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# Dent v. NFL LMRA 301 Preemption – The Ninth Circuit Court of Appeals Throws a Penalty Flag on the NFL

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NOTE

# *DENT V. NFL* LMRA 301 PREEMPTION – THE NINTH CIRCUIT COURT OF APPEALS THROWS A PENALTY FLAG ON THE NFL

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## INTRODUCTION

The National Football League's ("NFL") logo is a shield with white stars on a blue background on top and a white field with red lettering below. This logo evokes the United States flag, a symbol meant to inspire a sense of civic responsibility and patriotism.[1] In recent years the NFL has strived to be identified with those ideals.[2] One of the NFL's biggest stumbling blocks in achieving this goal has been the way the league handles player health issues.[3] In 2009 concerns over injuries led the House Judiciary Committee to hold hearings.[4] Ironically, recent decisions from the Eighth and Eleventh Circuit Courts of Appeal shielded the NFL from its responsibilities regarding medical decisions under state law.[5] Those courts ruled that Section 301 of the Labor Management Re-

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[1] *See* Flag of USA, https://statesymbolsusa.org/symbol-official-item/national-us/state-flag/american-flag (last visited Sep. 13, 2020).

[2] Brittainy Newman, *The N.F.L. Wears Patriotism on Its Sleeve. And Its Head. And Its Feet*, N.Y. TIMES (Jan. 6, 2020), https://www.nytimes.com/2020/01/03/sports/football/nfl-patriotism.html.

[3] Evan Grossman, *Latest CTE Findings Just Another Blow to NFL's Dubious History with Head Injuries*, DAILY NEWS (Jul. 30, 2017, 12:08 AM), https://www.nydailynews.com/sports/football/cte-findings-blow-nfl-bad-history-head-injuries-article-1.3368484.

[4] Alan Schwarz, *N.F.L. Scolded Over Injuries to Its Players*, N.Y. TIMES (Oct. 8, 2009), https://www.nytimes.com/2009/10/29/sports/football/29hearing.html.

[5] Atwater v. NFL Players Ass'n, 626 F.3d 1170 (11th Cir. 2010); Williams v. NFL, 582 F.3d 863 (8th Cir. 2009).

lations Act ("LMRA 301") preempted[6] NFL players' state-law tort claims because resolution of the claims would require interpretation of the terms of a Collective Bargaining Agreement ("CBA").[7] Both rulings denied justice to the players who help make the NFL a profitable venture: one which generated approximately $15 billion during the 2018-2019 season.[8] The mythology created by the NFL every game day is that the men on the field are warriors, heroes, and gladiators at the peak of physical perfection. Unfortunately, once the cheers fade and retirement looms, some players are left broken financially, physically, or both.[9]

Recently former players reveal an allegedly toxic culture that has perpetrated over the years, with injuries being improperly treated leading to long term negative effects.[10] The players claim that this improper treatment took the form of negligently prescribed opioids and painkillers.[11] Doctors supposedly handed these powerful drugs out to players in unmarked envelopes.[12] While trusting the doctors and taking these medications, the players were unaware of the long term ramifications.[13]

Richard Dent is a former defensive end[14] for the Chicago Bears.[15] He was voted MVP[16] of Super Bowl XX in 1986, racking up three tackles, one and a half sacks, and two forced fumbles.[17] His 2011 induction

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[6] The Supremacy Clause in Article VI of the United States Constitution declares that federal law is the "supreme Law of the Land." *Article VI*, CORNELL LAW LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution/articlevi. When federal and state law conflict federal law supersedes, or preempts, state law. *Preemption*. CORNELL LAW LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/preemption. When a court finds that LMRA 301 preempts a state-law claim, the courts will apply federal law based on federal labor policy. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957), *See also* Local 174 v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962).

[7] *Atwater*, 626 F.3d at 1170; *Williams*, 582 F.3d at 863.

[8] Gerry Smith & Bloomberg, *NFL Bullish About $25 Billion Revenue Goal Ahead of Super Bowl*, FORTUNE (Feb. 2, 2019, 10:04 AM), https://fortune.com/2019/02/02/nfl-super-bowl-ad-revenue/.

[9] Ken Belson, *For N.F.L. Retirees, Opioids Bring More Pain*, N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/sports/nfl-opioids-.html.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *See id*.

[14] This position is a highly versatile role in football requiring size, speed, and skill. Ty Schalter, *Why Defensive End is the 2nd-Most Important Position in the NFL*, BLEACHER REPORT (July 2, 2020), https://bleacherreport.com/articles/1251690-why-defensive-end-is-the-second-most-important-position-in-the-nfl.

[15] *Richard Dent,* PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/richard-dent/ (last visited Sep. 14, 2020).

[16] Neil Greenberg, *How the Super Bowl MVP is Chosen*, WASHINGTON POST, (Feb. 2, 2020, 1:49 PM), https://www.washingtonpost.com/sports/2020/02/02/how-super-bowl-mvp-is-chosen/.

[17] PRO FOOTBALL HALL OF FAME, *supra* note 15. (When Dent retired in 1997, his 137.5 career sack total was surpassed only by Reggie White and Bruce Smith, two legends of the game). A fumble is when a team loses control of the football which results in the other team taking possession.

into the Pro Football Hall of Fame cemented his legacy.[18] Dent now has an enlarged heart and nerve damage in his foot, resulting from his use of painkillers during his career.[19] According to Dent, painkillers and opioids distributed by the NFL fueled his and other players' ability to stay on the field and perform at a high level.[20] Dent and other star players are one of the main reasons why fans keep watching, a viewership which fills the NFL's coffers by keeping ad revenues high.[21] Players perform athletic feats that, at times, border on the superhuman. In 2014 Dent and other players brought allegations in federal court that NFL doctors negligently distributed medications.[22]

In *Dent v. NFL*, the Court of Appeals for the Ninth Circuit ("Ninth Circuit") determined that LMRA 301 did not preempt retired players' state law tort claims because it was unnecessary to interpret the CBA to resolve the claims.[23] This finding conflicted with holdings by both the Eight Circuit Court of Appeals ("Eighth Circuit") in *Williams v. NFL*[24] and the Eleventh Circuit Court of Appeals ("Eleventh Circuit") in *Atwater v. NFL Players Association*.[25] In *Dent*, the Ninth Circuit applied a two-pronged test to determine if resolution of a state law tort claim required interpretation of a CBA.[26]

The test used by the Ninth Circuit defined interpretation in depth,[27] unlike the tests used by the other circuit courts in *Williams* and *Atwater*. This key difference is likely why the Eight and Eleventh Circuit Courts reached a different result than the Ninth Circuit. The test applied by the Ninth Circuit should become the standard used by all federal courts going forward for all LMRA 301 preemption analysis for two reasons. First, application of the Ninth Circuit's test to the decisions in *Williams* and *Atwater* will show that when interpretation is properly defined it

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*See* Nat'l Football League, *NFL Rulebook* (2020) 4, https://operations.nfl.com/media/4349/2020-nfl-rulebook.pdf. A sack is a special type of tackle in which the quarterback is tackled behind the line of scrimmage. This results in a loss of forward progress in advancing the football. *See Are You Ready for Some Football (Words)?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/football-super-bowl-words/sack.

[18] *Id*.

[19] Second Amended Complaint at 7, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.

[20] *See id*. at 6.

[21] Shawn M. Carter, *NFL Commercial Score Big in 2019, pulling in $5B in revenue*, FOX BUSINESS (Jan 21, 2020), https://www.foxbusiness.com/sports/nfl-commercials-score-big-in-2019-pulling-in-5-billion-in-revenue.

[22] *See* Second Amended Complaint, *supra* note 19, at 27.

[23] Dent v. NFL, 902 F.3d 1109, 1126 (9th Cir. 2018).

[24] Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009).

[25] Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1177 (11th Cir. 2010).

[26] *Dent*, 902 F.3d at 1116.

[27] *Id*.

leads to a more consistent adjudication of LMRA 301 preemption. Second, the Ninth Circuit's test in *Dent* is more comprehensive, based on the Supreme Court's LMRA 301 jurisprudence, than those used by the Eighth Circuit and Eleventh Circuit.

Part I of this Note will discuss the procedural history of the case, the Ninth Circuit's application of the two-pronged test to determine if LMRA 301 preempted the players' state-law claims, the facts of *Dent v. NFL*, and finally a brief history of the NFL and its usage of CBAs. Part II will give a brief overview of the Supreme Court's development of LMRA 301 jurisprudence as well as its rulings on when LMRA 301 should preempt state-law tort claims. Part III will discuss the decisions by the Eighth Circuit in *Williams* and by the Eleventh Circuit in *Atwater*. Part IV of this Note will discuss why the Ninth Circuit's test should be adopted throughout the federal court system to analyze whether LMRA 301 preempts state-law claims.

## I. RICHARD DENT SUITS UP ONE LAST TIME TO TACKLE THE NFL

This section will discuss the procedural history of the case followed by the Ninth Circuit's LMRA 301 analysis. Then the factual background of Dent's claims will be provided, followed by a brief historical discussion of Collective Bargaining Agreements[28] by the NFL to negotiate with its players.

### A. PROCEDURAL HISTORY – THE NFL BLOCKS DENT AND THE NINTH CIRCUIT THROWS A PENALTY FLAG

In 2014, Dent filed a class action suit to represent a class of more than 500 former players (collectively, the "Plaintiffs") in the District Court for the Northern District of California ("ND Court of CA").[29] The Plaintiffs filed their complaint alleging the NFL violated state and federal laws by distributing controlled substances and prescription drugs, both negligently and on purpose.[30]

The Plaintiffs claimed that the NFL, in violation of federal drug laws, breached its duty of care and negligently supplied them with

[28] A collective bargaining agreement is a written legal contract between an employer and a union representing the employees. *What is a Collective Bargaining Agreement*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/collectivebargainingagreement.aspx (last visited Sept. 14, 2020).

[29] *See* Complaint at 2, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 1; s*ee also* Second Amended Complaint, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.

[30] Complaint, *infra* note 31 at 78-79.

opioids and other pain medications.[31] Further, the Plaintiffs maintained that instead of properly treating injuries, NFL doctors encouraged the Players to take the pills before, during, and after games to manage the pain.[32] The Plaintiffs filed several claims, including negligence per se under California state law.[33] In response, the NFL filed a motion to dismiss, arguing that LMRA 301 preempted the Plaintiffs' state-law tort claims.[34] The ND Court of CA agreed and granted the motion.[35] Judge Alsup ruled that he would need to construe, consult, and apply provisions of the CBA surrounding the NFL's oversight of individual team physicians.[36] For this reason he held that LMRA 301 preempted the negligence claim.[37] The Plaintiffs appealed, and the Ninth Circuit granted *de novo* review.[38]

### B. The Ninth Circuit Ruled That LMRA 301 Did Not Preempt Dent's Claims Because No Interpretation Of The CBA Was Required

In *Dent*, The Ninth Circuit laid out a two-step process for analyzing whether or not LMRA 301 preempted a state-law claim.[39] First, the court would determine whether the cause of action involved "rights conferred upon an employee by virtue of state law, not by a CBA."[40] If the right solely existed as a result of the CBA, the court would deem the claim preempted with no further analysis.[41]

Second, the court must determine if interpretation of the CBA was required and assess "whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration."[42] If the court determined that resolution of the claim required interpretation of

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[31] *See id*. at 6.

[32] *See id*.

[33] *Id*. at 65-86.

[34] *See* Defendant National Football League's Notice of Motion and Motion to Dismiss Second Amended Complaint at 15, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 72.

[35] Order re. Motions to Dismiss and Requests for Judicial Notice at 22, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 106.

[36] *See* Dent v. NFL, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448 at *22-24, (N.D. Cal. Dec. 17, 2014).

[37] *Id*. at *36.

[38] Dent v. NFL, 902 F.3d 1109, 1116 (9th Cir. 2018).

[39] *Id*.

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

[41] *Id*.

[42] *Id.* (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018) (en banc)).

the CBA then LMRA 301 would preempt the claim.[43] The Ninth Circuit's analysis was largely focused on the negligence per se[44] claim, but the players also filed claims of negligent misrepresentation, fraud, loss of consortium, fraudulent concealment, and negligent hiring and retention.[45]

The Plaintiffs' original complaint filed with the ND Court of CA claimed that the NFL violated federal and California law by providing and administering controlled substances without (1) warnings of long-term risks and side-effects, (2) proper labeling, or (3) written prescriptions.[46] The Ninth Circuit first assessed if the Plaintiffs right to proper medical care was granted solely by the CBAs.[47] The Court determined that nothing in the CBA required the NFL to provide medical care to the Plaintiffs.[48] The Court stated that the Plaintiffs were not claiming that the NFL violated the CBA, but rather state and federal law.[49] Based on this the Ninth Circuit determined that the right did not solely arise from the CBA.[50] The Ninth Circuit then analyzed each element of the Plaintiffs' negligence claim to determine if interpretation of the CBA was required to resolve the Plaintiffs' claim.[51]

First, the Ninth Circuit determined that no duty was established by statute or the CBA regarding distribution of pain medication from doctors to the Plaintiffs.[52] The Court instead found that a binding duty was inherent in the distribution of opioids and painkillers.[53] Next, Judge Tallman found that harm was foreseeable from the overuse or misuse of controlled substances.[54] He stated that carelessness in handling such substances is both "illegal and morally blameworthy."[55]

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[43] *Id.* (citing Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).

[44] Negligence per se in California is defined by four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. Alcala v. Vazmar Corp, 167 Cal. App. 4th 747, 755 (Cal. Ct. App. 2d 2008).

[45] *Dent*, 902 F.3d at 1115.

[46] Second Amended Complaint at 81-83, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.

[47] *Dent*, 902 F.3d at 1118.

[48] *Id*.

[49] *See* Second Amended Complaint, *infra* note 50 at 81-83.

[50] *Dent*, 902 F.3d at 1118.

[51] *Id*.

[52] *Id*. at 1119.

[53] *See id*.

[54] *Id*.

[55] *Id*.

Finally, the Ninth Circuit determined the responsible distribution of prescription drugs did not unduly burden the NFL.[56] For this reason, if the NFL was distributing controlled substances to the Plaintiffs, it had a duty to do so with reasonable care.[57] This duty arose from the general character of that activity, and not the Collective Bargaining Agreement ("CBA").[58] Therefore Judge Tallman determined that a court need only compare the conduct of the NFL to the requirements of state and federal law.[59] This comparison would determine if the Plaintiffs' harm was foreseeable and if the NFL breached its duty of care in distributing prescription drugs.[60]

Regarding causation, the Ninth Circuit found that it was purely a question of fact whether the NFL failed in its duty to safely prescribe painkillers and opioids.[61] Therefore no interpretation of the CBA was necessary to assess the alleged violation of the statutes by the NFL.[62] The Ninth Circuit then distinguished the current case from *Williams*, where the Eighth Circuit ruled it could not resolve the plaintiffs' negligence claims without evaluating the CBA's drug policy.[63] In contrast with that decision, the Ninth Circuit found that the NFL's duty to responsibly distribute drugs was completely independent of the CBA.[64] Therefore, no interpretation was necessary and LMRA 301 did not preempt the claims.[65] The Ninth Circuit remanded the case to the ND Court of CA to hear the claim on its merits.[66]

### C. FACTUAL BACKGROUND OF *DENT*

Dent and the Plaintiffs alleged that while playing in the NFL, they were given an abundance of various medications and opioids by NFL doctors.[67] The Plaintiffs claimed that NFL doctors distributed these drugs to keep the star players on the field to maintain ad revenues and ticket sales.[68] The Plaintiffs also asserted that NFL doctors accomplished this by masking their pain with drugs and improperly treating any underlying

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[56] *See id*.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 1120.
[60] *See id*.
[61] *Id*. at 1119-20.
[62] *Id*.
[63] *Id* at 1120.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 1126.
[67] Second Amended Complaint at 6, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.
[68] *See id*. at 74.

injuries.[69] The Plaintiffs also stated the NFL increased their risk of injury by shortening the offseason and adding more games to the schedule.[70]

The plaintiffs maintained that written prescriptions rarely accompanied the drugs.[71] Instead, they were handed various pills in manila envelopes with no labeling or instructions.[72] The Plaintiffs stated that the NFL failed to warn them that the continued use of such strong medications could result in negative side effects, long term health issues, or addiction.[73] Additionally, many players took these drugs, without a prescription or instruction, for an extended period of time.[74] This negligent distribution of opioids and other painkillers, according to the Plaintiffs, led to orthopedic injuries, heart problems, severe physical ailments, and drug addiction.[75]

### D. A Brief History Of The NFL and Its Use of Collective Bargaining Agreements

The NFL was founded in 1920[76] and operates as an unincorporated association of individually owned football teams.[77] The NFL "promotes, organizes, and regulates professional football in the United States."[78] Players are not employees of the NFL because they sign contracts with the individual teams.[79] A group of players, led by Creighton Miller, the first general manager for the Cleveland Browns, founded the National Football League Players Association ("NFLPA") in 1956.[80] The NFLPA's purpose was to provide a counterbalance to the power of the NFL by improving pay and working conditions for the players.[81] Since 1968, a series of Collective Bargaining Agreements has defined the relationship among the NFL, its member teams, and NFL players.[82]

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[69] *Id*. at 6.

[70] *See id*. at 3-4.

[71] *Id*. at 53.

[72] *Id*.

[73] *Id*. at 13-14.

[74] *Id*. at 7-13.

[75] *Id*.

[76] *National Football League*, Britannica, https://www.britannica.com/topic/National-Football-League (last visited Oct. 3, 2020).

[77] Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009).

[78] *Id*.

[79] *Dent*, 902 F.3d at 1114.

[80] *1956: The Beginning*, NFLPA, https://nflpa.com/about/history/1956-the-beginning (last visited Sep. 12, 2020).

[81] *See id*.

[82] *See Dent*, 902 F.3d at 1114.

## II. THE SUPREME COURT'S JURISPRUDENCE ON LMRA 301 PREEMPTION AND ITS RELATIONSHIP TO STATE-LAW TORT CLAIMS

This section will discuss how the Supreme Court ("SCOTUS") decided which law should apply when resolving LMRA 301 disputes. It will then discuss the framework created by SCOTUS to determine when LMRA 301 preempts state-law tort claims. Finally, this section will review SCOTUS' holdings that to refer or look to the terms of a CBA is not interpretation for the purposes of LMRA 301 analysis.

In 1957 the lower federal courts were split regarding their role under LMRA 301.[83] LMRA 301 provides that any United States District Court may hear suit involving a contract dispute between an employer and a labor organization.[84] Such a suit does not require a party to meet either the amount in controversy or diversity of citizenship requirements.[85] In *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, SCOTUS granted certiorari to determine the role of the courts in relation to LMRA 301.[86]

In *Textile Workers,* a union requested arbitration with the company to resolve a dispute concerning workloads and work assignments.[87] The employer refused arbitration so the union brought suit to compel arbitration.[88] SCOTUS noted that LMRA 301 had the purpose of maintaining industrial peace.[89] Justice Douglas highlighted that Congress intended to assign enforcement of CBAs on behalf of or against labor organizations to the federal courts.[90] SCOTUS held that federal law must be applied to resolve CBA disputes under LMRA 301.[91] The federal courts would be responsible to create that law utilizing the policy of national labor laws.[92] SCOTUS applied this holding to state courts as well in *Local 174 v. Lucas Flour Co*.[93]

At issue in *Lucas* was a strike by a labor union to force a company to rehire an employee.[94] As a result the company sued, claiming damages

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[83] Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 449 (1957).

[84] Labor Management Relations (Taft-Hartley) Act, LMRA 301(a), 29 U.S.C. §185(a) (2020).

[85] *See id*.

[86] *Textile Workers*, 353 U.S. at 449.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 455.

[90] *Id*.

[91] *Id*. at 456.

[92] *Id*. at 457.

[93] Local 174 v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

[94] *Id*. at 97.

for business losses that resulted from the strike.[95] The Supreme Court of Washington held that the strike violated the CBA because of a provision that required both parties to resolve disputes through arbitration.[96] SCOTUS agreed even though the CBA did not contain an explicit no-strike clause.[97] Despite affirming the state court's ruling, Justice Stewart found that the application of state law was improper.[98] He determined that federal law must be applied to any claim brought in state court regarding an alleged violation of a CBA.[99] He reasoned that this served the dual purpose of simplifying the agreements' interpretation and avoiding prolonged disputes.[100] In *Allis-Chambers Corp. v. Lueck*, SCOTUS held that LMRA 301 preempts any rights conferred by state law that do not exist independently of a CBA.[101]

The dispute in *Lueck* arose when a union worker filed a tort suit in Wisconsin State Court.[102] The worker claimed that both his employer and the insurance company improperly handled his payments resulting from a disability claim.[103] However, the employee did not follow the grievance and arbitration process defined by the terms of the CBA.[104] SCOTUS found that LMRA 301 preempted a state-law tort claim if evaluation of that claim was so enmeshed with the terms of a labor contract.[105] SCOTUS reversed the Wisconsin Supreme Court's ruling in Lueck's favor because Lueck's right was solely provided by the CBA.[106] Justice Blackmun also noted that SCOTUS did not hold that LMRA 301 would preempt all state-law claims that had a connection to the terms of a CBA.[107] He further explained that for LMRA 301 to preempt a state-law tort claim, the claim's resolution must substantially depend on an analysis of the terms of a CBA.[108] SCOTUS later granted certiorari in *Lingle v. Norge Div. of Magic Chef* to resolve a circuit split and expanded on the ruling in *Lueck*.[109]

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[95] *Id*.

[96] *Id*. at 97-98.

[97] *Id*. at 105.

[98] *Id*. at 103.

[99] *Id*. at 103.

[100] *Id*. at 104.

[101] Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

[102] *Id*.

[103] *Id*. at 205.

[104] *See id*. at 206.

[105] *Id*. at 213.

[106] *See id*. at 220.

[107] *See id*.

[108] *Id*.

[109] Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 403 (7th Cir. 1988) (ruling that to resolve a retaliatory discharge claim required interpretation of a CBA because it would require the

In *Lingle*, an employee claimed that her employer wrongfully discharged her in retaliation for filing a workers' compensation claim for her injuries.[110] SCOTUS reversed the lower court's ruling in favor of the employer because the remedy for the state-law claim was independent of the CBA since a purely factual inquiry could resolve the claim.[111]

Justice Stevens stated that a CBA's protection may provide a remedy for conduct that simultaneously violates state law.[112] However, he found that such an occurrence would not make the existence of a state-law violation dependent on the terms of the CBA.[113] He also determined that a claim is independent of a CBA, for the purposes of LMRA 301 preemption analysis, if a purely factual inquiry independent of the terms of the CBA will resolve the claim.[114] He then concluded that LMRA 301 preemption merely establishes federal law as the basis for interpreting CBAs.[115] Justice Stevens finally noted that resolution of a state-law claim, through either the terms of a CBA or rights granted by state law, could rely on the same set of facts for analysis.[116] However, he found that that this was not enough to find that such a claim is substantially dependent on a CBA for the purposes of LMRA 301 preemption analysis.[117] In *Livadas v. Bradshaw*, SCOTUS laid the foundation for the Ninth Circuit's definition of "interpretation."[118]

At issue in *Livadas* was whether the California Division of Labor Standards Enforcement ("Division") could adjudicate a dispute between Livadas and her employer.[119] The Division claimed that it could not because Livadas was subject to a CBA between the union and the employer.[120] Further, the Division claimed § 229 of the California Labor Code ("Code")[121] prohibited it from resolving the claim.[122] The Division stated it would have to look to and apply the CBA to determine to estab-

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same analysis of the facts, standing in contrast to similar cases in the Second, Tenth, and Third Circuits).

[110] *Id.* at 401.

[111] *Id*. at 407.

[112] *See id*. at 412-13.

[113] *See id*. at 413.

[114] *See id*. at 407.

[115] *Id*. at 409.

[116] *Id*. at 409-410.

[117] *See id*. at 410.

[118] Livadas v. Bradshaw, 512 U.S. 107 (1994).

[119] *Id*. at 112.

[120] *Id*. at 113.

[121] Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement. Cal. Lab. Code § 229.

[122] *Id*.

lish what rate Livadas should be paid under § 203[123] of the Code.[124] SCOTUS ruled that the Division could not decide on its own to unilaterally reject arbitration claims without a LMRA 301 preemption analysis.[125] Therefore the ruling of the lower court was reversed in favor of Livadas.[126] Justice Souter reasoned that a simple need to look to the terms of a CBA is not interpretation for the purposes of LMRA 301 preemption analysis.[127] Drawing on the decisions in *Lucas, Lueck, Lingle,* and *Livadas*, the Ninth Circuit developed its two-pronged test, with its expanded definition of interpretation, and then applied that test to the claims in *Dent*.[128] The Ninth Circuit held that LMRA 301 did not preempt the plaintiffs' claims because no interpretation of a CBA was required.[129] The Ninth Circuit noted that its decision contrasted with recent holdings by both the Eighth Circuit and Eleventh Circuit on whether LMRA 301 preempted the plaintiffs' state-law claims.[130]

## III. *DENT'S* HOLDING CLASHES WITH DECISIONS BY THE EIGHTH AND ELEVENTH CIRCUIT COURTS OF APPEAL

This section will look at two cases similar to *Dent* involving NFL players. The first, *Williams v. NFL,*[131] was decided by the Eight Circuit. The second, *Atwater v. NFL Players Ass'n*,[132] was decided by the Eleventh Circuit. In both *Atwater* and *Williams,* the court held that LMRA 301 preempted the state-law tort claims and ruled in favor of the defendants.

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[123] [I]f an employer willfully fails to pay, without abatement or reduction . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced. Cal. Lab. Code § 203.

[124] *Livadas*, 512 U.S. at 112-13.

[125] *See id*. at 134.

[126] *Id*. at 135.

[127] *See id*. at 125 (determining that any need to merely "look to" or "refer" to the CBA was not necessary to resolve the dispute).

[128] Dent v. NFL, 902 F.3d 1109, 1116 (9th Cir. 2018).

[129] *Id*.

[130] *Id*. at 1124.

[131] Williams v. NFL, 582 F.3d 863 (8th Cir. 2009).

[132] Atwater v. NFL Players Ass'n, 626 F.3d 1170 (11th Cir. 2010).

### A. The Eighth Circuit Holds That LMRA 301 Preempted NFL Players' State-Law Tort Claims Because Interpretation Of A CBA Was Necessary to Resolve the Plaintiffs' Claims

In *Williams v. NFL*, the Eighth Circuit considered if LMRA 301 preempted the plaintiffs' Minnesota common law claims, which included negligence and misrepresentation.[133] Central to the case was the Policy on Anabolic Steroids and Related Substances ("Policy"), incorporated in the NFL Collective Bargaining Agreement 2006-2012.[134] The Policy included language regarding banned substances and testing policies.[135] The plaintiffs were warned that the risk of taking supplements was theirs, and were told they were ultimately responsible for what went into their bodies.[136] In 2006, several players tested positive for bumetanide, which is a banned substance under the policy.[137] An investigation linked the results to a supplement called StarCaps.[138] NFL teams, along with the plaintiffs' agents, received memos with warnings and new policies regarding StarCaps.[139] However, the NFL did not directly notify the plaintiffs.[140] These memos did not state that StarCaps contained bumetanide or any other banned substances, or that the Policy banned StarCaps.[141]

The plaintiffs tested positive in 2008 for bumetanide and the NFL suspended them for four games without pay.[142] During an arbitration hearing, the plaintiffs admitted they were aware of the warnings regarding supplements, the supplement hotline, and the rule from the Policy that each player is responsible for what goes into his body.[143] Regardless, the plaintiffs claimed that the NFL's failure to notify them specifically about the bumetanide in StarCaps should have excused their positive test results.[144] The plaintiffs filed suit in Minnesota District Court for the Fourth District on December 3, 2008, alleging various violations of Minnesota common law including: breach of fiduciary duty, fraud, negligent misrepresentation, negligence, and vicarious liability.[145] The Eighth Cir-

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[133] *Williams*, 582 F.3d at 868.
[134] *Id*.
[135] *Id*. at 868-69.
[136] *Id*. at 869. The Policy emphasized this warning in capital letters.
[137] *Id*.
[138] *Id*.
[139] *Id*. at 869-70.
[140] *See id*.
[141] *Id*. at 870.
[142] *Id*.
[143] *Id*. at 871.
[144] *Id*.
[145] *Id*. at 872 n.7.

cuit upheld the district court's ruling that LMRA 301 preempted the suit's state-law tort claims.[146]

The Eighth Circuit applied a two-pronged test to determine if LMRA 301 preempted the plaintiffs' state-law tort claims.[147] LMRA 301 would preempt those claims if the "claims: (1) [were] premised on duties created by the relevant CBA such that they are 'based on' the agreement, or (2) require interpretation of the CBA such that they [were] 'dependent upon an analysis' of the agreement."[148]

Judge Shepherd gave two reasons for LMRA 301 preemption of the plaintiffs' negligence, breach of fiduciary duty, and gross negligence claims.[149] First, it was necessary to examine and determine the parties' relationship and expectations established by the CBA and the Policy.[150] Second, the claims were "inextricably intertwined with consideration of the terms of the Policy."[151] Similarly, he found that federal law preempted the plaintiffs other state-law tort claims because it would not be possible to resolve the claims without interpretation of the CBA and the Policy.[152] Judge Shepherd primarily relied on the language assigning the plaintiffs' responsibility to control what went into their bodies.[153] This reasoning mirrored *Atwater*, where the Eleventh Circuit assigned responsibility to the players for managing their finances.[154]

### B. THE ELEVENTH CIRCUIT HOLDS THAT LMRA 301 PREEMPTED NFL PLAYERS' STATE-LAW TORT CLAIMS BECAUSE INTERPRETATION OF A CBA WAS NECESSARY TO RESOLVE THE PLAINTIFFS' CLAIMS

In *Atwater v. NFL Players Association*, the plaintiffs alleged negligence and misrepresentation under Georgia state law by the National Football League and the National Football League Players Association ("NFLPA"). Specifically, the plaintiffs cited defendants' failure to properly vet Kirk Wright and Nelson "Keith" Bond, who operated the International Management Association ("IMA"), for participation in the Financial Advisors Program ("Program").[155] The plaintiffs claimed the defendant's failure led to Wright's theft of almost $20 million from the

[146] *Id*. at 868.
[147] *Id*. at 881.
[148] *Id*. at 881 (citing Bogan v. GMC, 500 F.3d 828, 832 (8th Cir. 2007)).
[149] *See id*.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *See id*. at 882.
[154] *See* Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1183 (11th Cir. 2010).
[155] *See id*. at 1174.

plaintiffs' accounts.[156] The Eleventh Circuit used the following test to assess whether LMRA 301 preempted the plaintiffs' claims: "If the state-law claim either arises out of a CBA or is dependent upon the meaning of a CBA, 'the application of state law . . . is preempted and federal labor-law principles . . . must be employed to resolve the dispute.' "[157]

The defendants argued that LMRA 301 preempted the plaintiffs' claims because they substantially depended on an interpretation of section 12 of the CBA, which established and defined the Career Planning Program ("CPP").[158] The CPP, according to the CBA, would provide information to the players on how to handle their personal finances, but it would not assume responsibility for those finances.[159] The defendants argued that because they both provided this warning and conducted background checks in compliance with the CPP they were not liable for Wright's actions.[160]

The plaintiffs alleged that the NFLPA failed to exercise reasonable care while performing due diligence background checks on Wright, Bond, and IMA.[161] The plaintiffs maintained that the NFLPA failed by (1) not evaluating IMA's application properly, and (2) inadequately monitoring IMA's compliance with the Program.[162] Judge Ebel determined that the defendant's duties were created by the CBA's mandate given to the defendants to create the CPP and "provid[e] information to players on handling their personal finances."[163] To support this conclusion, he cited undisputed evidence that fulfilled the NFLPA's obligations to provide information on handling personal finances to the players.[164] This evidence consisted of statements from the NFLPA's general counsel that the Program was part of the CPP mandated by the CBA.[165]

The plaintiffs disputed this evidence linking the Program and the CPP in three ways: (1) by introducing statements from the NFLPA to the Securities and Exchange Commission when discussing the Program, (2) by citing the NFLPA's failure to mention the CPP when approving the program, and (3) by pointing to the lack of evidence of the existence of

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[156] *See id*.

[157] *Id*. at 1176-77 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 406 (1988)).

[158] *Id*. at 1174.

[159] *Id*. at 1174-75.

[160] *See id*. at 1175.

[161] First Amended Complaint at 27, Atwater v. NFL Players Ass'n, No. 1:06-CV-1510-JEC (N.D. Ga., Mar. 26, 2009), ECF No. 10.

[162] *Id*.

[163] *Atwater*, 626 F.3d at 1179 (citing Motion for Summary Judgement at 80, Atwater v. NFL Players Ass'n, No. 1:06-CV-1510-JEC (N.D. Ga., Mar. 26, 2009), ECF No. 180).

[164] *See id*. at 1179-80.

[165] *Id*. at 1180.

the CPP.[166] The plaintiffs also claimed that the NFL failed in its duty to provide proper background checks and to act reasonably and competently in providing background information about the advisors.[167] The plaintiffs argued that they reasonably relied on the Program as a fully-insured and validated financial investment option.[168]

The Eleventh Circuit was unpersuaded and ruled that any claims of negligence required interpretation of the personal finance provision of the CBA to determine the scope of any duty owed by the NFL.[169] Regarding the other state-law claims, the court would likewise need to interpret the personal finance provision of the CBA.[170] For these reasons, the Eleventh Circuit ruled that LMRA 301 preempted the plaintiffs' state-law claims and granted summary judgment to both defendants.[171] These holdings reflected the decision in Williams, where the Eight Circuit determined it would have to interpret the CBA's language assigning responsibility to the players for substances found in their bodies.[172] The decisions in *Williams* and *Atwater* reveal the need for a consistent, robust test for LMRA 301 preemption analysis. Such a test must include the Supreme Court's definition of what constitutes CBA interpretation for the purposes of LMRA 301 preemption analysis. This will help ensure that a tenuous reliance on the terms of a CBA will not preempt rights granted to employees by state law. The Ninth Circuit provided such a test in *Dent*.[173]

## IV. THE NINTH CIRCUIT'S TEST SHOULD BE ADOPTED THROUGHOUT THE FEDERAL COURT SYSTEM

In *Dent*, the Ninth Circuit used a two-pronged test to analyze whether LMRA 301 preempted the plaintiffs' state-law tort claims.[174] First it determined if the right claimed existed by virtue of state law or arose solely as a result of a CBA.[175] If the right was conferred by a CBA, then LMRA 301 preempted the claim with no further analysis needed.[176] Second, if the right is determined to be independent of a CBA, the court

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[166] *Id*. at 1180.

[167] First Amended Complaint at 30, Atwater v. NFL Players Ass'n, No. 1:06-CV-1510-JEC (N.D. Ga., Mar. 26, 2009), ECF No. 10.

[168] *See Atwater*, 626 F.3d at 1182-83.

[169] *Id*. at 1182.

[170] *Id*. at 1182-84.

[171] *Id*. at 1185.

[172] *See* Williams v. NFL, 582 F.3d 863, 882 (8th Cir. 2009).

[173] *Dent*, 902 F.3d at 1116.

[174] *Id*. at 1116.

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

[176] *Id*.

must analyze if resolution of the claim requires interpretation of a CBA to avoid threatening the proper role of grievance and arbitration.[177]

Judge Tallman explained that LMRA 301 preempts a claim that requires interpretation of a CBA.[178] He also noted that interpretation is construed narrowly; it means something more than considering, referring to, or applying the language of a CBA.[179] Finally he stated that the need for a purely factual inquiry that does not rely on the meaning of any CBA provision is not cause for LMRA 301 preemption.[180]

The discussion below will show that the Ninth Circuit's test for LMRA 301 preemption fully integrates the Supreme Court's LMRA jurisprudence in *Lucas Flour*, *Lingle*, *Livadas*, and *Lueck*. Applying the Ninth Circuit's test to the facts presented in *Williams* and *Atwater* will show that the claims could have been resolved without interpretation of a CBA. Finally, contrasting the Ninth Circuit's test with those used by the Eighth Circuit in *Williams* and the Eleventh Circuit in *Atwater* will show that it is a more holistic representation of the Supreme Court's LMRA 301 preemption jurisprudence. For these reasons, the federal court system should adopt the Ninth Circuit's test.

### A. Applying The Ninth Circuit's Test To *Williams* And *Atwater* Shows That Justice Could Have Been Obtained For The Plaintiffs Without Interpretation Of A Cba

#### *1. Applying the Ninth Circuit Test to* Williams v. NFL

In *Williams*, the Eighth Circuit held that LMRA 301 preempted the Plaintiffs' state-law claims of negligence, gross negligence, and breach of fiduciary duty.[181] However, if the Eighth Circuit had applied the Ninth Circuit's two-pronged test, the outcome of the case would likely have been different. First, the claims did not arise solely from the CBA, nor was an interpretation of the CBA necessary to resolve the claims.

The Ninth Circuit's test states that a court must first determine if the plaintiffs' rights arose solely from the CBA or were conferred under state law.[182] The Eighth Circuit ruled that any duty owed by the NFL or its doctors required an examination of the legal relationship between the

[177] *Id*. (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018)).
[178] *Id*. (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).
[179] *Id*. (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018)).
[180] *Id*. (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1072 (9th Cir. 2007)).
[181] Williams v. NFL, 582 F.3d 863, 881 (8th Cir. 2009).
[182] Dent v. NFL, 902 F.3d 1109, 1116 (9th Cir. 2018).

parties established by the CBA.[183] The court explained that the claims were "inextricably intertwined with consideration of the terms of the CBA's Policy on Anabolic Steroids and Related Substances ("Policy")."[184] However, since Minnesota requires its doctors to obtain a license to practice medicine, and to keep their license or avoid censure, doctors are required to meet specific standards under state law whether or not the patient is a party to a CBA.[185] Therefore, the doctors' duty was assigned independently of the CBA. The NFL employed the doctors involved, thus under the doctrine of *respondeat superior*[186] the NFL was responsible for their actions. For these reasons, the rights granted to the plaintiffs did not solely arise from the CBA. If a right is independent of a CBA, a court must determine if an interpretation of the CBA is necessary to resolve the claims.[187] Interpretation means more than to consider, refer to, or apply.[188]

The Eighth Circuit relied on the fact that the Policy, incorporated into the CBA, contained language that directed the plaintiffs to a hotline to obtain information about supplements and advised them they were solely responsible for what went into their bodies.[189] However, the court's analysis was flawed because merely referring to language in a CBA that does not meet the standard of interpretation defined by the Supreme Court and later adopted by the Ninth Circuit. It would have been possible to read the Policy language and analyze any duties assigned to doctors or plaintiffs using Minnesota common law through a purely factual inquiry to determine if the plaintiffs' tort claims were valid.

LMRA 301 preemption requires more than a casual reference to the language of a CBA that is simply understood.[190] The phrase "at your own risk" is similar to the phrase caveat emptor ("let the buyer beware"), both of which are understood and taken at face value. Similarly, the language from the Policy "you and you alone are still responsible for what

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[183] *See Williams*, 582 F.3d at 881.

[184] *Id*. at 881 (citing Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007)) (internal quotations omitted).

[185] *See* MINN. STAT. § 147.001 (2019).

[186] "Latin – Let the chief answer. A superior is responsible for any acts of omission or commission by a person of less responsibility to him." *What is Respondeat Superior*?, L. DICTIONARY, https://thelawdictionary.org/respondeat-superior/ (last visited Aug. 12, 2020).

[187] *Dent*, 902 F.3d at 1116 (9th Cir. 2018) (citing Alaska Airlines Inc. v. Schurke., 898 F.3d 904, 921 (9th Cir. 2018) (en banc)).

[188] *Id*.

[189] *Williams*, 582 F.3d 863 at 869.

[190] *See Dent*, 902 F.3d at 1116 (9th Cir. 2018) (citing Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018) (en banc)).

goes into your body"[191] is also straightforward. An in-depth analysis of these statements is unnecessary because a purely factual inquiry could be conducted to determine any duty owed. Such an inquiry could draw on testimony regarding the parties' intentions, as well as the memos and communication from the NFL to the plaintiffs.

The plaintiffs' rights existed by virtue of Minnesota common law and did not solely arise from a CBA. Additionally, interpretation of the Policy and the CBA's language was not necessary to resolve their state-law claims. For these reasons, under the test used in *Dent*, LMRA 301 should not have preempted the state-law claims at issue in *Williams*. An application of the same test should also have produced a different outcome in *Atwater v. NFL*, because resolution of the plaintiffs' claims did not require interpretation of a CBA.[192]

### 2. *Applying the Ninth Circuit Test to* Atwater v. NFL Players Association

In *Atwater*, the Eleventh Circuit held that LMRA 301 preempted the plaintiffs' state-law claims. The court reasoned resolution of the claims substantially depended on an interpretation of the Collective Bargaining Agreement ("CBA") between the parties.[193] However, an application of the *Dent* test will show that LMRA 301 should not have preempted the plaintiffs' state-law claims. The court relied on section 12 of the CBA,[194] which mandated the creation of the Career Planning Program ("CPP") and provided the warning that players had sole responsibility for their finances.[195]

The scope of any duty owed by the defendants did not arise solely from the CBA because section 12 of the CPP did not explicitly create the Financial Advisors Program ("Program").[196] None of the terms found in section 12 addressed the requirements for admission, background checks for advisors wishing to participate, or ensuring compliance with the Program.[197] Section 12 contained language assigning responsibility to the players for their finances, but it did not assign responsibility for the advi-

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[191] *Williams*, 582 F.3d at 869.

[192] *See* Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1174 (11th Cir. 2010).

[193] *Id*.

[194] *Id*. at 1175 ("The parties will use best efforts to establish an in depth, comprehensive Career Planning Program. The purpose of the program will be to help players enhance their career in the NFL and make a smooth transition to a second career. The program will also provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances").

[195] *Id*. at 1174.

[196] *Id*. at 1175.

[197] *Id*.

sors' selection or oversight.[198] This is in sharp contrast to the Policy in Williams that warned players that they were responsible for the contents of the supplements they chose to take.[199]

The NFLPA's general counsel stated that the Program was part of the CPP mandated by the CBA and satisfied the requirement to provide players with information on how to handle their finances.[200] This statement is not enough to definitively show that the NFLPA's duty solely arose from the CBA. Simply giving a person information on how to *handle* finances does not relieve a duty to sufficiently *investigate* a financial advisor to ensure their trustworthiness.

The NFL then relied on its acknowledgment that it performed background checks as part of the CBA-mandated CPP.[201] The Eleventh Circuit held that any duty the NFL may have owed to establish negligence,[202] misrepresentation,[203] or breach of fiduciary duty[204] was due to the CBA's provision regarding personal finances. However, compliance with the CPP does not negate any duty owed under Georgia state law. Therefore, any duty owed by the defendants did not exist solely from the terms of the CBA. The second part of the Ninth Circuit's test, with its in-depth definition of interpretation, would likely have directed the court to hold that LMRA 301 did not preempt the plaintiffs' claims. The Eleventh Circuit stated it would have to consider and consult the CBA to determine if the defendants' breached any duty owed by the defendants to determine negligence.[205] However, under the test used in *Dent*, merely considering or consulting the language of a CBA is not interpretation.[206]

Regarding the misrepresentation claim, the court stated it would have to interpret the CPP and CBA's language to ascertain whether the players reasonably relied on the alleged misrepresentations.[207] The court once again referenced the CPP's disclaimer regarding the players' sole responsibility for their finances.[208] It even referenced Georgia law regarding disclaimers,[209] which was not necessary given that the purpose of preemption analysis is not to litigate the merits of a claim but to en-

[198] *Id*.
[199] Williams v. NFL, 582 F.3d 863, 869 (8th Cir. 2009).
[200] *Id*.
[201] *Id*. at 1182.
[202] *Id*.
[203] *Id*. at 1183.
[204] *Id*. at 1184.
[205] *Id*. at 1181-82.
[206] Dent v. NFL, 902 F.3d 1109, 1117 (9th Cir. 2016).
[207] *Atwater*, 626 F.3d at 1183.
[208] *Id*.
[209] *Id*.

sure the proper law is applied.[210] Also, referencing state law while maintaining that federal law should resolve the claims is inherently illogical, as it is analogous to a football referee referencing the rules of baseball to support a penalty flag. This reasoning in favor of preemption was inappropriate using the Ninth Circuit's test because the mere need to read or reference a disclaimer is not interpretation.[211]

Finally, the Eleventh Circuit's finding that LMRA 301 preempted the players' fiduciary duty claims would likely have been different under the Ninth Circuit's test. The court held that resolution of the claims depended substantially on the interpretation of the CBA's language that "players shall be solely responsible for their personal finances."[212]

A purely factual inquiry, using testimony and documents provided by the parties, could have been conducted to determine if a fiduciary relationship existed between the plaintiffs and defendants. Further, a responsibility for one's own finances does not negate the defendants' responsibility to perform adequate background checks on financial advisors listed by the employer or union. Since all three of the plaintiffs' claims did not arise solely from the CBA, and resolution of those claims did not require interpretation, LMRA 301 should not have preempted the claims in *Atwater*.

It should not be surprising that a different holding would likely result from application of the Ninth Circuit's test to the facts of *Atwater* and *Williams*. The test used in both cases failed to properly incorporate the Supreme Court's standard for interpretation of a CBA for the purpose of determining LMRA 301 preemption.

### B. THE NINTH CIRCUIT'S TEST IS MORE COMPLETE THAN THE TESTS USED IN *WILLIAMS* AND *ATWATER* BECAUSE IT RELIES ON THE SUPREME COURT'S DEFINITION OF "INTERPRETATION"

The Supreme Court laid the groundwork for analyzing when LMRA 301 should preempt a state-law claim. The *Lingle* Court addressed a claim's independence based on a purely factual inquiry,[213] and reiterated that federal law is the basis for interpretation of a CBA.[214]

Even if resolution of a claim using either state law or a CBA would address the same set of facts, the state-law claim is independent of the

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[210] *See Livadas*, 512 U.S. at 123-24.

[211] *See Dent*, 902 F.3d at 1116.

[212] *Atwater*, 626 F.3d at 1183.

[213] Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 407 (1988).

[214] *Id*. at 409.

CBA for the purposes of LMRA 301 preemption if the claim can be resolved without interpreting the CBA.[215] The *Livadas* Court held that a state-law claim is independent of, and therefore not preempted by, a CBA if the claim can be resolved by "look[ing] to" rather than interpreting the CBA.[216] A comparison of the Ninth Circuit test and those used in *Atwater* and *Williams* will show that its definition of interpretation is more complete because it more closely follows the Supreme Court's jurisprudence.

The Eleventh Circuit's test in *Atwater* did not define interpretation, and therefore lacked the thoroughness of the Ninth Circuit's test. This is because it did not completely include the Supreme Court's rulings on the role of interpretation in assessing LMRA 301 preemption. The Eleventh Circuit's test simply stated that if a state-law claim arose from a CBA or was dependent on the meaning of a CBA, then federal labor-law principles must be applied to resolve the dispute.[217] The Eleventh Circuit did not include the qualifier *substantially dependent* in its test, but later used it when ruling that LMRA 301 preempted the plaintiffs' claims.[218] The Eleventh Circuit then stated that it would need to *consider*[219] or *consult*[220] the CBA to resolve the claims presented by the plaintiffs.

To *consider* (or think about)[221] and to *consult* (or refer to)[222] equate to *looking to*[223] a CBA and should not have led to preemption. If a court needs to think about or refer to the terms of a CBA, this is not interpretation for the purposes of LMRA 301 preemption analysis. Since the Eleventh Circuit did not include the definition of *interpretation* used by both the Supreme Court and the Ninth Circuit, it concluded that LMRA 301 preemption was unnecessary. It could be argued that the Eleventh Circuit's later usage of the term *substantially dependent* implies that the test requires more than a look or a reference to a CBA when doing LMRA 301 analysis. However, when dealing with a person's rights and potential abuses, it is better to have an explicit definition of interpretation for

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[215] *Id*.

[216] Livadas v. Bradshaw, 512 U.S. 107, 125 (1994).

[217] Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1176-77 (11th Cir. 2010) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 406 (1988)).

[218] *Id*. at 1185.

[219] *Id*. at 1181.

[220] *Id*. at 1182.

[221] The main definition of "consider" is to think carefully about, such as (1) to think of especially with regard to taking some action, or (2) to take into account. *Consider*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consider (last visited Oct. 4, 2020).

[222] The definition of "consult" is (1) to refer to or (2) to ask the advice or opinion of. *Consult*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consider (last visited Oct. 4, 2020).

[223] *See Livadas*, 512 U.S. at 125.

LMRA 301 analysis. Without an explicit requirement, sports leagues and other organizations that enter into CBAs with their workers may be able to circumvent rights granted under state law. Since the Eleventh Circuit failed to include this explicit definition, its test is less complete when compared to the test used in *Dent*. The Eighth Circuit's test, while closer to the Ninth Circuit's, also fails to provide an explicit definition of interpretation.

The test used by the Eighth Circuit allowed LMRA 301 to preempt claims based on duties created by a CBA or that required interpretation of the CBA that was dependent upon an analysis of the agreement.[224] The Eighth Circuit's test mentions interpretation but does not define interpretation. This omission could lead to an inefficient and potentially unjust analysis because it allows a court to casually reference the language of a CBA and rule that LMRA 301 preempts state-law claims. The Eighth Circuit's main argument for preemption was a need to *examine* the CBA's language to determine the duty owed by the NFL and its doctors.[225] Even if it was necessary to *examine* the language of the CBA, the test used by the Eighth Circuit still falls short of the standard laid out by the Supreme Court. Examination of the terms of a CBA to find any duty owed would be the same as *referring* to or *looking* to the terms of the CBA, which is not interpretation according to the Supreme Court's definition.

Similar to the test used in *Atwater*, the Eighth Circuit's test could be read as impliedly incorporating the Supreme Court's definition of interpretation that requires a court to do more than to *look to* the terms of a CBA. However, any implicit incorporation will fall short because an explicit requirement provides a firmer foundation for analysis. Without an explicit requirement defining interpretation, a court can superficially refer to the terms of a CBA without truly determining if resolution of the claim substantially depends on the CBA. This can deny justice to plaintiffs seeking to resolve their claims using state law.

Some may criticize the Ninth Circuit's definition for being too explicit and leaving little room for courts to exercise judicial discretion. However, labor relations are an area of the law where precision is especially important due to the potential impact on the economy.[226] Additionally, workers could be more vulnerable if they do not have the proper legal recourse to pursue claims. Failure to use a test that relies com-

[224] Williams v. NFL, 582 F.3d 863, 881 (8th Cir. 2009) (citing Bogan v. GMC, 500 F.3d 828, 832 (8th Cir. 2007)).

[225] *Id*.

[226] *See* Katia Dmitrieva, *GM strike hits broader economy, skewing recession-forecast data*, LOS ANGELES TIMES (Oct. 11, 2019), https://www.latimes.com/business/autos/story/2019-10-11/gm-strike-hits-broader-economy-skewing-recession-forecast-data.

pletely on the Supreme Court's definition of interpretation could allow the NFL and other industries to violate state law as long as they are abiding by the provisions of a CBA. Such behavior could threaten worker protection and industrial harmony. The Ninth Circuit's test, with its in-depth definition of "interpretation" based on the Supreme Court's jurisprudence, provides a more precise framework for analysis than the Eighth and Eleventh Circuit Courts' tests.

## CONCLUSION

The physical and financial hardships suffered by Richard Dent and the plaintiffs in *Williams* and *Atwater* show a need for robust LMRA 301 preemption analysis. Plaintiffs should be afforded the opportunity to resolve claims that arise from state law and not solely from the terms of a CBA. The Ninth Circuit Court of Appeals' test, if adopted throughout the federal court system, would meet this need. Application of this test to the facts of *Williams* and *Atwater* showed that it was possible to resolve the claims without an interpretation of the relevant Collective Bargaining Agreements. LMRA 301 preemption was therefore unwarranted in those cases. The test is also an integrated approach based on the Supreme Court's jurisprudence compared to the tests used by the Eighth Circuit and Eleventh Circuit. The *Dent* test surpasses those used in *Williams* and *Atwater* because it includes an in-depth definition of interpretation based on the rulings in *Lucas, Lueck, Lingle,* and *Livadas*. For these reasons the Ninth Circuit's two-pronged test for LMRA 301 preemption analysis, as stated in Dent v. NFL, should be adopted throughout the federal court system. This would help achieve Congress's initial goal of promoting industrial harmony in adopting LMRA 301. Finally, it would also ensure that athletes in all major sports leagues can play with confidence, knowing that the courts are ready to throw a penalty flag when necessary.