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Student Note: The NFL and Opioid Abuse: Choosing the Best Route to Tackle a Difficult Problem

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THE NFL AND OPIOID ABUSE: CHOOSING THE BEST ROUTE TO TACKLE A DIFFICULT PROBLEM

JACOB FREELAND

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I. INTRODUCTION

Due to the sheer physical nature of football, the National Football League (“NFL”) and its players have a long history of prescribing and using opioids to relieve pain.¹ According to a 2011 survey commissioned by ESPN in which 644 former players were asked about their use of painkillers in their playing days, the following information was discovered: fifty-two percent of former players used prescription opioids during their NFL careers.² Among these players, seventy-one percent reported misusing opioids while they were playing in the NFL.³ Additionally, fifteen percent of retired players who misused prescription opioids while in the NFL reported additional misuse within the past thirty days. Further, fifty-one percent of former NFL players who used opioids while playing in the NFL reported obtaining the painkillers from a combination of doctors and nonmedical sources, such as teammates, trainers, and

¹ Matt Gonzales, *Opioids: A Painful Problem for the NFL*, THE RECOVERY VILLAGE (Jan. 16, 2020), <https://www.therecoveryvillage.com/opiate-addiction/related-topics/misuse-nfl/#gref>.

² *Id.*

³ *Id.*

even coaches.⁴ Lastly, the survey found that former players who misused opioids during their playing careers were over three times more likely to misuse the drugs in the past month than players who used opioids as prescribed.⁵

Many former players have spoken against the regular use of painkillers in the NFL. According to recently retired NFL wide receiver Calvin Johnson, team doctors and physicians were giving out painkillers to players “like candy” during his career.⁶ He further stated, “If you were hurting, then you could get them, you know. It was nothing. If you were dependent on them, they were readily available.”⁷ Former NFL quarterback Brett Favre also admitted that he developed an addiction to prescription painkillers during his career.⁸ During his MVP season in 1995, Brett Favre admitted that he took as many as fourteen Vicodin at one time in order to suppress his pain from playing football.⁹ Favre stated, “It is really amazing, as I think back, how well I played that year. That was an MVP year for me. But that year, when I woke up in the morning, my first thought was, ‘I got to get more pills.’”¹⁰ Further, former player Eugene Monroe, who is an outspoken opponent of painkiller use in the League, stated that opioids were readily dispensed in team locker rooms for several years. He even suggested that NFL teams encourage their players to take and use painkillers.¹¹

However, former players are not the only ones complaining about opioid misuse in the NFL. Current NFL superstar Travis Kelce admitted that as a result of his involvement with the NFL, he developed a dependence on opioids.¹² Kelce stated, “During my first surgery, I had no idea that these pain medications were something that I was going to want, that my body was going to want, and that I was going to feel uncomfortable if I didn’t have these.”¹³

When analyzing the high volume of reports from current and former players, it is clear that there is a long history of painkiller abuse by teams and players in the NFL. To make matters worse, the abuse does not always end when players stop playing.¹⁴ According to former NFL lineman Aaron Gibson, after he retired he was taking as many as 200 pills a day because of the substance dependence he

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

developed during his time in the League.¹⁵ Gibson later stated, “If I didn’t play in the NFL, I know I wouldn’t have been in this situation.”¹⁶

Even the NFL’s front office is aware of the issue and has commented openly on the topic. Commissioner Roger Goodell stated, “We obviously put this as a huge priority for us, making sure that we are taking care of our current players as well as our former players.” Goodell continued by stating, “Our players are cared for by the world’s finest medical professionals. The dedicated medical and training staffs of every NFL club are always and have always been committed to providing their patients with the best possible care.”¹⁷

In short, the history of painkiller abuse by players and distribution of painkillers by team doctors has spurred debate concerning whether or not the NFL should be held liable for the dangerous addictions and resulting injuries to former players’ health.¹⁸

This note will provide a background of the history of opioid use in the National Football League to understand better the context of the issue, the legal discrepancies between the League office and players of determining whether or not the League itself is liable for the negligent distribution of opioids to players and their reliance on the drugs, and what the most feasible solution to this issue is going forward when taking into account the most recent holding in *Dent v. Nat’l Football League*.¹⁹

Based on current precedent, legal relief is not a viable solution to remedy the NFL’s ongoing substance abuse issues. However, the long-term safety of current and future football players, as well as the integrity of the sport, can be saved if instead of resorting to the courts, the players take this battle to state and federal legislatures while simultaneously promoting cultural awareness of the dangers that these prescription practices pose to past, current, and future football players. Part II of this note will examine the relevant legal and procedural history of opioid-related lawsuits that have been filed against the NFL and its franchises. Part III will discuss why legal relief is not a viable form of relief for past, current, and future NFL players under the current precedent on the NFL’s role in administering painkillers. Lastly, Part IV of this article will examine why legislative action and cultural awareness is the best

¹⁵ Ken Belson, *For N.F.L. Retirees, Opioids Bring More Pain*, N.Y. TIMES (Feb. 3, 2019), <https://www.nytimes.com/2019/02/02/sports/nfl-opioids-.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Dent v. Nat’l Football League*, 384 F.Supp.3d 1022 (N.D. Cal. April 18, 2019).

possible course of action to achieve meaningful results in an attempt to bring this epidemic to a halt.

II. LEGAL AND PROCEDURAL POSTURE RELATING TO OPIOID ABUSE IN THE NFL

There have been two significant lawsuits filed which involve former players suing the National Football League asserting that the League was liable for negligently distributing opioids to its players. These cases are *Dent v. Nat'l Football League* and *Evans v. Arizona Cardinals*.²⁰ These two lines of cases both involve state law claims by former players asserting that the NFL has violated various California Statutes relating to the issuance of prescription drugs.²¹ A major focal point of both of these cases involves whether these claims by the players are preempted by Section 301 of the Labor Management Relations Act.²² Before going into a discussion of the relevant cases, it is essential to understand what the Labor Management Relations Act is and precisely why the preemption aspect of this federal legislation comes into play.

A. LABOR MANAGEMENT RELATIONS ACT

Section 301 of the Labor Management Relations Act ("LMRA") on its face provides federal jurisdiction over disputes regarding collective bargaining agreements ("CBA").²³ CBAs are legal contracts between an employer and a union representing the employees.²⁴ The CBA is the result of negotiations between the employer and union regarding various topics such as wages, hours, and employment conditions.²⁵ In interpreting the LMRA, the Supreme Court has concluded that when a suit stating a claim under Section 301 is brought, the CBA is interpreted under federal common law and state law claims are preempted.²⁶ This is to allow parties who are drafting and agreeing on CBAs to have a reliable

²⁰ *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448 (N.D. Cal. Dec. 17, 2014); *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207 (N.D. Cal. July 1, 2016).

²¹ *Id.*

²² *Id.*

²³ Paul J. Zech, *Federal Pre-emption and State Exclusive Remedy Issues in Employment Litigation*, 72 N.D. L. REV. 325, 331 (1996).

²⁴ Bridget Miller, *What is a Collective Bargaining Agreement?*, HR DAILY ADVISOR (Feb. 17, 2016), <https://hrdailyadvisor.blr.com/2016/02/17/what-is-a-collective-bargaining-agreement/>.

²⁵ *Id.*

²⁶ Zech, *supra* note 23, at 331.

view of the way that the CBA will be interpreted and ruled on by the courts.²⁷

However, the Supreme Court has made clear that not every controversy regarding employment or a CBA will be preempted by Section 301.²⁸ The courts have determined that Section 301 of the LMRA preempts state law as long as the state law claim demands an interpretation of the CBA.²⁹ If the determination of the state law claim does not require the court to construe or evaluate any terms of the CBA, then the state law claim will not be preempted.³⁰ Ultimately, LMRA Section 301, which governs actions by an employee against an employer under a CBA, preempts state law claims involving the interpretation of rights and responsibilities under a CBA regardless of whether the plaintiff's claims sound in state tort or contract law.³¹ Lastly, federal law exclusively governs suits for breach of collective bargaining agreements as a result of the LMRA.³²

B. *DENT V. NAT'L FOOTBALL LEAGUE, 2014*

In *Dent*, former NFL player Richard Dent and 1,100 other plaintiffs brought a punitive class action lawsuit against the NFL as an entire organization in 2014 in the United States District Court for the Northern District of California.³³ Dent and his fellow plaintiffs alleged that beginning in 1969, NFL trainers and physicians fraudulently and negligently administered opioids, Toradol, and other medications to players in ways that violated federal laws as well as the American Medical Association's Code of Ethics in what they coined as a "return-to-play scheme."³⁴ Plaintiffs asserted this scheme was designed to get players to return to the field of play faster, as opposed to letting them heal in ways that were appropriate but resulted in an extended absence from the game.³⁵ The plaintiffs alleged that due to the League's conduct, they suffered long-standing and continuing mental and physical injuries including,

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 332.

³⁰ *Id.*

³¹ See generally *Tand v. Solomon Schechter Day School of Nassau Co.*, 324 F.Supp.2d 379 (E.D. N.Y. 2004).

³² See generally *Pitts v. Plumbers & Steamfitters Local Union No. 33*, 718 F.Supp.2d 1010 (S.D. Iowa 2010).

³³ *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448, at *3 (N.D. Cal. Dec. 17, 2014).

³⁴ *Id.*

³⁵ *Id.*

“nerve, knee, and elbow injuries that never healed properly, heart disease, renal failure, and drug addiction.”³⁶

Dent and the other plaintiffs filed claims including negligence, negligence per se, negligent hiring and retention, negligent misrepresentation, fraudulent concealment, fraud, and loss of consortium.³⁷ They sought relief in the form of damages, injunctive and declaratory relief, and medical monitoring.³⁸ In response to these claims, the NFL filed two motions to dismiss.³⁹ The first motion argued that the players’ claims were preempted by Section 301 of the Labor Management Relations Act of 1947.⁴⁰ The second motion filed by the NFL argued Dent and his co-plaintiffs failed to state a claim, and that their claims were barred by the statute of limitations.⁴¹

Responding to these motions, the district court held that Section 301 did preempt the plaintiffs’ claims because it would not be possible to address or determine the NFL’s negligence without reference to the CBA, and stated that, “it would be essential to take into account the affirmative steps the NFL has taken to protect the health and safety of the players, including the administration of medicine.”⁴² In their counter argument, Dent and his co-plaintiffs replied that the duties of the NFL could be considered separately from the duties of by the individual clubs and their medical personnel.⁴³ The district court rejected these arguments and clearly stated that the claim was based on an overarching duty owed by the NFL.⁴⁴ To determine the scope of that duty, the court would have to consider the CBA to determine what the NFL required of the individual team doctors.⁴⁵

Additionally, the court emphasized that because the CBA was absent of medical and health responsibility at the League level, it is implied that such medical and health responsibility was only placed upon the individual teams themselves and not on the League as a whole.⁴⁶ In short, the plaintiffs in *Dent* were unsuccessful in their attempt to hold the NFL liable for the injuries that the plaintiffs

³⁶ *Id.* at *4.

³⁷ *Id.* at *5.

³⁸ *Id.*

³⁹ *Dent v. Nat’l Football League*, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448, at *5 (N.D. Cal. Dec. 17, 2014).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *20.

⁴³ *Id.* at *23.

⁴⁴ *Id.* at *24.

⁴⁵ *Dent v. Nat’l Football League*, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448, at *24 (N.D. Cal. Dec. 17, 2014).

⁴⁶ *Id.* at *24-25.

suffered during their time in the NFL because their claims of negligence were preempted under Section 301 of the LMRA, because the court determined that the CBA would have to be interpreted in order to reach a conclusion.⁴⁷

C. *EVANS V. ARIZONA CARDINALS*

In 2016, *Evans v. Arizona Cardinals* once again raised the issue of the NFL's distribution of painkillers.⁴⁸ The same class of plaintiffs in *Dent* once again filed another class action suit in the United States District Court for the Northern District of California.⁴⁹ However, in this instance, the plaintiffs brought suit against each of the thirty-two NFL franchises individually.⁵⁰ As in *Dent*, the plaintiffs in *Evans* claimed that franchises' trainers and physicians routinely withheld injury-related information from players.⁵¹ They further asserted that the individual NFL franchises illegally provided and administered painkillers without informed consent in violation of California statutory law, in an effort to keep players on the field.⁵² In response, the individual franchises moved to dismiss once again under Section 301 and requested that the case be transferred to the Northern District of California where *Dent* was decided.⁵³ The court granted the defendant's motion for transfer.⁵⁴

In a surprising decision, the court denied the franchisees' motion to dismiss under Section 301, drawing two clear distinctions from *Dent*.⁵⁵ First, the court reasoned the claim was directed at the individual clubs themselves instead of the League.⁵⁶ For the second distinction, the court reasoned that the claims were directed at intentional conduct in violation of the relevant statutes, instead of negligence.⁵⁷ The court stated that these distinctions were significant for two reasons.⁵⁸

First, under *Dent*, the court would be evaluating any possible negligence by the NFL itself, and this would require analyzing what

⁴⁷ *Id.* at *36.

⁴⁸ *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *1 (N.D. Cal. July 1, 2016).

⁴⁹ *Id.* at *3-4.

⁵⁰ *Id.*

⁵¹ *Id.* at *4-5.

⁵² *Id.*

⁵³ *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *6-7 (N.D. Cal. July 1, 2016).

⁵⁴ *Id.*

⁵⁵ *Id.* at *11-13.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *11-13 (N.D. Cal. July 1, 2016).

the NFL had affirmatively done in its CBAs to protect the health of the players through the individual clubs.⁵⁹ In contrast, in *Evans* the complaint was directed at the specific clubs themselves, thus the CBA would not need to be evaluated, as in *Dent*, because only the specific clubs' conduct would need to be evaluated.⁶⁰

Second, the claims in *Evans* were grounded in illegal conduct of the clubs themselves and not negligence on behalf of the NFL as in *Dent*.⁶¹ Because of this, the complaint falls under the illegality exception, which states that Section 301 of the LMRA does not grant parties to a CBA the ability to contract for what is illegal.⁶² Thus, the CBA would not need to be referenced and the claims are not preempted under Section 301.⁶³ In short, the Court established in *Evans* that players could bring suit for intentional representation against the individual clubs, but not against the NFL itself.⁶⁴

D. DENT V. NAT'L FOOTBALL LEAGUE, 2018

Moving forward, *Dent* experienced a revival in 2018.⁶⁵ Stemming from the decision in the 2014 *Dent* case, the players challenged the district court's decision in an appeal before a three-judge panel of the Ninth Circuit Court of Appeals.⁶⁶ During the 2018 appeal, the issue before the court of appeals was whether the plaintiffs' state law claims under fraud and negligence required interpretation of or arose from the Collective Bargaining Agreement.⁶⁷ The Ninth Circuit emphasized that its role at this current stage of litigation was to take the allegations as true.⁶⁸ The court stated that the forum preemption inquiry under Section 301 of the Labor Management Relations Act is "not an inquiry into the merits of a claim; it is an inquiry into the claim's 'legal character' whatever its merits."⁶⁹

To make this determination, the Ninth Circuit settled on and conducted a two-step inquiry in determining whether state law

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *11-13 (N.D. Cal. July 1, 2016).

⁶⁵ *Dent v. Nat'l Football League*, 902 F.3d 1109, 1114 (9th Cir. 2018).

⁶⁶ *Id.* at 1115.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1117.

⁶⁹ *Id.*

claims were preempted by Section 301.⁷⁰ First, the court asked, “whether the cause of action involves ‘rights conferred upon an employee by virtue of state law, not by a CBA.’”⁷¹ The court further stated, “If the rights exist ‘solely’ from the CBA, then the claim is preempted.”⁷² Second, suppose the rights are independent of the CBA. In that case, the court asks whether an interpretation of the CBA is required to resolve the claim, “such that resolving the entire claim in court threatens the proper role of grievance and arbitration.”⁷³

Using this two-step framework, the court first applied the framework to Dent’s negligence-based claims.⁷⁴ In analyzing the first step, the court mentioned that the plaintiffs had shaped their claim as one being negligence *per se*. However, California law does not recognize negligence *per se* as a cause of action, but only as a doctrine. To clarify this, the court stated, “We construe the players’ claim as traditional negligence but apply the negligence [*per se*] doctrine.”⁷⁵

Specifically, the court found that the statutes CSA, Federal Drug and Cosmetics Act (FDCA), and California Pharmacy Laws would establish a standard of care and stated that, “violation of a statute would give rise to the presumption that it failed to exercise due care.”⁷⁶

The players asserted that the NFL violated both federal and state laws that govern the administration of opioids.⁷⁷ The Ninth Circuit here reasoned that it did not see the claim as the NFL’s mere failure to stop or intervene as viewed by the district court.⁷⁸ Instead, the court reasoned that the spirit of the claim was that the NFL itself illegally distributed controlled substances, and therefore its actions directly injured the players.⁷⁹ The court placed particular emphasis on its determination that the claim argued that the NFL itself distributed controlled substances. The court read the claim as alleging that the NFL both indirectly and directly supplied players with drugs, and that they managed the illegal distribution of painkillers and anti-inflammatories without informed consent.⁸⁰

⁷⁰ Dent v. Nat’l Football League, 902 F.3d 1109, 1116 (9th Cir. 2018).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1117.

⁷⁵ Dent v. Nat’l Football League, 902 F.3d 1109, 1117 (9th Cir. 2018).

⁷⁶ *Id.* at 1119.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1118.

⁷⁹ *Id.*

⁸⁰ Dent v. Nat’l Football League, 902 F.3d 1109, 1118 (9th Cir. 2018).

Continuing with the analysis of the first prong of the two-step inquiry, the court of appeals reasoned that the CBAs did not create a right for the players' to receive medical care from the NFL that did not create an unreasonable risk of harm.⁸¹ In holding this, the court reasoned that the players were not arguing the NFL violated the CBA. Instead, the plaintiffs argued it violated the state and federal laws that govern prescription drugs.⁸²

The court then moved to the second prong of the analysis to determine whether the players' claim required interpretation of the CBA.⁸³ The court stated that analyzing this prong required showing the elements of negligence without referring to the CBA.⁸⁴ In doing so, the court stated the elements required for a state claim of negligence in California which are as follows: First, the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risk. Second, a breach of duty occurred. Third, causation is present. Fourth, damages are present.⁸⁵ The court then analyzed each specific element to determine whether the elements for a *prima facie* case for negligence could be interpreted without going to the CBA.⁸⁶

For the first element, the court of appeals concluded that the NFL's duty to exercise reasonable care in the distribution of controlled substances arose from the "general character of its involvement."⁸⁷ Additionally, there is foreseeable harm to individuals hinted by the fact the drugs are labeled a controlled substance in the first place, and carelessness in the handling of these drugs is "both illegal and morally blameworthy given the risk of injury that it entails." Moreover, there is no undue burden upon entities that should be following laws governing prescriptions.⁸⁸ Second, the court determined a breach occurred due to the requirements in the federal and state statutes.⁸⁹ Third, the court concluded that the question of causation was purely factual.⁹⁰ Fourth, the court held that clearly, damages had arisen that did not arise from the CBA.⁹¹ In considering this analysis, the court held

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Dent v. Nat'l Football League*, 902 F.3d 1109, 1122 (9th Cir. 2018).

⁸⁶ *Id.* at 1118-20.

⁸⁷ *Id.* at 1118.

⁸⁸ *Id.* at 1119.

⁸⁹ *Id.*

⁹⁰ *Dent v. Nat'l Football League*, 902 F.3d 1109, 1119 (9th Cir. 2018).

⁹¹ *Id.*

that the plaintiffs' negligence claim alleging the NFL violated state and federal statutes was not preempted by Section 301.⁹²

After the appeals court held liability could be found without reference to the CBA, the court analyzed the claims of negligent hiring and retention and negligent misrepresentation. The court stated that because the CBA did not give rise to the duty, nor was it required to determine a breach, there was no preemption for the negligent hiring and retention claim.⁹³

In the claim of negligent misrepresentation, the players asserted that the NFL "continuously and systematically" misrepresented the risks associated with the medications at issue, that they reasonably relied on those misrepresentations, and that they were injured as a result.⁹⁴ The NFL responded by arguing that the scope of its duty to the players would require interpretation of the CBA provisions related to "medical care, including those that give players the right to access medical facilities, view their medical records, and obtain second opinions."⁹⁵ Additionally, the NFL argued it would be impossible to determine if the plaintiffs reasonably relied on the representations without interpreting CBA provisions related to team doctors' disclosure obligations.⁹⁶

The court responded to the NFL's arguments by noting that California law does not require the various parties' disclosures to be weighed, but instead, whether the circumstances were such that it would be reasonable for the plaintiffs to rely on the NFL's statements without independent inquiry or investigation.⁹⁷ Although sister courts to the Ninth Circuit found that interpretation of a CBA was necessary, this case differed in that, "no provision of the CBAs even arguably render the players' reliance on the NFL's purported representations unreasonable," and therefore, the claim is not preempted. More importantly, the court stated, "As we have said, none of the CBA provisions address the NFL's responsibilities concerning the distribution of prescription drugs."⁹⁸

Next, the court applied its two-step analysis to *Dent*'s fraud-based claims.⁹⁹ The appeals court quickly determined that the players' claims for fraud and fraudulent concealment were not preempted under Section 301.¹⁰⁰ Using case law, the court laid out

⁹² *Id.* at 1121.

⁹³ *Id.* at 1122-23.

⁹⁴ *Id.* at 1123-25.

⁹⁵ *Dent v. Nat'l Football League*, 902 F.3d 1109, 1123-25 (9th Cir. 2018).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1125.

¹⁰⁰ *Dent v. Nat'l Football League*, 902 F.3d 1109, 1125 (9th Cir. 2018).

the elements required to establish a *prima facie* case for fraud and fraudulent concealment.¹⁰¹

The players alleged that the NFL “knew, or should have known, that its provisions and administration of medications created a substantial risk of causing addictions and related physical and mental problems,” and the NFL intentionally withheld this information with the intent to deceive the players.¹⁰² The NFL failed to cite any analogous CBA provision that would resolve the players’ fraud-based claims. Instead, the NFL again argued that to assess the existence of its duty to make disclosures, as well as whether the players’ reliance was reasonable, it was necessary to interpret the CBA provisions that required club physicians to make certain disclosures.¹⁰³

The court disagreed with the NFL’s argument and reasoned that because the players’ claims were based on the NFL’s conduct, interpretating the team-doctor disclosure provisions was not required. Essentially, the court stated that the NFL’s duty arose from the character of the act by the NFL and not from the CBA.¹⁰⁴

Judge Tallman concluded by stating that the NFL’s defenses, including CBA provisions on team doctors’ disclosure obligations, the qualifications of team medical personnel, and players’ rights to obtain second opinions or examine their medical records, were irrelevant to the question of whether the NFL violated federal laws regarding distribution of controlled substances and state law regarding hiring, retention, misrepresentation, and fraud.¹⁰⁵ Thus, the court determined the claims were not preempted under Section 301.¹⁰⁶

The 2018 *Dent* case concluded that the meaning of CBA terms governing team doctors’ disclosure obligations, qualifications of team medical staff, and players’ rights to obtain second opinions or review their medical records is not relevant to the question of whether or not the League’s conduct itself violated federal laws regarding the distribution of opioids and state law regarding hiring, retention, misrepresentation, and fraud. Thus, no interpretation of the CBA was necessary, and Section 301 did not preempt the plaintiffs’ claims.¹⁰⁷

E. DENT V. NAT’L FOOTBALL LEAGUE, 2019

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Dent v. Nat’l Football League*, 902 F.3d 1109, 1126 (9th Cir. 2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Finally, the *Dent* line of lawsuits came to a close in April of 2019.¹⁰⁸ Here, the United States District Court for the Northern District of California reviewed the players' third and final amended complaint, which argued that the NFL was required to, or voluntarily undertook the duty to, comply with federal and state laws regulating the manner in which these opioids were administered and distributed among players. Further, the complaint alleged that the NFL failed to comply with federal and state laws, consistently and repeatedly, from the 1970s through at least 2014, and that failure directly and proximately caused the injuries for which plaintiffs seek damages.¹⁰⁹ In response to the final complaint, the NFL moved to dismiss arguing that the plaintiffs failed to state a claim and that the statute of limitations barred the claim.¹¹⁰

By leaning the analysis of the appellate court's findings, the district court determined it was clear that the interpretation of the CBA was not required solely because of the plaintiffs' position that the NFL itself was engaged in the handling, distribution and administration of the painkillers to players.¹¹¹ However, the court stressed that in the players' third amendment of their complaint, they now explicitly based their claim of the NFL's direct involvement of the administration of the medication on the "maintenance" and "creation" of the "return-to-play" scheme, as opposed to the direct distribution of the painkillers to the players itself.¹¹² Thus, the court stated that under this pleading, the plaintiffs are no longer alleging that the NFL violated the relevant California statutes, but that the individual club doctors and trainers are violating the relevant statutes.¹¹³

Further, the court found problems with the players' pleading because it did not point to any specific allegations that the California statutes in question applied directly to the NFL or that the NFL itself even violated those statutes.¹¹⁴ The court stated, "despite ninety pages of allegations, nowhere in the third amended complaint do plaintiffs allege, as they previously pitched before our court of appeals, that the NFL undertook to provide direct medical care and treatment to players such that its conduct violated any relevant drug laws."¹¹⁵ The court of appeals explained that the players' negligence

¹⁰⁸ *Dent v. Nat'l Football League*, 384 F.Supp.3d 1022 (N.D. Cal. April 18, 2019).

¹⁰⁹ *Id.* at 1028.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1029.

¹¹² *Id.*

¹¹³ *Dent v. Nat'l Football League*, 384 F.Supp.3d 1022, 1029 (N.D. Cal. April 18, 2019).

¹¹⁴ *Id.* at 1030.

¹¹⁵ *Id.*

claim would need to show that the relevant statutes applied to the NFL, the NFL violated those statutes, and the violations resulted in the injuries to the players.¹¹⁶ The court stated that because the players did not acknowledge in their final amended complaint that the NFL did not itself provide medical care or distribute painkillers to the players, the players failed to plead sufficient facts that would support their claim against the NFL.¹¹⁷

The court clarified that the only reason the players were able to escape Section 301 preemption before the court of appeals was only by asserting that the NFL itself was directly involved with the distribution of painkillers.¹¹⁸ Thus, once they escaped preemption, the players could not “bob and weave” back to other theories of negligence that relied on the NFL’s failure to intervene with the individual team’s distribution of the medication.¹¹⁹

The court concluded that while they were sympathetic to the former players’ position and recognized the societal issue that is prominent regarding the opioid epidemic, the players here failed to adequately plead a claim for negligence and granted the NFL’s motion to dismiss.¹²⁰ Since this was the players’ “best and final” pleading, the suit was dismissed with no further chances to be amended.¹²¹

¹¹⁶ *Id.* at 1033.

¹¹⁷ *Id.*

¹¹⁸ *Dent v. Nat’l Football League*, 384 F.Supp.3d 1022, 1032 (N.D. Cal. April 18, 2019).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1035.

¹²¹ *Id.*

III. LEGAL RELIEF IS NOT A VIABLE FORM OF RELIEF WITH GIVEN FACTS AND PRECEDENT

Seeking relief from the courts is not a viable course of action for former and current NFL players suffering from painkiller addictions because of the precedent and reasoning established in the *Dent* and *Evans* line of cases.¹²² These two cases established that Section 301 bars a state law negligence claim against the NFL directly, intentional misrepresentation claims can only be brought against the individual clubs themselves which harms the interests and efficiency of the class as a whole, and that the only viable claims left available for the entire class against the NFL rest with a breach of contract claim regarding the collective bargaining agreement.¹²³

First, it is clear from the holding in *Dent* and the factual information brought forward in *Evans* that the players do not have enough evidence to support a claim that the NFL itself was directly involved in the negligent distribution of the painkillers to the players and because of this, the collective bargaining agreement would need to be interpreted, and a negligence claim would be preempted under Section 301 of the LMRA.¹²⁴ As a state law negligence claim against the NFL cannot be filed, the former and current players would have to pivot to one of two alternative legal strategies in order to seek some form of legal relief.

One possible legal alternative for the current and former players that is still available is to bring a state law claim for intentional misrepresentation against the individual clubs as opposed to the entire NFL.¹²⁵ However, this option presents several challenges and impracticalities regarding the representation of the class as a whole. For one, this route would result in the claims for misrepresentation being aimed directly at each football club involved and the facts would be different as they pertained to each club and player involved.¹²⁶ This would add a layer of complexity to seeking legal relief because all members of the class did not play for the same teams, some individuals may gain relief while others may not, and all clubs are individual entities so they all are subject to individualized review when determining whether or not their actions were negligent and would justify the awarding of legal

¹²² *Id.* at 1022.; *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *1 (N.D. Cal. July 1, 2016).

¹²³ *Dent v. Nat'l Football League*, 384 F.Supp.3d 1022 (N.D. Cal. April 18, 2019).

¹²⁴ *Id.*

¹²⁵ *Evans v. Arizona*, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *13 (N.D. Cal. July 1, 2016).

¹²⁶ *Id.* at *12.

relief.¹²⁷ When understanding the ultimate holding in *Evans*, it is fair to conclude that it is not likely an effective or efficient strategy to continue to seek relief through a class action lawsuit due to the individualized claims of each player that would need to be litigated regarding the specific club's practices that they played for.

Another alternative form of legal relief would be for former and current players to bring a federal breach of contract action against the NFL for violating the terms of the CBA.¹²⁸ However, once again, this route presents its own disadvantages and impracticalities. An issue with this legal route is that the remedies that would potentially be acquired from a breach of contract claim regarding the CBA would not likely be as fruitful as a negligence per se claim in violation of California law.¹²⁹ In the final holding of *Evans*, Judge Alsup recognized that this legal remedy may not be the most fruitful, stating, "although workers' compensation and collective bargaining remedies are not gold-plated remedies, they are at least remedies recognized under the law."¹³⁰ Therefore, under this legal theory, it is not likely that players would be compensated in a manner that would equal the harm that they are currently suffering. Additionally, the CBA between the NFL and its players is subject to change, and has been changed nine times throughout the League's tenure.¹³¹ Thus, former and current players may have claims that arise from different versions of the CBA, which would produce additional complications and reduce efficiency for a class action lawsuit.

In short, legal relief is not a viable solution to resolve the ongoing painkiller issue in professional football. In light of the most recent decision in *Dent*, which firmly stated that under the current facts provided that state law claims for negligence against the NFL itself were preempted under Section 301 of the LMRA, it is not in the best interest of current and former players to seek legal remedies for their substance addictions and abuse. In analyzing the two alternative legal strategies that could still be pursued by current and former players with opioid addictions, the impracticalities and inefficiencies that come with these theories paired with the cost of litigation would weigh against the potential benefit that the players would receive if their attempts were successful.

¹²⁷ *Id.* at *4.

¹²⁸ *Evans v. Arizona Cardinals Football Club, LLC*, 262 F.Supp.3d 935, 942 (N.D. Cal. July 21, 2017).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Associated Press, *Chronology of NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), https://www.espn.com/nfl/news/story?page=nfl_labor_history.

IV. LEGISLATIVE ACTION & CULTURAL AWARENESS AS THE APPROPRIATE ROUTE FOR RELIEF

As courts are unable to provide an adequate remedy to players who have suffered from opioid addictions, and since the NFL cannot be held liable for its negligence in a class action lawsuit, the most appropriate remedy for this ongoing problem would be to take legislative action and spread cultural awareness that can help prevent these dangerous prescription practices from continuing to take place in the future.¹³² In determining the appropriate next steps, it is beneficial to analyze the legislative and cultural actions taken in response to the ongoing concussion crisis in the NFL.

A. THE NFL'S CONCUSSION CRISIS

The controversy regarding concussions in the NFL is similar to the debate regarding painkiller use in that it has affected many players, there is an ongoing struggle for legal relief, and there is an abundance of concern and attention from the public.¹³³ Reports show that many retired NFL players who suffered concussions during their NFL careers have developed long term health defects such as dementia and Chronic Traumatic Encephalopathy ("CTE").¹³⁴ Several class action lawsuits were filed to address the long-term health effects former players were suffering as a result of these injuries.¹³⁵ Unlike the painkiller lawsuit at hand, former players were actually successful in a class action lawsuit against the NFL and achieved a settlement from the NFL as a result of the litigation.¹³⁶ However, while originally this settlement was thought to be a historic breakthrough, many players who suffered from concussions did not receive compensation, and the settlement descended into a battle between plaintiffs' attorneys and the NFL, who is still trying to avoid liability.¹³⁷ Thus, even though the lawsuit was held in favor of the players, many players and their families

¹³² Dent v. Nat'l Football League, 384 F.Supp.3d 1022 (N.D. Cal. April 18, 2019); Evans v. Arizona, No. C 26-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *13 (N.D. Cal. July 1, 2016).

¹³³ CNN Library, *NFL Concussions Fast Facts*, CNN (Aug. 15, 2019), <https://www.cnn.com/2013/08/30/us/nfl-concussions-fast-facts/index.html>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Taylor Simpson-Wood & Robert H. Wood, *When Popular Culture and the NFL Collide: Fan Responsibility in Ending the Concussion Crisis*, 29 MARQ. SPORTS L. REV. 13, 53 (2018).

¹³⁷ *Id.*

continue to suffer the effects of serious brain damage from playing football, and the concussion problem continues to persist.¹³⁸

The legal system has not provided adequate relief to former players and did not result in satisfactory solutions to the concussion crisis that the NFL is currently facing. In order to help resolve this epidemic, society turned to legislative action and cultural awareness to make changes to prevent this problem from persisting. In response to the NFL's concussion epidemic, forty-eight states have adopted concussion laws that pertain to their youth sports leagues.¹³⁹ These laws are designed to inform and educate young football players and their parents or guardians, and includes a requirement that forces players to sign a concussion information form.¹⁴⁰ Additionally, this legislation requires youth football players who appear to have suffered a concussion to be immediately removed from a game.¹⁴¹ In addition, this legislation requires that the player be cleared by trained health professionals in the field of concussions before returning.¹⁴²

In response to the concussion epidemic in the NFL, society and popular culture have played a role in bringing awareness to the public about the crisis.¹⁴³ For example, a major motion picture starring actor Will Smith entitled "Concussion" was released, which played a role in educating and warning viewers about the long-term health risks and brain damage that one can suffer from playing football.¹⁴⁴ Additionally, with widespread access to media and sports-talk radio available to individuals through television and other media outlets, the rampant dialogue between sportscasters, players and analysts on channels such as ESPN has brought large-scale public awareness to the CTE issue.¹⁴⁵

This increasing societal awareness has resulted in severe pressure being mounted on the shoulders of the NFL to prevent concussions from taking place on its fields and to increase player safety.¹⁴⁶ This approach, of public awareness and public pressure, has resulted in the NFL refining and increasing the effectiveness of its concussion protocols, which is clearly a positive sign for the

¹³⁸ *Id.*

¹³⁹ *Concussion Legislation by State*, NFL (Aug. 9, 2013), <http://www.nfl.com/news/story/0ap1000000228347/article/concussion-legislation-by-state>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Wood & Wood, *supra* note 135, at 58.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 54-57.

game moving forward.¹⁴⁷ In the most recent 2019 NFL season, there were 145 reported concussions in the regular season compared to 190 reported concussions just two years prior in the 2017 season.¹⁴⁸ Although the problem has not been eradicated completely, the NFL's changes in protocol and player safety requirements by the NFL seem to be trending in the right direction.¹⁴⁹

B. THE SOLUTION: APPLYING THESE PRINCIPLES TO PAINKILLER ABUSE IN THE NFL

The most appropriate and realistic remedy for this ongoing problem would be to take legislative action and spread cultural awareness that can help prevent these dangerous prescription practices from taking place in the future. Due to the similarities between the NFL's opioid problem and concussion crisis concerning lack of viable relief for former players, and the potential lifelong harm associated with playing in the NFL, the appropriate solution here should be taken from the playbook that was established in response to the NFL's concussion crisis.

First, like the forty-eight states that implemented and passed legislation that spread awareness pertaining to the dangers of concussions in football and enforced mandatory standards regarding concussion protocols for players at all levels, an appropriate measure to take in response to the opioid problem in the NFL would be for states to take action in the form of legislation to spread awareness of the dangers of opioids and to set clear guidelines for appropriate prescribing practices for sports-related injuries. Although legal claims against the NFL for violations of this proposed legislation may be preempted by Section 301 of the LMRA, these standards would set hard and fast guidelines for non-team physicians for all other levels of sports ranging from youth leagues to college athletics. Additionally, this would help inform the public of the threats that opioids and painkillers pose to young athletes across the country.

Next, similar to the cultural awareness movement that took place relating to the NFL's concussion crisis through the constant discussions on media platforms and major motion picture films, an appropriate solution to combat the NFL's painkiller addiction problem is to raise cultural awareness of the threats that opioid addiction poses on former, current and future NFL players.

¹⁴⁷ *Id.*

¹⁴⁸ *Incidence of Concussion – 2012-2019*, NFL PLAYER HEALTH & SAFETY (Jan. 23, 2020), <https://www.playsmartplaysafe.com/newsroom/reports/injury-data/>.

¹⁴⁹ *Id.*

Specifically, as former players who came forward and spoke out about concussion trauma and CTE in the NFL, which resulted in a media frenzy, current players who are experiencing or witnessing these prescription practices first-hand should similarly use their platforms to bring awareness to the issue. This would likely lead to an increase in media coverage of this issue that would shed light on this glaring problem.

Further, like the public pressure from the concussion crisis that forced the NFL to update and improve its concussion protocols and procedures which ultimately led to a decrease in concussions on a per year basis, this increased public awareness would likely lead to an increase in public pressure on the NFL to improve its protocols and procedures regarding proscribing painkillers to players which would likely also lead to a decrease in the number of players who suffer from opioid addiction.

It must be acknowledged that this proposed solution is unable to bring complete relief to the former players who are currently suffering from opioid addiction. However, by taking the issue out of the hands of the courts and giving it to the public and lawmakers, the proposed solution helps combat the continuance of this pestering problem for future generations. This solution would lead to a future for football in which there are clear guidelines for the prescription of opioids to athletes on all levels, and a society that is willing to hold the NFL accountable for improperly engaging in these prescription practices. Ultimately, the passage of legislation mandating specific prescription requirements and the increase of cultural awareness concerning the NFL's unethical practices will increase the amount of public pressure on the NFL and will force the NFL to rectify its prescription protocols, thus benefitting the future of the sport of football as a whole for years to come.

V. CONCLUSION

Although beloved by a vast number of Americans, football is an extremely violent and physical game that unsurprisingly results in a great deal of injuries for its players. As a result, the NFL and its players have a long history of opioid abuse stemming from the administration of painkillers from team doctors to players in order to keep them on the field. This issue led to several class action lawsuits alleging the NFL was negligent in its administration of pain medications to its players. In light of the most recent decision in *Dent*, it is not in the best interest of current and former players to seek legal remedies for their substance addictions and abuse. When analyzing the two alternative legal strategies that could still be

pursued by current and former players with opioid addictions, the impracticalities and inefficiencies that come with these theories, along with the cost of litigation, would weigh against the potential benefit that the players would receive if their attempts were successful.

While there is not an appropriate monetary remedy for former players suffering from painkiller addictions, the long-term safety of current and future football players, as well as the integrity of the sport, can be saved if the players take this battle to state and federal legislatures while simultaneously promoting cultural awareness of the dangers that these prescription practices present to past, current and future football players.