissed the case for preemption, the same argument can be made here. At the beginning of the analysis, Judge Nelson emphasized that they should “adopt[ ] a ‘narrow[ ] approach’” to interpreting precedent on the preemption doctrine.<sup>199</sup> While Judge Nelson makes a compelling argument that discovery is needed to determine which players and which CBAs are perhaps relevant, the critical portion of the opinion is the attempt to distinguish the precedent that broadly applied Section 301 preemption.<sup>200</sup>

For example, Judge Nelson distinguished *Stringer* and *Dent* by noting that, in those cases, the plaintiffs alleged that the NFL failed to use reasonable care in providing information to the teams’ personnel, but in this case, the plaintiffs alleged that the NHL breached a duty that runs

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192. 29 U.S.C. § 141 (2012).

193. Diana Novak Jones, *Judge Could Keep NHL Wrongful Death Suit Alive*, LAW360 (April 14, 2016), <https://www.law360.com/articles/784738/judge-could-keep-nhl-wrongful-death-suit-alive> [<https://perma.cc/TMX4-8FZL>].

194. *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d 856, 882 (D. Minn. 2016).

195. Adam Kilgore, *Judge Denies NHL’s Motion to Dismiss Retired Players’ Concussion Suit*, WASH. POST (May 18, 2016), [https://www.washingtonpost.com/news/sports/wp/2016/05/18/retried-nhl-players-win-legal-victory-over-nhl-in-class-action-concussion-suit/?utm\\_term=.1ff10660214c](https://www.washingtonpost.com/news/sports/wp/2016/05/18/retried-nhl-players-win-legal-victory-over-nhl-in-class-action-concussion-suit/?utm_term=.1ff10660214c) [<https://perma.cc/H422-AZFD>].

196. *See supra* text accompanying note 84.

197. Ken Belson, *Judge Rejects N.H.L.’s Bid to Dismiss Concussion Suit*, N.Y. TIMES (Mar. 25, 2015), [https://www.nytimes.com/2015/03/26/sports/hockey/judge-rejects-nhls-bid-to-dismiss-concussion-suit.html?\\_r=0](https://www.nytimes.com/2015/03/26/sports/hockey/judge-rejects-nhls-bid-to-dismiss-concussion-suit.html?_r=0) (Perma link unavailable).

198. *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d at 860.

199. *Id.* at 867 (quoting *Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998)).

200. *Id.* at 871–72.

straight from the league to the players.<sup>201</sup> However, this analysis is simply incorrect because the plaintiffs in *Dent* also made allegations that run straight from the NFL to the players, and yet, those claims were preempted by Section 301.<sup>202</sup> Moreover, in *Dent* and *Stringer*, the NFL was not a signatory to the CBA, but here, the NHL is a direct party to the CBA, and thus the analogy is further flawed.<sup>203</sup> The court's effort to distinguish these precedents therefore fails.

Most importantly, it appears that *Duerson* is directly on point to this case and would necessarily require preemption.<sup>204</sup> Just as in *Duerson*, even though the CBA provisions concerning health and safety are duties of the clubs and not the NHL itself, Judge Nelson could have held that they would have to interpret the CBA to determine whether the club's duty was triggered, and then, that would be "one factor tending to show that the [NHL's] alleged failure to take action to protect [the players] from concussive brain trauma was reasonable."<sup>205</sup>

However, notably, the Court "respectfully disagree[d]" with the reasoning in *Duerson*.<sup>206</sup> Judge Nelson stated that the *Duerson* court's conclusion that the "duty the NFL owed to the players would be tempered by the CBA's imposition of duties on the teams" "without any citation to the CBA or case law" is incorrect.<sup>207</sup> Judge Nelson felt it was premature to find the plaintiffs' claims preempted since the alleged breached duties were those that ran directly from the NFL, who was not a party to the CBA, to the players.<sup>208</sup> It appears that under Judge Nelson's much narrower approach, the claims against the NHL, who was a party to the CBA, should naturally be preempted before those in *Duerson*. Judge Nelson seems to agree with *Duerson*'s attorney in the case who noted, "[a] successful bid by the NFL to keep the case in federal court would 'greatly expand preemption and federal question jurisdiction to a degree never contemplated by the legislature or our courts.'"<sup>209</sup>

Thus, this opinion demonstrates the court's issue with applying Section 301 preemption broadly to the cases today. Ultimately, Judge Nelson erred on the side of caution in this case by applying Section 301 preemption much more narrowly than the NHL and precedent suggested.

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201. *Id.* at 876–78 n.9.

202. Oral Argument at 27:35, *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*1 (N.D. Cal. Dec. 17, 2014), <https://www.youtube.com/watch?v=0gvVpIviwKw> [<https://perma.cc/HF9Z-S3U8>].

203. *Id.* at 21:10.

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

205. *Id.* at \*4.

206. *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 189 F. Supp. 3d at 879–80.

207. *Id.*

208. *Id.*

209. Greg Ryan, *NFL Player's Son Pushes for Remand of Key Concussion Suit*, LAW360 (May 7, 2012), <https://www.law360.com/articles/337874/nfl-player-s-son-pushes-for-remand-of-key-concussion-suit> [<https://perma.cc/XY2K-F7TG>].

## B. THE IMPACT OF PUBLIC OPINION

In many of the recent cases on the issue, the courts have not allowed the defendants to escape liability using Section 301 preemption. However, as demonstrated above, the courts' analysis of the doctrine throughout these cases does not quite square with precedent nor does it aid in clarifying the application of the doctrine. Arguably, these decisions are narrowing the preemption doctrine as a response to increased public opinion that our legal system should force the leagues and teams to be accountable for their decisions.

When news that these high-contact sports potentially cause serious short-term and long-term injuries came to light in the early to mid-2000's, the public initially put responsibilities on the athletes.<sup>210</sup> The media portrayed the athletes' motivation for competition and attention as the source for aggression and unnecessary hits.<sup>211</sup> The idea was that "sacrificing one's body for the sake of sporting glory is a key tenet" in the game, and it leads to "more exposure and idol status."<sup>212</sup>

However, as more information has been released on the leagues' and teams' roles in failing to prevent these injuries or even encouraging them, the media switched the public's focus to the leagues, the multi-billion dollar industries, taking advantage of these athletes.<sup>213</sup> The response has been sympathy for the players and placing blame on the leagues.<sup>214</sup> The media even began blaming the trainers for not having the courage or authority to tell a player he cannot go back in the game after a concussion.<sup>215</sup> The media also began scrutinizing the NFL for not attributing enough resources to research on concussions and the players' equipment.<sup>216</sup> This led the NFL to donate over \$30 million to research on traumatic brain injuries, as they wanted to demonstrate that they were taking some responsibility on the issue.<sup>217</sup>

There is no denying the impact the media has on public opinion, particularly in professional sports.<sup>218</sup> As a Harvard Law School study stated, "[t]he general public consequently forms opinions about football concussions in a way that is colored by the information that ESPN chooses to broadcast and the attitude which TV presenters adopt towards these injuries."<sup>219</sup> In 2016, a study showed that 94% of American adults believe that concussion and head injuries from participation in sports are a public

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210. Shockey, John, *Media Framing of the NFL Concussion Crisis Is Changing the Culture of the NFL*, 3-4 (Mar. 7, 2014), available at [http://www.jlshock.com/documents/writing/MediaFramingofNFLConcussionCrisis\\_Shockey.pdf](http://www.jlshock.com/documents/writing/MediaFramingofNFLConcussionCrisis_Shockey.pdf) [<https://perma.cc/K8BL-L3M4>].

211. *Id.* at 4.

212. *Id.*

213. *Id.* at 5.

214. *Id.*

215. *Id.*

216. Shockey, *supra* note 210, at 13.

217. *Id.* at 12.

218. *Id.* at 6.

219. *Id.* at 7.

health issue, and 65% say such injuries are a major problem.<sup>220</sup> Over half of those who identified as NFL fans said the league did not do enough to address the issue, and 42% of professional hockey fans agreed with respect to the NHL.<sup>221</sup> In October 2016, members of Congress asked the NHL for more answers from the commissioner about what the league is doing about concussions in hockey.<sup>222</sup> The same congressional committee has also targeted the NFL for not taking appropriate action.<sup>223</sup>

In 2014, even former President Obama weighed in on concussions and called for more research into youth concussions, signaling an effort by Obama to use the power of the presidency to elevate a national conversation about concussions, noting that we need to change a culture that says, “suck it up.”<sup>224</sup> One former NHL player met with members of the Obama administration to tell his story and draw attention to the effects concussions have on the brains of hockey players.<sup>225</sup> He commented, “[t]his can’t be tucked under the rug anymore, . . . [w]e were all young children aspiring to be NHL hockey players. And we finally get to that point, and it’s led us into so many situations of depression, anxiety, addictions. And the root cause is concussions.”<sup>226</sup>

While the debate continues on whether public opinion should impact the legal analysis of our judicial system, public opinion inevitably does so regardless.<sup>227</sup> Recently, in *In Re National Hockey Concussion Injury Litigation*, the league urged the court to deny the plaintiff’s request to force the league to unseal specific documents, arguing the players would use the documents “to ‘influence the court of public opinion.’”<sup>228</sup> The shift in public attitude towards holding the leagues and teams responsible for keeping professional athletes safe has caused the courts to reign in the Section 301 preemption doctrine, ignoring and misapplying precedent. While the impact for plaintiffs and public opinion may be positive, the confusion on Section 301 preemption continues to grow. The recent case

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220. Christine Gillette, *National Survey Finds Concern About Brain Injuries in Athletics from Youth to Pro*, UMASS LOWELL (July 20, 2016), <https://www.uml.edu/News/press-releases/2016/ConcussionPoll072016.aspx> [<https://perma.cc/5GT7-HVGR>].

221. *Id.*

222. John Branch, *Members of Congress Ask N.H.L. for More Concussion Information*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/11/sports/hockey/congress-concussions-nhl-bettman.html> (Perma link unavailable).

223. *Id.*

224. Darlene Superville, *Obama Promotes Awareness and Research for Sports Concussions, Urges Kids to Pay Heed to Health*, U.S. NEWS (May 29, 2014), <http://www.usnews.com/news/politics/articles/2014/05/29/youth-sports-concussions-draws-obamas-attention> [<https://perma.cc/7C9T-XRJU>].

225. Travis Waldron, *Former NHL Players Want You to Pay Attention to Hockey Concussions, Too*, HUFFINGTON POST (Sept. 19, 2016), [http://www.huffingtonpost.com/entry/nhl-hockey-concussions\\_us\\_57dc554ee4b08cb14095f395](http://www.huffingtonpost.com/entry/nhl-hockey-concussions_us_57dc554ee4b08cb14095f395) [<https://perma.cc/4J4A-BFQ4>].

226. *Id.*

227. See Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (but We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 264 (2010).

228. Matthew Perlman, *Players Vow Not to Use NHL Concussion Docs for Media Fight*, LAW360 (Oct. 26, 2015), <https://www.law360.com/articles/719054/players-vow-not-to-use-nhl-concussion-docs-for-media-fight> [<https://perma.cc/TS5G-FJD7>] (internal quotations omitted).

law is perhaps frustrating the purpose of Section 301 preemption—to have “uniformity of interpretation of collective bargaining agreements and prevention of interference with those agreements”<sup>229</sup>—as it demonstrates the various applications of Section 301 preemption with a myriad of factors in play.

Thus, while the narrower application of Section 301 is a positive change in terms of public policy, as it forces these defendants to take responsibility for their actions and does not allow them to hide behind the shield of Section 301, it has further confused precedent in this area. Moreover, it has other serious potential impacts in this area of the law.

## V. PREDICTIONS, IMPLICATIONS, AND A NEED FOR CLARIFICATION

### A. PREDICTIONS OF PENDING CASES

After the Ninth Circuit heard oral arguments in *Dent*, the court will likely reverse Judge Alsup in part or in whole.<sup>230</sup> The panel seemed perplexed by how Judge Alsup’s decisions in *Dent* and *Evans* can possibly co-exist.<sup>231</sup> Judge ByBee was “scratching his head” after reading *Evans* and stated he could not figure out why preemption would not apply to the clubs, but would to the league.<sup>232</sup> Moreover, Judge Kozinski was highly concerned with the precedent that *Dent* sets in terms of allowing a “random defendant,” who is not a party to the CBA, to be shielded by the CBA.<sup>233</sup>

Since *Evans*, *Boogaard*, and *In Re National Hockey Concussion Injury Litigation* have all been decided since *Dent*, the Ninth Circuit will have plenty of ammunition to reverse *Dent*.<sup>234</sup> Just as in *In Re National Hockey Concussion Injury Litigation*, the plaintiffs in *Dent* are merely asking for discovery at this point.<sup>235</sup> It is unlikely that the court will allow the inconsistencies referenced above between *Dent* and *Evans* to stand as good law. The court is free to preempt some claims or all of them, so it will also be greatly significant if the court reverses both the negligence and intentional tort claims or just some of them.

The plaintiffs should also have success in *Boogaard* because it is unlikely that Judge Feinerman will reconsider his decision to allow the second amended complaint.<sup>236</sup> Judge Feinerman went to great lengths to

229. Heard, *supra* note 18.

230. See Oral Argument, *Dent v. Nat’l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*1 (N.D. Cal. Dec. 17, 2014), <https://www.youtube.com/watch?v=0gvVpIv iwKw> [<https://perma.cc/GZ3S-BWQ3>].

231. *Id.* at 27:30.

232. *Id.* at 26:50.

233. *Id.* at 17:50.

234. See *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d 856 (D. Minn. 2016); *Boogaard v. Nat’l Hockey League*, No. 13 C 4846, 2016 WL 5476242, at \*1 (N.D. Ill. Sept. 29, 2016); *Evans v. Arizona Cardinals Football Club, LLC*, No. CV WMN-15-1457, 2016 WL 759208, at \*1 (D. Md. Feb. 25, 2016).

235. Oral Argument, *supra* note 230, at 34:15.

236. Archer, *supra* note 132.

explain how the first four claims are not preempted.<sup>237</sup> He emphasized that the NHL did not show how the duty to not unreasonably harm others “would require interpretation of the CBA.”<sup>238</sup> Until the Supreme Court states that a plaintiff cannot escape Section 301 by merely changing their claim from a failure to act to an active misdeeds claim, Judge Feinerman will likely stand by his decision.

The decision in the DeMeco Ryans case is of great significance as well. While Ryans’ complaint noted, “the CBA is not the source of any claim asserted” and *Bush* is a clear precedent for remand, *Bush* may be distinguished since it occurred after the play had ended.<sup>239</sup> Unlike in *Bush*, Ryans’ injury occurred in the middle of the field of play, which may impact the court’s analysis.<sup>240</sup> However, assuming the court does follow the narrow interpretation in *Bush* and *Green*, noting that “[m]ere reference to part of a CBA is insufficient,” Ryans will be able to evade preemption, and the case will be remanded to state court.<sup>241</sup>

Finally, the NHL will undoubtedly raise the Section 301 preemption defense again in *In Re National Hockey Concussion Litigation*. The recent victory in *Boogaard*, unless reversed, will likely be used as strong precedent by the plaintiffs to defend a Section 301 preemption claim, as they also allege that the NHL actively harmed the players. Moreover, because Judge Nelson misapplied *Stringer* and *Dent* and subsequently disregarded *Duerson*, even if post-discovery it is clear to the court which players are subject to certain CBAs, it is unlikely Judge Nelson will dismiss all the claims because of preemption.<sup>242</sup> Judge Nelson has already stated the court will apply the doctrine narrowly, and she will now be able to use the *Evans* decisions as significant precedent.<sup>243</sup>

Due to this new precedent in favor of the plaintiff and Judge Nelson’s narrow application, the NHL may look to discuss a settlement as in *Turner*. The NHL will likely want to avoid the chance that any or all of the claims will be preempted and risk having to fund state court litigation. Moreover, the NHL has already been very reluctant in the case to hand over certain documents during discovery.<sup>244</sup> Thus, they may want to settle prior to disclosing any more private information. A major issue, then, will be the appropriate settlement amount. As evidenced by *Turner*, the court will want to ensure that there will be enough funds to pay all players.

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237. *Boogaard v. Nat’l Hockey League*, No. 13 C 4846, 2016 WL 5476242, at \*2 (N.D. Ill. Sept. 29, 2016).

238. *Id.* at \*3.

239. Zagger, *supra* note 180.

240. *Id.*

241. *See Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1023 (E.D. Mo. 2014).

242. *See supra* text accompanying notes 202–209.

243. *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d 856, 866 (D. Minn. 2016); *see Evans v. Arizona Cardinals Football Club, LLC*, No. CV WMN-15-1457, 2016 WL 759208, at \*1 (D. Md. Feb. 25, 2016).

244. Katie Strang, *NHL Ordered to Hand Over Documents in Concussion Lawsuit*, ESPN (Aug. 5, 2015), [http://www.espn.com/nhl/story/\\_/id/13382217/nhl-ordered-hand-documents-concussion-lawsuit](http://www.espn.com/nhl/story/_/id/13382217/nhl-ordered-hand-documents-concussion-lawsuit) [<https://perma.cc/2FVU-MKW6>].

## B. IMPLICATIONS OF THE PREEMPTION APPLICATION

Besides causing continual confusion, the narrower application of Section 301 preemption has other implications as well. Specifically, there will be an impact on collective bargaining agreement negotiations, settlement negotiations, insurance premiums, and new lawsuits in this area. The current NHL CBA is only applicable for five more years, and the current NFL CBA is only applicable for three more years.<sup>245</sup> Thus, both the players' associations and the NHL and NFLMC will have to determine what is important for each party in future negotiations. This recent case law will undoubtedly have an impact on those negotiations.

The leagues will certainly want to cover a broader range of potential claims to strengthen their arguments in court that CBA interpretation is required. Moreover, the leagues will inevitably be more concerned than prior years with the availability of funds for state-law tort claims, as many of the recent claims would have been arbitrated under the old, broader application of Section 301. While this seems beneficial for the players, the associations will likely not want to allow the leagues to put in these broad coverage provisions, especially since the players have had so much success in their lawsuits lately. Thus, it may force the players' associations to give in on other key issues such as player benefits. They also will likely be left negotiating the salary caps at a lower level due to the need for the league to retain funds for the state-law claims.

As *Turner* demonstrated, the threat that Section 301 preemption will not apply to the players' claims will likely lead to an increase in the leagues and teams coming to the settlement table much sooner than before. The unknown and virtually uncapped amount of damages available in state court will be a huge consideration for the defendants.<sup>246</sup> Moreover, as seen recently, discovery, while not only expensive, exposes the leagues and teams to even more public scrutiny.<sup>247</sup> Thus, potential for massive discovery may also push the teams towards settlement.

Another major implication of the recent case law is the impact on insurance costs and insurance litigation for defendants. For example, since the settlement in *Turner*, the NFL has been in intense litigation with its insurance companies.<sup>248</sup> The insurers are suing to avoid paying the settlement, and in May 2016, a New York state judge forced the league to make its officials and doctors, as well as relevant documents, available to the insurance companies.<sup>249</sup> The league argues this undermines their set-

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245. See *supra* text accompanying notes 38–39.

246. Telis, *supra* note 11, at 1846.

247. See Barry Petchesky, *Unsealed NHL Emails Show Gary Bettman Discussing the Effects of Fighting and Concussions*, DEADSPIN (Mar. 29, 2016), <http://deadspin.com/unsealed-nhl-emails-show-gary-bettman-discussing-the-ef-1767694064> [<https://perma.cc/J329-LQNT>].

248. Chris Dolmetsch, *NFL Must Give Insurers Evidence in Concussion-Coverage Cases*, CHICAGO TRIBUNE (May 2, 2016), <http://www.chicagotribune.com/sports/football/ct-nfl-concussion-lawsuits-20160502-story.html> [<https://perma.cc/6NUR-ML2D>].

249. *Id.*

tlement.<sup>250</sup> Thus, not only may insurance costs rise for the teams and leagues after these recent cases, but they will also be very apprehensive about the costs to litigate with the insurers as well as the possibility of information still being made public.<sup>251</sup> As one insurance attorney stated in response to Bush and Ryans' recent success,

It seems to be new, and if history is any indication of what is coming, I bet plaintiffs lawyers are taking note as well, and there could be several more copycat lawsuits to follow, which is why I would be advising other teams and leagues to put their insurers on notice. . . . In my world, the most important advice would be that all of these entities have general liability policies with a duty to defend all potential liabilities, including bodily injury.<sup>252</sup>

As just noted, there is no doubt that plaintiff's attorneys are watching the recent success of players and preparing their cases. One litigator commented:

I think what you are seeing is a greater awareness of injury in football, and I think it begins with CTE [a progressive degenerative disease found in people who have had a severe blow or repeated blows to the head] and concussions, but it does not end there. . . . I think with a greater awareness, people are showing more of a willingness to pursue claims.<sup>253</sup>

After these recent cases, it is likely that lawsuits will continue to roll in, and the plaintiffs will surely be cautious in their complaints to not expressly assert any claim under the CBA. Moreover, until the Supreme Court gives clarification, plaintiffs will likely focus their claims on the illegality exception, allegations of actively harming the player, and appealing to the court to allow justice for the players who were harmed by these multi-billion dollar industries.

### C. THE SUPREME COURT MUST OFFER CLARIFICATION

As discussed, the new line of cases has confused Section 301 preemption even further. Thus, there is a serious need for clarification in this area of the law. The Supreme Court should take the opportunity with this new influx of cases to grant certiorari and clarify the doctrine. The main issues that need to be addressed are the illegality exception, active versus failure to act claims, the appropriate standard for interpretation of the CBA, and what role injustice should have in the application.

The inconsistencies in Judge Alsup's application of the illegality exception in *Dent* and *Evans* demonstrate this need for clarification.<sup>254</sup> Specifi-

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250. *Id.*

251. See Melissa Farber, *Their Blood, Their Sweat, Whose Problem? Insurance Coverage Implications of the NFL Concussion Litigation*, 65 RUTGERS U. L. REV. 63, 76 (2016) (discussing how insurance providers are attempting to remove themselves from the concussion liability and the NFL is also trying to avoid accountability).

252. Zagger, *supra* note 180.

253. *Id.*

254. See *supra* text accompanying notes 165–177.



cally, the Court should address whether the plaintiffs must assert a direct violation of a state or federal statute, under which they have a private remedy, or if a violation of a statute as part of negligence theory is enough. The second amended complaint in *Boogaard* shows a need for the Court to explain the impact on preemption when the plaintiffs allege claims of action versus claims of inaction.<sup>255</sup> Without clarification, this case necessarily leaves a loophole for plaintiffs to avoid Section 301 preemption.

*In Re National Hockey Concussion Injury Litigation* is a prime example of the confusion in applying the appropriate standard for whether the court will have to “interpret” the CBA.<sup>256</sup> Confusing and disagreeing with crucial precedent, Judge Nelson ignored the broad application of “interpretation” and held the claim “must require the interpretation of some *specific* provision of a CBA.”<sup>257</sup> Thus, the Court should step in and clarify the standard for lower courts. Finally, the Court needs to address whether the plaintiffs’ options for other recourse should be a factor in the Section 301 preemption analysis. For example, in *In Re National Hockey Concussion Injury Litigation*, Judge Nelson noted that the plaintiffs would be unable to access arbitration, and in *Boogaard*, the time for arbitration for the family had passed. Thus, litigation was the only recourse for the Boogarrd family.<sup>258</sup> However, in oral arguments for *Dent*, Judge Smith on the Ninth Circuit stated:

I understand justice, but all we are trying to do is look at what the law is and apply it. The [lack of] prejudice [to the defendant], I appreciate your argument, but I didn’t find anything that suggests that ought to be something I ought to be looking at in determining preemption.<sup>259</sup>

Therefore, the Court should answer whether other recourse for the plaintiffs, or lack of prejudice to the defendant, should be a consideration in preemption decisions.

## VI. CONCLUSION

The number of lawsuits brought by professional athletes will inevitably continue to grow in the coming years due to the recent success of many players in overcoming Section 301 preemption. If courts follow the recent decisions and disregard precedent, the leagues and teams will be forced to respond. The current narrow application of Section 301 reflects the

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255. *See supra* text accompanying notes 189–193.

256. *See supra* text accompanying notes 200–209.

257. *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d 856, 874 (D. Minn. 2016)

258. *See id.* at 869 n.6; Diana Novak Jones, *Judge Could Keep NHL Wrongful Death Suit Alive*, LAW360 (April 14, 2016), <https://www.law360.com/articles/784738/judge-could-keep-nhl-wrongful-death-suit-alive> [<https://perma.cc/MT6Q-NTUR>].

259. Oral Argument at 34:30, *Dent v. Nat’l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*1 (N.D. Cal. Dec. 17, 2014), <https://www.youtube.com/watch?v=0gvVpIviwKw> [<https://perma.cc/Y38M-TKQU>].

recent increase in the public's awareness of the leagues' and teams' roles in player injuries. As the concern of athlete injury at the youth and professional levels continues to rise, the public pressure to hold the leagues and teams accountable will persist. Thus, the Supreme Court must address the application of Section 301 preemption to avoid any further confusion on the role of Section 301 preemption in these cases.