

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 31 XXX/
Number 1

Article 4

2020

Pain Mismanagement: The Opioid Problem in the NFL

Dylan McGowan

Fordham University School of Law, dmcgowan4@law.fordham.edu

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Legal Remedies Commons](#)

Recommended Citation

Dylan McGowan, *Pain Mismanagement: The Opioid Problem in the NFL*, 31 Fordham Intell. Prop. Media & Ent. L.J. 223 (2020).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol31/iss1/4>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Pain Mismanagement: The Opioid Problem in the NFL

Dylan McGowan*

In 2014 and 2015, two groups of former National Football League (“NFL”) players brought lawsuits against the NFL for its handling and distribution of opioids and other dangerous painkillers. While neither lawsuit has succeeded in its goal of addressing the painkiller problem, they brought to light the broken pain management culture of the NFL and the health risks these medications pose to both active and former players. Addressing the opioid problem should be a top priority for the NFL and the National Football League Players’ Association (“NFLPA”). This Note examines the pain management crisis in the NFL, and analyzes the two player lawsuits, illustrating the difficulty players face in obtaining relief in the courts. Additionally, this Note discusses the joint NFL-NFLPA Collective Bargaining Agreement (“CBA”) and demonstrates the NFLPA’s need to negotiate for changes in that agreement to secure relief for former players and protect active players from any further harm.

* J.D. Candidate, Fordham University School of Law, 2021; B.A. Government & Politics, University of Maryland, 2015. I would like to thank Professor Wendy Luftig for her guidance. I would also like to thank the IPLJ Editorial staff for their hard work and feedback, particularly Senior Research & Writing Editor Sara Mazurek. Finally, thank you to my friends and family for their support and advice, especially my girlfriend, Chandler Sella, for her continuous encouragement throughout the writing process.

INTRODUCTION	225
I. BACKGROUND.....	228
A. <i>The Opioid Crisis in the United States</i>	228
B. <i>Opioids in the National Football League</i>	231
C. <i>The Collective Bargaining Agreement and Substance Abuse Policy</i>	234
1. <i>Player Medical Care in the Collective Bargaining Agreement</i>	234
2. <i>The Substance Abuse Policy and Medical Marijuana</i>	237
3. <i>Retired Player Benefits</i>	240
D. <i>Preemption under Labor Management Relations Act Section 301</i>	241
II. DIFFICULTY OF OBTAINING RELIEF FOR OPIOID RELATED HARMS	243
A. <i>The NFL Opioid Litigation</i>	243
1. <i>Dent v. National Football League</i>	243
2. <i>Evans v. Ariz. Cardinals, LLC, et al</i>	247
B. <i>Inability to Remedy the “Return to Play” Culture in the Courts</i>	253
C. <i>Shortcomings of the New CBA and Possible Preemption Concerns</i>	256
1. <i>Inadequate Medical Care</i>	256
2. <i>Medical Marijuana Remains Unavailable</i>	258
3. <i>Insufficient Retirement Benefits</i>	259
III. REMEDIES	261
A. <i>Independent Medical Care</i>	261
B. <i>Medical Marijuana as an Opioid Alternative</i>	264
C. <i>Increased Retirement Benefits</i>	268
CONCLUSION.....	270

INTRODUCTION

Hall of Famer Richard Dent played fifteen seasons in the National Football League (“NFL”) from 1983 to 1997.¹ During his time with the Bears, he was named a First-Team All-Pro² and Most Valuable Player of Super Bowl XX;³ he was additionally named to the Pro-Bowl four times⁴ and, in 1985, led the NFL in sacks.⁵ Unbeknownst to most, Dent had such success in part due to a steady supply of painkillers to keep him performing for his team.⁶ The emphasis on painkiller use in the NFL to ensure on-field production was made clear to Dent early in his career.⁷ During a preseason practice prior to his 1983 rookie season, Dent tore his hamstring, as well as tendons and ligaments in his ankle.⁸ Barely able to walk, he received anti-inflammatories and painkillers, and

¹ Sheilla Dingus, *Are Prescription Painkillers an NFL Sanctioned PED?*, ADVOC. FOR FAIRNESS IN SPORTS (Jan. 23, 2017), <https://advocacyforfairnessinsports.org/current-litigation/nfl-painkiller-lawsuits/are-prescription-painkillers-an-nfl-sanctioned-ped/>; [https://perma.cc/6WLE-LUCG]; Richard Dent, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/D/DentRi00.htm> [https://perma.cc/5D7P-YYYS].

² *All-Pro*, WIKIPEDIA (Sept. 14, 2020), <https://en.wikipedia.org/wiki/All-Pro> [https://perma.cc/5S9K-49AQ]. All-Pro is a distinction awarded to the best players at each position during a given season. *Id.*

³ *Super Bowl Most Valuable Player Award*, WIKIPEDIA, https://en.wikipedia.org/wiki/Super_Bowl_Most_Valuable_Player_Award [https://perma.cc/3G4Z-R6RT]. The Most Valuable Player award is given to the player voted to have had an important impact in the Super Bowl. It is often given to the player deemed to have performed the best during the game. *Id.*

⁴ See generally Tom Sheen, *What is the Pro Bowl? Everything You Need to Know About NFL Version of All-Star Game*, THE SUN (Jan. 28, 2018), <https://www.thesun.co.uk/sport/5377761/what-is-the-pro-bowl-nfl-all-star-game/> [https://perma.cc/H5FV-KEJM].

⁵ See generally Sack, SPORTS LINGO, <https://www.sportslingo.com/sports-glossary/s/sack/> [https://perma.cc/GP49-2EMY]; *NFL Sacks Year-by-Year Leaders (Since 1982)*, PRO FOOTBALL REFERENCE, https://www.pro-football-reference.com/leaders/sacks_year_by_year.htm. [https://perma.cc/ZH3T-8YWZ]. A sack is awarded when a player tackles the quarterback behind the line of scrimmage before he has thrown a pass. *Id.*

⁶ Dingus, *supra* note 1.

⁷ *Id.*; see also Plaintiff’s Second Amended Complaint Demand for Jury Trial Class Action at 1, *Dent v. Nat’l Football League*, 384 F. Supp. 3d 1022 (N.D. Cal. 2019) (No. C-14-2324) [hereinafter *Dent Plaintiffs’ Second Amended Complaint*].

⁸ Dingus, *supra* note 1; *Dent Plaintiff’s Second Amended Complaint*, *supra* note 7, at 28.

subsequently returned to the field.⁹ He recalls playing the last pre-season game of that year on so many drugs that he could barely remember playing at all.¹⁰ This was Dent's first encounter with NFL's pain management culture—one that encouraged the use of pills and painkillers to keep players performing for their teams.¹¹

Throughout Dent's career, team doctors and trainers continued to provide him with pain medication so he would return to the field despite severe injuries.¹² For instance during a game in Seattle in 1990, Dent suffered a broken bone in his foot.¹³ Team doctors told him that he would require surgery, but no further damage could be done if he continued playing on the injury.¹⁴ Trusting his doctors, he followed their advice and played the final eight weeks of the season aided by a steady diet of pills and repeated injections of painkillers.¹⁵ Dent now has permanent nerve damage in the foot.¹⁶ Dent additionally suffers from an enlarged heart, which he claims is due to the large quantities of opioid pain medication team physicians and trainers gave him during his NFL career.¹⁷

Dent's experience with opioids and painkillers in the NFL is not unique. Many other players whose careers span many decades have shared similar stories.¹⁸ These experiences form the basis of two player lawsuits, *Dent v. National Football League* in which Richard Dent was the lead plaintiff, and *Evans v. Ariz. Cardinals, LLC, et al.*¹⁹ Despite these harrowing tales, the NFL has not done enough to address the concerns raised over its culture of opioid and painkiller abuse.

⁹ Dingus, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Dent Plaintiffs' Second Amended Complaint, *supra* note 7, at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Dingus, *supra* note 1.

¹⁸ See generally Dent Plaintiffs' Second Amended Complaint, *supra* note 7, at 4-7; Plaintiffs' Class Action Complaint and Demand for Jury Trial, *Evans v. Ariz. Cardinals, LLC*, 2016 WL 3566945 (N.D. Cal. 2016) (No. 3:16-cv-01030).

¹⁹ See Dent Plaintiffs' Second Amended Complaint, *supra* note 7; Plaintiffs' Class Action Complaint and Demand for Jury Trial, *supra* note 18.

In March 2020, the NFL and the NFL Players Association (“NFLPA”) entered into a new Collective Bargaining Agreement (“CBA”).²⁰ A CBA is a labor agreement that often addresses a variety of subjects, including working conditions, benefits, and salaries, among others.²¹ This new CBA included provisions meant to tackle the pain management problem in the NFL. While the new provisions are a step in the right direction, they are inadequate to fully address the problem.²² For instance, conflicts of interest in player medical care remain a significant concern. Team physicians’ financial interest to get players back on the field for their employers is often at odds with actions that would enhance players’ health.²³ Similarly, a lack of alternatives, such as medical marijuana, ensure that players have no choice but to turn to powerful opioids and other painkillers to manage their pain.²⁴ Finally, the retirement benefits available to players are limited and often run out or are difficult to obtain when players need them most.²⁵

This Note argues that the NFL and NFLPA must make further substantive changes to the NFL CBA and Substance Abuse Policy to remedy the dangerous pain management culture the league has fostered. Part I outlines the opioid crisis in America generally and the NFL specifically. It also provides foundational background information on the two player painkiller lawsuits and the NFL CBA. Part II discusses the lawsuits and CBA in depth, explaining the difficulty players face in succeeding in court and the shortcomings of the new 2020 CBA. Part III offers solutions to address the opioid problem in the NFL, stressing the need to reform medical care, treatment options, and retired player benefits. Part III recommends policies that limit conflicts of interest in medical care, such as increasing team physician independence of medical treatment and widening access to and enhancing the duration of retirement benefits for former players.

²⁰ *See generally NFLPA Approves New 10-Year Collective Bargaining Agreement*, N.Y. POST (Mar. 15, 2020) <https://nypost.com/2020/03/15/nflpa-approves-new-10-year-collective-bargaining-agreement/> [https://perma.cc/9Z8X-KK5P].

²¹ *See infra* Section I.C.

²² *See infra* Section II.C.

²³ *See infra* Section II.C.1.

²⁴ *See infra* Section II.C.2.

²⁵ *See infra* Section II.C.3.

I. BACKGROUND

A. *The Opioid Crisis in the United States*

For the past two decades, America has been in the throes of an opioid epidemic and more broadly a pain management crisis.²⁶ Opioids are natural, synthetic, or semi-synthetic chemicals that interact with opioid receptors in the body to reduce the sensation of pain.²⁷ Beginning in the late 1990s, pharmaceutical companies began aggressively pushing doctors to prescribe their patients opioid pain relievers.²⁸ The manufacturers spent millions in exaggerating the benefits of their opioid painkillers while simultaneously downplaying their risks for treatment of chronic pain²⁹ despite contrary evidence.³⁰ The manufacturers created websites and distributed educational materials which claimed that people who take opioids rarely become addicted.³¹ For example, Purdue Pharma sponsored a publication, disseminated by the American Pain Foundation, that stated the risk of addiction in *children* is less than one percent.³² Many doctors, convinced of the pills' efficacy and hoping to help their patients, began prescribing opioid painkillers in enormous quantities.³³ Other less scrupulous doctors saw opportunity and established pill mills, practices where they see many

²⁶ *Opioid Overdose Crisis*, NAT'L. INST. ON DRUG ABUSE (May 27, 2020) <https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis> [<https://perma.cc/2ZFA-6DQR>].

²⁷ *Commonly Used Terms*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/opioids/terms.html> [<https://perma.cc/XL2S-LMSH>].

²⁸ German Lopez, *The Opioid Epidemic, Explained*, VOX (Dec. 21, 2017, 9:10 AM), <https://www.vox.com/science-and-health/2017/8/3/16079772/opioid-epidemic-drug-overdoses> [<https://perma.cc/K6NL-MESU>] [hereinafter *Opioid Epidemic, Explained*].

²⁹ German Lopez, *The Thousands of Lawsuits Against Opioid Companies, Explained*, VOX (Oct. 17, 2019, 6:10 PM), <https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycotin> [<https://perma.cc/PA97-5PEW>] [hereinafter *Thousands of Lawsuits*].

³⁰ Lopez, *Opioid Epidemic, Explained*, *supra* note 28.

³¹ Lopez, *Thousands of Lawsuits*, *supra* note 29.

³² *Id.*

³³ German Lopez, *America's Huge Problem with Opioid Prescribing, in One Quote*, VOX, (Sept. 18, 2017, 11:50 AM), <https://www.vox.com/science-and-health/2017/9/18/16326816/opioid-epidemic-keith-humphreys> [<https://perma.cc/X8UE-5DFX>].

more patients and issue many more painkiller prescriptions than is typical, to make a profit.³⁴

At the same time, distributors continued supplying pills even when it should have been clear that the drugs were being misused.³⁵ For instance, millions of pills flooded into communities with only a few hundred residents.³⁶ In some states, pharmacies filled more painkiller prescriptions than there were total people in the state.³⁷ In 2012, doctors wrote 259 million opioid prescriptions, enough to provide a bottle of medication to every adult in the country.³⁸ In allowing this volume of drugs to flow to these communities, drug distributors flouted their responsibilities to prevent abuse. Federal regulations require distributors to monitor supply chains for suspicious orders to ensure that drugs are not being abused.³⁹ Unsurprisingly, in part due to this failure to monitor suspicious purchases, America became the biggest consumer of opioids in the world by a wide margin.⁴⁰

The results of this massive overconsumption of these dangerous narcotics were tragic. Between 1999 and 2015, more than 560,000 Americans died from opioid overdoses⁴¹—many thousands involving the same pills that manufacturers earlier said were safe and nonaddictive.⁴² This enormous death toll led many states and localities to take legal action, filing thousands of lawsuits against manufacturers, distributors, and pharmacies for their role in the

³⁴ *Id.*

³⁵ Lopez, *Thousands of Lawsuits*, *supra* note 29.

³⁶ *Id.*

³⁷ German Lopez, *How the Opioid Epidemic Became America's Worst Drug Crisis Ever*, in *15 Maps and Charts*, VOX, (Mar. 29, 2017, 12:51 PM), <https://www.vox.com/science-and-health/2017/3/23/14987892/opioid-heroin-epidemic-charts> [<https://perma.cc/T4AN-JXES>] [hereinafter *America's Worst Drug Crisis*].

³⁸ Kim Painter, *Painkiller Prescription Rates Vary Widely Among States*, USA TODAY (July 1, 2014, 3:49 PM), <https://www.usatoday.com/story/news/nation/2014/07/01/pain-killer-prescription-rates-states/11898327/> [<https://perma.cc/YV4W-UT7Z>].

³⁹ *See* 21 C.F.R. § 1301.74(b).

⁴⁰ Lopez, *America's Worst Drug Crisis*, *supra* note 37.

⁴¹ *Id.*

⁴² *Id.*; *see also* *Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/VT5H-UKQN>]. According to Figure 4, many of the deaths that were attributable to opioid overdoses were caused by prescription opioids. *Id.*

crisis.⁴³ Not wanting to face the cost and publicity of trial, many of the companies have attempted to reach settlements of tens of billions of dollars.⁴⁴ For Purdue—the company many believe sparked the opioid crisis with its OxyContin pill—it has led to an \$8.3 billion settlement, an agreement to plead guilty to three felonies, and bankruptcy.⁴⁵ Some of the hardest hit states and localities disapprove of such settlements saying they fail to hold those responsible for the crisis accountable, indicating that opioid related litigation is far from over.⁴⁶

Even those individuals who have not followed the opioid saga in the news are likely cognizant of it due to its frequent presence in popular culture. The opioid crisis has been the subject of at least two episodes of the HBO show *Last Week Tonight with John Oliver*⁴⁷

⁴³ Lopez, *Thousands of Lawsuits*, *supra* note 29.

⁴⁴ Sheila Kaplan & Jan Hoffman, *Mallinckrodt Reaches \$1.6 Billion Deal to Settle Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/health/mallinckrodt-opioid-settlement.html> [<https://perma.cc/V9Z6-Y5RM>]; Laura Strickler, *Purdue Pharma Offers \$10-12 Billion to Settle Opioid Claims*, NBC NEWS (Aug. 27, 2019), <https://www.nbcnews.com/news/us-news/purdue-pharma-offers-10-12-billion-settle-opioid-claims-n1046526> [<https://perma.cc/4FR2-BJQ8>].

⁴⁵ Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> [<https://perma.cc/8T9Q-UGV7>]; Andrew Joseph, *Purdue Pharma, Maker of OxyContin and Other Drugs, Files for Bankruptcy*, STAT (Sept. 16, 2019), <https://www.statnews.com/2019/09/16/purdue-pharma-maker-of-oxycotin-and-other-drugs-files-for-bankruptcy> [<https://perma.cc/PXA4-PH58>]; Associated Press & Laura Strickler, *Purdue Pharma, Maker of Painkiller OxyContin, Files for Bankruptcy as Part of Settlement*, NBC NEWS (Sept. 16, 2019), <https://www.nbcnews.com/news/us-news/purdue-pharma-maker-painkiller-oxycotin-files-bankruptcy-part-settlement-n1054711> [<https://perma.cc/745E-QWSA>].

⁴⁶ Jan Hoffman, *Opioid Settlement Offer Provokes Clash Between States and Cities*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/health/opioids-settlement.html> [<https://perma.cc/B7P6-B533>]; Meryl Kornfield, Christopher Rowland, Lenny Bernstein & Devlin Barrett, *Purdue Pharma agrees to plead guilty to federal criminal charges in settlement over opioid crisis*, WASH POST (Oct. 21, 2020), <https://www.washingtonpost.com/national-security/2020/10/21/purdue-pharma-charges/> [<https://perma.cc/8H4Z-73HH>].

⁴⁷ *Opioids*, LAST WEEK TONIGHT WITH JOHN OLIVER (HBO), YOUTUBE (Oct. 23, 2016), <https://www.youtube.com/watch?v=5pdPrQFjo2o> [<https://perma.cc/H9TC-2597>]; *Opioids II*, LAST WEEK TONIGHT WITH JOHN OLIVER (HBO), YOUTUBE (Apr. 15, 2019), <https://www.youtube.com/watch?v=-qCKR6wy94U> [<https://perma.cc/HYE4-3KEB>].

and was covered by Hasan Minhaj on his Netflix show *Patriot Act*.⁴⁸ These shows helped raise public consciousness of the issue, which helps ensure greater understanding of this problem.⁴⁹ Despite this increased cultural awareness, many people are likely not mindful of the impact opioids and other painkillers have had on a popular form of entertainment itself, one many people enjoy each week: NFL football.⁵⁰

B. Opioids in the National Football League

Each Sunday⁵¹ millions of Americans tune in to watch their favorite athletes and teams play one of the most popular and profitable games on earth.⁵² However, those viewers may not know that to stay on the field players, like Richard Dent, have resorted to using powerful opioids and other painkillers to play through

⁴⁸ Victoria Kim, *Hasan Minhaj: Drug Companies, This Crisis is on You*, FIX (Aug. 13, 2019), <https://www.thefix.com/hasan-minhaj-drug-companies-crisis> [https://perma.cc/5J9T-RMVU]. Netflix is also home to a four-part documentary series called *The Pharmacist* which mixed a story about one man's fight against the opioid crisis with another of America's addictions, true crime. Sophie Gilbert, *The Story The Pharmacist Can't Tell*, ATLANTIC (Feb. 16, 2020), <https://www.theatlantic.com/culture/archive/2020/02/netflix-the-pharmacist-true-crime-opioid-epidemic/606604/> [https://perma.cc/3XHA-MLBQ]. Another eight-part Netflix series, *Painkiller*, about the origins of the opioid crisis, has been ordered by the streaming giant as well. Joe Otterson, *Netflix Sets Opioid Crisis Series From "Narcos" Eric Newman, Peter Berg to Direct*, VARIETY (Feb. 18, 2020), <https://variety.com/2020/tv/news/netflix-opioid-crisis-series-peter-berg-eric-newman-micah-fitzerman-blue-noah-harpster-1203506588/> [https://perma.cc/7QX8-7UYK].

⁴⁹ Andrew Joseph, *From Rural Kentucky to HBO*, STAT (Apr. 16, 2019), <https://www.statnews.com/2019/04/16/john-oliver-sackler-deposition-purdue-pharma/> [https://perma.cc/9Q7D-8CWW].

⁵⁰ See generally *National Football League*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/National-Football-League> [https://perma.cc/2TTA-4CJ9].

⁵¹ Monday and Thursday too.

⁵² Jon Lafayette, *NFL Games Score Big With 5% Boost in Viewership*, BROADCASTING + CABLE (Jan. 2, 2020), <https://www.broadcastingcable.com/news/nfl-games-score-big-with-5-in-viewership> [https://perma.cc/B526-XD7K]; Sourav Das, *Top 10 Most Popular Sports in the World*, SPORTS SHOWS, <https://sportsshow.net/top-10-most-popular-sports-in-the-world/> [https://perma.cc/EXG2-922E]; Michael Colangelo, *The NFL made roughly \$16 billion in revenue last year*, TOUCHDOWN WIRE (July 15, 2019), <https://touchdownwire.usatoday.com/2019/07/15/nfl-revenue-owners-players-billions/> [https://perma.cc/T7RP-GQHM].

injuries.⁵³ While extremely effective for treating short-term pain, these drugs are addictive and dangerous if not used properly.⁵⁴ The reliance on painkillers allows players to perform for the fans and their team but comes at great cost to their long-term health.⁵⁵ Former players noted how easy it was to get painkillers, saying they were handed out like “tic tacs”⁵⁶ or “candy.”⁵⁷ Similarly, Eugene Monroe, a former NFL offensive tackle for the Jacksonville Jaguars and Baltimore Ravens, described players waiting in line outside the trainer’s office to get their pregame shot of Toradol, a nonsteroidal anti-inflammatory drug (“NSAID”).⁵⁸ Players euphemistically called it riding the “T-train.”⁵⁹ While not an opioid, Toradol is a powerful painkiller that can have serious side effects when not used properly.⁶⁰ Alongside opioids, Toradol has become a drug of choice in the NFL.⁶¹ Nevertheless few, if any, players were warned of the side effects of these easily available drugs.⁶²

⁵³ Eugene Monroe, *Getting Off the T Train*, PLAYERS’ TRIB. (May 23, 2016), <https://www.theplayertribune.com/en-us/articles/2016-5-23-eugene-monroe-ravens-marijuana-opioids-toradol-nfl> [<https://perma.cc/58NL-ACM8>].

⁵⁴ *Opioids*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drug-topics/opioids> [<https://perma.cc/V7YP-X2HD>].

⁵⁵ Sara Bellum, *Painkiller Abuse in the NFL*, NAT’L INST. ON DRUG ABUSE (Sept. 10, 2013), <https://teens.drugabuse.gov/blog/post/painkiller-abuse-nfl-hefty-price-entertainment> [<https://perma.cc/8MYZ-UCSJ>].

⁵⁶ Sally Jenkins & Rick Maese, *Pain and Pain Management in NFL Spawn a Culture of Prescription Drug Use and Abuse*, WASH. POST (Apr. 13, 2013), https://www.washingtonpost.com/sports/redskins/pain-and-pain-management-in-nfl-spawn-a-culture-of-prescription-drug-use-and-abuse/2013/04/13/3b36f4de-a1e9-11e2-bd52-614156372695_story.html [<https://perma.cc/E6CB-VB3V>].

⁵⁷ Des Bieler, *Calvin Johnson Says Painkillers Were Handed Out ‘Like Candy’ to NFL Players*, WASH. POST (July 6, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/07/06/calvin-johnson-says-painkillers-were-handed-out-like-candy-to-nfl-players/> [<https://perma.cc/4VJN-AX5T>].

⁵⁸ Monroe, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ *See generally Toradol Solution*, WEBMD, <https://www.webmd.com/drugs/2/drug-6418/toradol-injection/details> [<https://perma.cc/X52L-342L>]; *Toradol*, RX LIST, <https://www.rxlist.com/toradol-side-effects-drug-center.htm> [<https://perma.cc/HV5L-RQK9>]; Jordan Zirm, *How Dangerous is Toradol, the NFL Pain Fix Known as ‘Vitamin T’?*, STACK (Jan. 22, 2016), <https://www.stack.com/a/how-dangerous-is-toradol-the-nfl-pain-fix-known-as-vitamin-t> [<https://perma.cc/M6CP-N96B>].

⁶¹ Nicoleas R. Mayne, *Derailing the T Train: Curbing the Abuse of Toradol in the National Football League*, 25 SPORTS L.J. 167, 168 (2018).

⁶² Jenkins & Maese, *supra* note 56.

A 2011 survey of retired NFL players found that over fifty-two percent of respondents had used opioids and other painkillers during their careers.⁶³ Seventy-one percent of those who reported opioid use during their playing days also stated misusing them.⁶⁴ The overall rate of misuse was thirty-seven percent, which is nearly three times higher than the lifetime rate of nonmedical use of opioids among the general population of a comparable age.⁶⁵ These numbers are shocking, but understandable due to the high rate of injury among NFL players. Fifty-six percent of the players who reported opioid use suffered three or more injuries during their careers.⁶⁶ Sixty-one percent reported a career-ending injury.⁶⁷ The high risk of suffering an injury in the NFL, and near inevitability that players will need medication to manage their pain, emphasizes the importance of addressing the opioid problem in the NFL.

The players' misuse of opioids does not stop once their careers end. Former athletes who misused opioids during their playing careers were roughly three times more likely to have misused in the past thirty days than players who used just as prescribed.⁶⁸ Similarly, seven percent of players reported misusing opioids in the last thirty days, three times higher than among men of a similar age in the general population.⁶⁹ This rate of misuse can likely be traced to lingering effects from their playing careers. As a result, only thirteen percent of former players surveyed reported current excellent health.⁷⁰ Meanwhile, ninety-three percent of the sample reported living with pain.⁷¹ Eighty-one percent perceived their pain to be moderate or severe, which is over three times higher than the rate of pain reported

⁶³ Linda B. Cottler et al., *Injury, Pain, and Prescription Opioid Use Among Former National Football League (NFL) Players*, 116 *DRUG ALCOHOL DEPENDENCE* 188, 190 (2011).

⁶⁴ *Id.* Players who reported that they used more pills or used pills for more days than prescribed; misled a physician to get opioids; used someone else's prescription, or received opioids from a teammate, coach, trainer, the "pill guy," a family member or friend, a dealer or the Internet, during their NFL careers, were categorized as NFL misusers.

⁶⁵ *Id.* at 192.

⁶⁶ *Id.* at 190.

⁶⁷ *Id.*

⁶⁸ *Id.* at 191.

⁶⁹ *Id.* at 192.

⁷⁰ *Id.* at 191.

⁷¹ *Id.*

in the general population.⁷² Of additional concern, players who misused opioids also tended to drink more than players who did not, greatly increasing the risk of death.⁷³

C. *The Collective Bargaining Agreement and Substance Abuse Policy*

An important instrument that will have a significant role in resolving legal disputes surrounding opioid misuse in the NFL is the CBA. A CBA is a contract between management and workers that covers a variety of subjects, including working conditions, benefits, and salaries.⁷⁴ In 1968, the NFLPA and the NFL negotiated and entered into a collective bargaining agreement for the first time.⁷⁵ The NFLPA and the NFL Management Council (“NFLMC”), the NFL’s sole and exclusive bargaining representative, have negotiated and entered into successive collective bargaining agreements periodically in the ensuing years.⁷⁶ On March 15, 2020, after nearly ten months of negotiations, the players approved a new CBA by a narrow vote of 1,019 to 959.⁷⁷ This new agreement, which contains new provisions relevant to the opioid issue, will bind the two sides through the 2030 season.⁷⁸

1. Player Medical Care in the Collective Bargaining Agreement

The 2011 NFL Collective Bargaining agreement—and earlier agreements—at issue in the *Dent* and *Evans* player lawsuits

⁷² *Id.* at 191–92. The rate reported in the general population is 26%. *Id.*

⁷³ *Id.* at 191; *More than Half of People Who Misuse Prescription Opioids Also Binge Drink*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/releases/2019/p0611-people-opioids-drink.html> [https://perma.cc/G6PY-RP5D] (last updated June 10, 2019).

⁷⁴ Michael B. Scallan, *Painkillers for Profit Gains: How the Ninth Circuit’s Revival of Dent v. NFL Could Hold the League Liable for Long-Term Injuries Caused by Its Administration of Painkillers*, 46 S.U. L. REV. 325, 327 (2019).

⁷⁵ Nairi Dulgarian, *How the Holding in Dent v. National Football League Tackles Collective Bargaining*, 39 LOY. L.A. ENT. L. REV. 205, 218 (2019).

⁷⁶ Scallan, *supra* note 74, at 327.

⁷⁷ Dan Graziano, *NFL Players Approve New CBA, Runs Through 2030*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28906786/nfl-players-approve-new-cba-2030 [https://perma.cc/YS2A-ZFPB].

⁷⁸ *Id.*

sparsely addresses player medical care.⁷⁹ Article thirty-nine of the 2011 CBA contains just seven sections devoted to medical care, covering a scant three pages of the 301-page document. Section one addresses team physicians and medical consultants.⁸⁰ These doctors are all hired and employed by the individual teams, not the league.⁸¹ In addressing the doctor/patient relationship, the agreement states, “each Club physician’s primary duty in providing player medical care shall be not to the Club but instead to the player-patient.”⁸² Section two lists criteria for team athletic trainers, who are again employed directly by the team.⁸³ Section three established an “Accountability and Care Committee.”⁸⁴ This committee is tasked with “conduct[ing] research into prevention and treatment of illness and injury commonly experienced by professional athletes, including patient care outcomes from different treatment methods.”⁸⁵ Sections four and five secure the players’ right to seek a second opinion and hire the surgeon of their choice, respectively.⁸⁶ Section six states that all players must undergo a pre-season physical examination administered by team physicians.⁸⁷ Section seven incorporates the leagues’ Policy and Program on Substances of Abuse and the Policy on Anabolic Steroids and Related Substances.⁸⁸ The 2011 CBA makes no mention of opioids at all.

The 2020 CBA includes a significantly expanded article thirty-nine, covering twenty-one sections and spanning twenty-seven pages of the document.⁸⁹ It contains many provisions discussing

⁷⁹ For discussions of the lawsuits see *infra* Section I.A; NFL PLAYERS ASSOCIATION, NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 171–74 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/DFG6-8THX>] [hereinafter NFL CBA 2011].

⁸⁰ *Id.* at 171–72.

⁸¹ *Id.*

⁸² *Id.* at 171.

⁸³ *Id.* at 172.

⁸⁴ *Id.* at 172–73.

⁸⁵ *Id.* at 172.

⁸⁶ *Id.* at 173.

⁸⁷ *Id.*

⁸⁸ *Id.* at 173–74.

⁸⁹ NFL PLAYERS ASSOCIATION, NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 214–41 (Mar. 5, 2020), <https://nflpaweb.blob.core.windows.net/media/>

topics covered by the 2011 agreement, including team physicians and athletic trainers as well as players' right to a second opinion and the surgeon of their choice.⁹⁰ Many of the new provisions of article thirty-nine are aimed at player safety, including provisions covering field surface safety,⁹¹ equipment safety,⁹² head, neck, and spine safety, concussion diagnosis and management,⁹³ and a new behavioral health program.⁹⁴

The new Prescription Medication and Pain Management Program found in section twenty is particularly significant.⁹⁵ This provision establishes a Joint Pain Management Committee to “provide guidance and establish uniform standards addressing club practices and policies regarding pain management and use of prescription medication by NFL players, including the administration of certain federally scheduled drugs.”⁹⁶ The purpose of the committee is to create guidelines for the teams' medical staff when administering pain medication.⁹⁷ These guidelines reflect the Food and Drug Administration (“FDA”) mandate that players receive the FDA drug warning for each prescription provided to them and understand the potential side effects.⁹⁸ The committee is also tasked with implementing player education about the use and risks of pain medications—particularly opioids—and tracking all prescriptions issued by NFL team physicians.⁹⁹ Each team is also required to hire a pain management specialist, which is a physician with specialization in one of six areas of medicine specified in the agreement.¹⁰⁰ Section twenty also lays out a detailed enforcement procedure for alleged violation of the Pain Management Guidelines

Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf
[<https://perma.cc/AM68-RWET>] [hereinafter NFL CBA 2020].

⁹⁰ *Id.* at 214, 215–16, 220.

⁹¹ *Id.* at 221–22.

⁹² *Id.* at 222–23.

⁹³ *Id.* at 225–29.

⁹⁴ *Id.* at 231–37.

⁹⁵ *Id.* at 237–41.

⁹⁶ *Id.* at 237.

⁹⁷ *Id.*

⁹⁸ *Id.* at 237–38.

⁹⁹ *Id.* at 238.

¹⁰⁰ *Id.* at 239.

established by the Joint Pain Committee.¹⁰¹ These improvements address some concerns about opioids while failing to address other factors that lead to the opioid crisis in the NFL.

2. The Substance Abuse Policy and Medical Marijuana

Both the 2011 and 2020 CBAs incorporate the league's Policy and Program on Substance Abuse into the agreements.¹⁰² The 2020 Substance Abuse Policy prohibits the illegal use of drugs, the abuse of prescription and over-the-counter drugs, and the abuse of alcohol; the policy identifies these three kinds of drugs as potential "substances of abuse."¹⁰³ The policy states that its primary goal is to assist players who misuse substances of abuse.¹⁰⁴ It also sets out procedures and protocols for testing¹⁰⁵ and entry into the programs,¹⁰⁶ as well as discipline for violations of the policy.¹⁰⁷

Marijuana is among the substances banned by the NFL under the policy.¹⁰⁸ Although the 2020 CBA still bans marijuana, the league did make some concessions.¹⁰⁹ First, the league raised the threshold necessary to trigger a positive test from thirty-five nanograms to 150 nanograms.¹¹⁰ Second, the pre-season testing window was reduced from four months to two weeks of training camp.¹¹¹ Third, players

¹⁰¹ *Id.*

¹⁰² *Id.* at 221; NFL CBA 2011, *supra* note 79, at 173–74.

¹⁰³ "Substances of Abuse" are defined in the Substance Abuse Program as "illegal use of drugs and the abuse of prescription drugs, over the counter drugs, and alcohol." Alcohol is prohibited only if a player's treatment plan explicitly prohibits it. NAT'L FOOTBALL LEAGUE POL'Y & PROGRAM ON SUBSTANCES OF ABUSE I (2020), <https://nflpaweb.blob.core.windows.net/website/2020-Policy-and-Program-on-Substances-of-Abuse.pdf>. [<https://perma.cc/7HZP-GEEJ>] [hereinafter NFL SUBSTANCE ABUSE POL'Y].

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.* at 7–10.

¹⁰⁶ *Id.* at 11.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ Austin Anderson, *NFL's New Marijuana Policy: CBA Changes Rules Dramatically for Players*, SPORTING NEWS (Mar. 16, 2019), <https://www.sportingnews.com/us/nfl/news/nfl-new-marijuana-policy-rules-cba-2020/1svd83aq5q0m71x4t2rfto1m5> [<https://perma.cc/A6BP-5JS7>].

¹¹⁰ *Id.*

¹¹¹ Terez Paylor, *Why the NFL CBA's New Marijuana Policy Isn't a Big Win for Players*, YAHOO! SPORTS (Mar. 15, 2020, 6:40 PM), <https://sports.yahoo.com/new-nfl-cba-has-its->

will also no longer face suspensions for violations of the program for marijuana, but will still face fines.¹¹² While these changes make it much harder to be caught using marijuana, the substance nevertheless remains banned.¹¹³ Many players and doctors advocate for the league to allow medical marijuana¹¹⁴ as an alternative to opioids and other painkillers.¹¹⁵ The NFL's policy is problematic because studies have shown that use of medical marijuana can reduce use of opioids in patients with chronic pain.¹¹⁶

Medical marijuana is unavailable even for those seeking a therapeutic use exemption¹¹⁷ ("TUE"), which is where a player requests

pluses-but-benefits-for-marijuana-users-are-far-down-the-list-224020429.html [https://perma.cc/N8HJ-3EUN].

¹¹² Mike Florio, *New CBA Removes All Substance-Abuse Suspensions for Positive Drug Tests*, NBC SPORTS (Mar. 5, 2020, 9:52 AM), <https://profootballtalk.nbcsports.com/2020/03/05/new-cba-removes-all-substance-abuse-suspensions-for-positive-drug-tests/> [https://perma.cc/37E3-D595].

¹¹³ See NFL CBA 2020, *supra* note 89, at 238.

¹¹⁴ *Marijuana as Medicine*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> [https://perma.cc/F5CT-FMEB].

¹¹⁵ SI Staff, *Ricky Williams Takes the High Road*, SPORTS ILLUSTRATED (July 18, 2016), <https://vault.si.com/vault/2016/07/18/ricky-williams-takes-high-road> [https://perma.cc/D6WJ-PRD2]; Tyler Conway, *DeAndre Hopkins on NFL Allowing CBD Medication: 'I Only Think It Would Help'*, BLEACHER REP. (July 2, 2018), <https://bleacherreport.com/articles/2784108-deandre-hopkins-on-nfl-allowing-cbd-medication-i-only-think-it-would-help> [https://perma.cc/NZ7C-WHFV]; Mike Freeman, *Banned, but Bountiful: Marijuana Coveted by NFL Players as Invaluable Painkiller*, BLEACHER REP. (June 30, 2015), <https://bleacherreport.com/articles/2486218-banned-but-bountiful-marijuana-coveted-by-nfl-players-as-invaluable-painkiller> [https://perma.cc/YF9D-C2JD]; Rick Maese, *NFL Players Fight Pain with Medical Marijuana: 'Managing it with pills was slowly killing me'*, WASH. POST (May 2, 2017), https://www.washingtonpost.com/sports/redskins/nfl-players-fight-pain-with-medical-marijuana-managing-it-with-pills-was-slowly-killing-me/2017/05/02/676e4e62-2e80-11e7-9534-00e4656c22aa_story.html [https://perma.cc/NY2Q-QRAS]; Adam Kilgore, *Ravens Lineman Pushing Marijuana on the NFL*, WASH. POST (June 5, 2016), https://www.washingtonpost.com/sports/redskins/ravens-lineman-pushing-marijuana-on-the-nfl/2016/06/05/b600dda4-28fc-11e6-ae4a-3cdd5fe74204_story.html [https://perma.cc/F35C-VJJR].

¹¹⁶ Laurel Thomas, *Medical Marijuana Reduces Use of Opioid Pain Meds, Decreases Risk for Some with Chronic Pain*, MICH. NEWS (Mar. 22, 2016), <https://news.umich.edu/medical-marijuana-reduces-use-of-opioid-pain-meds-decreases-risk-for-some-with-chronic-pain/> [https://perma.cc/MBS6-N2MG].

¹¹⁷ Tyler Conway, *RB Mike James' Request to Take Marijuana as a Painkiller Denied by NFL*, BLEACHER REP. (May 8, 2018), <https://bleacherreport.com/articles/2775067-rb>

permission from the league to use an otherwise prohibited substance for medical purposes.¹¹⁸ Often players seek and are granted TUEs for substances that are banned under another league substance program, the Policy on Performance-Enhancing Substances, to treat a diagnosed medical problem.¹¹⁹ Although opioids and other painkillers are subject to the substance abuse program if used illegally, they do not require a TUE when they are prescribed by a physician and used accordingly.¹²⁰ However, marijuana, even with a prescription, is not permitted without a TUE, as shown by the case of the Buffalo Bills' Seantrel Henderson who was suspended for using doctor prescribed medical marijuana to treat his Crohn's disease.¹²¹ While players can seek a TUE for medical marijuana under the Substance Abuse Policy, they face hurdles in having it approved.

These exemptions may be granted when four conditions are met.¹²² First, the medication must be necessary for the treatment of the medical problem for which the exemption was requested.¹²³ Second, acceptable alternative treatments with substances that are not banned must have been attempted and failed, or reasons for not

mike-james-request-to-take-marijuana-as-a-painkiller-denied-by-nfl
[<https://perma.cc/V2CD-YXPN>].

¹¹⁸ NFL SUBSTANCE ABUSE POL'Y, *supra* note 103, at Appendix F.

¹¹⁹ Players have been granted TUEs for substances such as Adderall. Mark Ziegler & Hieu Tran Phan, *Behind the Shield: NFL Drug Testing Policy Not As Good as Sold*, SAN DIEGO TRIB. (Dec. 8, 2014), <https://www.sandiegouniontribune.com/sports/nfl/sdut-nfl-drug-testing-policies-2014dec08-story.html> [<https://perma.cc/4798-AWCM>]. Adderall is banned under the Policy on Performance-Enhancing Substances. The conditions for a TUE under that policy are the same as under the Substance Abuse Policy. NAT'L FOOTBALL LEAGUE POL'Y ON PERFORMANCE-ENHANCING SUBSTANCES Appendix I (2018), <https://nflcommunications.com/Documents/2018%20Policies/2018%20Policy%20on%20Performance-Enhancing%20Substances%20-%20EXTERNAL.pdf> [<https://perma.cc/FRY4-4Q8Y>]; NFL SUBSTANCE ABUSE POL'Y, *supra* note 103, at Appendix F.

¹²⁰ See Joseph M. Hanna, *It's Time to Get Real about Marijuana and Professional Sports: Part 2*, ABA (June 13, 2019), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2019/marijuana-professional-sports-part-2/> [<https://perma.cc/QC64-JW42>].

¹²¹ Jared Dubin, *NFL Bans Bills Player for Doctor-Prescribed Marijuana to Treat Crohn's Disease*, CBS SPORTS (Nov. 29, 2016, 3:24 PM), <https://www.cbssports.com/nfl/news/nfl-bans-bills-player-for-doctor-prescribed-marijuana-to-treat-crohns-disease/> [<https://perma.cc/BZ36-C884>].

¹²² NFL SUBSTANCE ABUSE POL'Y, *supra* note 103, at Appendix F.

¹²³ *Id.*

using the alternatives must be presented.¹²⁴ Third, the player must have undergone an appropriate evaluation and submitted medical records documenting the diagnosis for review.¹²⁵ Fourth, the player may not begin using the substances until the TUE has been granted.¹²⁶ Because opioids and other painkillers are available for use by players when they have a valid prescription without a TUE and the NFL is generally skeptical of the benefits of medical marijuana, players fail at condition two.¹²⁷ As a result, medical marijuana is not in practice available to players despite its medical benefits.

The policy states that the substance abuse “can lead to on-the-field injuries . . . and to personal hardship.”¹²⁸ It also notes that substance abuse has tragically led to the death of several NFL players.¹²⁹ However, disallowing alternatives such as medical marijuana under the substance abuse policy may drive players to dangerous painkillers and opioids to manage their pain, increasing the risk of both injury and death.

3. Retired Player Benefits

The NFL offers its players a group insurance plan under both the 2011 and 2020 CBAs.¹³⁰ Retired players are able to remain on the plan for five years after retirement, but only if they have met the vesting requirement under the Retirement Plan.¹³¹ Under the 2011 CBA, a player needed four credited seasons to meet this requirement.¹³² Under the new 2020 CBA, a player meets the requirement if he has accrued three NFL seasons.¹³³ Players who do not meet this

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Michael David Smith, *Roger Goodell: Marijuana is Addictive and Unhealthy*, NBC SPORTS (Apr. 28, 2017, 9:23 AM), <https://profootballtalk.nbcsports.com/2017/04/28/roger-goodell-marijuana-is-addictive-and-unhealthy/> [<https://perma.cc/5UDW-2HGL>].

¹²⁸ NFL SUBSTANCE ABUSE POL’Y, *supra* note 103, at 1.

¹²⁹ *Id.*

¹³⁰ NFL CBA 2020, *supra* note 89, at 310.

¹³¹ *See Id.* at 301.

¹³² NFL CBA 2011, *supra* note 79, at 222.

¹³³ NFL CBA 2020, *supra* note 89, at 301.

vesting threshold are ineligible for post-retirement healthcare on the NFL's player plan.¹³⁴

Article sixty of the 2020 CBA covers NFL Player Disability.¹³⁵ The new 2020 agreement reduces disability benefits by about twenty percent¹³⁶ for some players who receive total and permanent disability.¹³⁷ The 2020 CBA has an added offset provision, which deducts the amount players receive in social security benefits from their total and permanent disability benefits.¹³⁸ The players conceded to this cut in return for the lower vesting cutoff and pensions for pre-1993 players who only had three credited seasons.¹³⁹ If a player qualifies for and takes an NFL pension, the disability amount is reduced by that value as well.¹⁴⁰

D. Preemption under Labor Management Relations Act Section 301

The CBA is the players' strongest tool to address the opioid and medical care problem. They can negotiate for provisions to be included in the legally binding agreement that call for stronger protections and guarantees from the NFL that are necessary to

¹³⁴ Sally Jenkins and Rick Maese, *Do No Harm: Who Should Bear the Costs of Retired NFL Players' Medical Bills?* WASH. POST (May 9, 2013), https://www.washingtonpost.com/sports/redskins/do-no-harm-who-should-bear-the-costs-of-retired-nfl-players-medical-bills/2013/05/09/2dae88ba-b70e-11e2-b568-6917f6ac6d9d_story.html [<https://perma.cc/N7PQ-8L36>].

¹³⁵ NFL CBA 2020, *supra* note 89, at 316.

¹³⁶ Ryan Boysen, *NFL's New CBA Is a Raw Deal for Players, Attys Say*, LAW360 (Mar. 21, 2020, 12:02 AM), <https://www.law360.com/articles/1255578/nfl-s-new-cba-is-a-raw-deal-for-players-attys-say> [<https://perma.cc/YB4P-TQS9>].

¹³⁷ Ken Belson, *Help for Disabled N.F.L. Players Is Sacrificed for Pension Deal*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/sports/football/nfl-retired-players-benefits.html> [<https://perma.cc/U575-D7JB>].

¹³⁸ Ron Borges, *NFL Players Better Read the Fine Print before Approving Owners' New CBA Offer*, SPORTS ILLUSTRATED (Mar. 4, 2020), <https://www.si.com/nfl/talkoffame/nfl/nfl-players-better-read-the-fine-print-before-approving-owners-new-cba-offer> [<https://perma.cc/83V9-KUMC>].

¹³⁹ *Id.*

¹⁴⁰ Borges, *supra* note 138; Alex Raskin, *Eric Reid Demands an Investigation and a Re-vote on the NFL's New Collective Bargaining Agreement Because 'Language Cutting Disability Payments Was Mysteriously Added AFTER the Deal Was Approved'*, DAILY MAIL (Mar. 31, 2020, 9:06 AM), <https://www.dailymail.co.uk/news/article-8169395/Reid-promotes-probe-vote-post-ballot-changes-CBA.html> [<https://perma.cc/XT68-J24H>].

combat these issues. But the CBA also provides the NFL with one of its best defenses in court. Section 301 of the Labor Management Relations Act (“LMRA”) states, “suits for violation of contracts between an employer and a labor organization representing employees... may be brought in any district court of the United States having jurisdiction of the parties....”¹⁴¹ Courts have interpreted Section 301 to preempt state law claims that arise directly from a CBA or are “substantially dependent” on the analysis and interpretation of such an agreement.¹⁴² In *Allis-Chalmers Corp. v. Lueck*,¹⁴³ the Supreme Court extended preemption under Section 301 to state tort law claims.¹⁴⁴

The test for Section 301 preemption is two-pronged.¹⁴⁵ First, a court must determine whether the claim involves “rights conferred upon an employee by virtue of state-law [and] not by a CBA.”¹⁴⁶ If the right asserted exists solely due to the CBA, the claim is preempted.¹⁴⁷ However, if the right exists independent of the CBA, the court must then ask whether the claim is “substantially dependent on analysis of a collective-bargaining agreement.”¹⁴⁸ Courts must conduct a case-by-case analysis to determine whether the state law claim requires interpretation of a CBA to be resolved.¹⁴⁹ If the claim cannot be resolved without interpretation of the CBA, then the claim is preempted.¹⁵⁰ In the context of player lawsuits, the claims must be analyzed in relation to the provisions of the CBA or CBAs under which they played.¹⁵¹

¹⁴¹ Dulgarian, *supra* note 75, at 211.

¹⁴² Jordyne Johnson, *Dent v. National Football League: The Ninth Circuit Declines to Preempt Former Professional Football Players’ Claims Under Section 301 of the Labor Management Relations Act*, 26 SPORTS L. J. 285, 287 (2019).

¹⁴³ *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

¹⁴⁴ Scallan, *supra* note 74, at 328.

¹⁴⁵ Thomas Cain, *Painkillers and Preemption: “Dent”-ing the NFL’s Preemption Defense*, 54 WAKE FOREST L. REV. 859, 864 (2019).

¹⁴⁶ *Id.*

¹⁴⁷ *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007).

¹⁴⁸ *Id.*

¹⁴⁹ Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1855 (2014).

¹⁵⁰ Dulgarian, *supra* note 75, at 213.

¹⁵¹ *Id.*

II. DIFFICULTY OF OBTAINING RELIEF FOR OPIOID RELATED HARMS

A. *The NFL Opioid Litigation*

Two lawsuits filed in the Northern District of California further illustrate the extent of the opioid problem in the NFL. They also highlight the challenge players face in attempting to affect change through the court system because preemption challenges and statutes of limitations provide significant hurdles to obtaining relief. Additionally, the cases demonstrate the difficulty of avoiding harm before it occurs under the current NFL medical care system. Players face a pain management culture that encourages them to return to play before it is safe, increasing the risk of further injury and damage to their long-term health.

1. *Dent v. National Football League*

In 2014, a group of former players filed suit against the NFL for its opioid practices. The players alleged that the league had intentionally, recklessly, and negligently created and maintained a culture of drug misuse, putting profit ahead of player health.¹⁵² The plaintiffs in the suit comprised individuals who played between 1969 and 2012.¹⁵³ Although their individual careers spanned many decades, the players had similar stories of playing through gruesome injuries aided by powerful painkillers—with no warning of side effects or their long term implications.¹⁵⁴ The players' complaint alleged that the league distributed opioids, NSAIDs, and local anesthetics—often without a prescription and without regard to individual players' medical histories—in violation of federal drug laws.¹⁵⁵ As discussed above, lead plaintiff Richard Dent stated that he was regularly given opioids, anesthetics, and anti-inflammatory drugs to help him play through significant injuries.¹⁵⁶

¹⁵² Dent Plaintiffs' Second Amended Complaint, *supra* note 7, at 1.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.* at 4–7.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ See Hannah Albarazi, *NFL Hammered By 9th Circ. Panel over Painkiller Policies*, LAW360 (Mar. 12, 2020, 7:08 PM), <https://www.law360.com/articles/1243925/nfl-hammered-by-9th-circ-panel-over-painkiller-policies> [<https://perma.cc/A7Y7-84UK>].

Players on other teams joined the class action lawsuit due to their remarkably similar stories. Former offensive lineman Keith Van Horne played an entire season on a broken leg with the help of pain medication, albeit not purposefully.¹⁵⁷ He claimed he only realized his leg was broken five years later, having received pills to mask the pain in the intervening years.¹⁵⁸ Similarly, in 2011 or 2012, Super Bowl winning quarterback Jim McMahon first discovered that he had suffered a broken neck at some point during his fifteen-year career that ended in 1996.¹⁵⁹ He believes he suffered the injury during a 1993 playoff game; however, instead of holding him out of the game, medical staff gave him medication and permitted him to go back on the field.¹⁶⁰ Moreover, no one from the NFL ever told him of the injury.¹⁶¹ McMahon also claimed that during the course of his career, team doctors and trainers gave him thousands of injections and copious amounts of pills without warning him about the side effects.¹⁶² Another player, Marcellus Wiley, also said he received hundreds, if not thousands, of injections and pills without mention of side effects.¹⁶³ In 2014, Wiley was hospitalized and diagnosed with partial renal failure at only thirty-nine years old and without a history of kidney problems.¹⁶⁴ Kidney failure can be a side effect of Toradol,¹⁶⁵ a drug Wiley says he was given during his playing days.¹⁶⁶

In response to the lawsuit, the NFL brought two sets of motions to dismiss: the first claimed that the players' allegations were preempted by Section 30, and the second asserted that the statute of limitations had run.¹⁶⁷ Judge William Alsup of the Northern District of California granted the first set of motions to dismiss

¹⁵⁷ Dent Plaintiffs' Second Amended Complaint, *supra* note 7, at 2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 28.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 6.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Toradol*, RXLIST, <https://www.rxlist.com/toradol-drug.htm#description> [<https://perma.cc/MMM2-BH9B>] (last updated Aug. 1, 2018).

¹⁶⁶ Dent Plaintiffs' Second Amended Complaint, *supra* note 7, at 6.

¹⁶⁷ *Dent v. Nat'l Football League*, No. C-14-02324, 2014 WL 7205048, at *1, (N.D. Cal. Dec. 17, 2014), *rev'd and remanded*, 902 F.3d 1109 (9th Cir. 2018).

on preemption grounds.¹⁶⁸ Judge Alsup examined various provisions related to medical care in the numerous CBAs operative since 1982 and stated that although they didn't specifically address administration of painkillers, the court needed to interpret the provisions to determine the scope of the NFL's duties in regards to the players' claims.¹⁶⁹

The players appealed the district court decision to the Ninth Circuit.¹⁷⁰ Writing for the three-judge panel, Judge Tallman found that the players claims were not preempted under Section 301.¹⁷¹ The NFL's duty to exercise reasonable care in the distribution of medications did not arise out of the CBA,¹⁷² but rather out of the various statutes governing controlled substances.¹⁷³ The panel held similarly for the players' negligent hiring and retention,¹⁷⁴ negligent misrepresentation,¹⁷⁵ and fraud claims.¹⁷⁶

With the benefit of discovery, the plaintiffs filed an amended complaint in the district court.¹⁷⁷ This complaint alleged that the NFL had instituted a "return to play" business plan.¹⁷⁸ They alleged that the league prioritized profits over player safety, part of which included encouraging players to return to the field as quickly as possible.¹⁷⁹ The complaint stated that from the time they are rookies, players are told, "you can't make the Club in the tub,"¹⁸⁰ referring to players being unable to practice because they are in ice baths

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at *7–11.

¹⁷⁰ See Brief for Plaintiffs-Appellants, *Dent v. Nat'l Football League*, 902 F.3d 1109 (9th Cir. 2018) (No. 15-15143).

¹⁷¹ See *Dent v. Nat'l Football League*, 902 F.3d 1109, 1118–26 (9th Cir. 2018).

¹⁷² *Id.* at 1119.

¹⁷³ *Id.* ("The Controlled Substances Act, 21 U.S.C. § 801 et seq.; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 et seq.; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 et seq., set forth requirements governing how drugs are to be prescribed and labeled.").

¹⁷⁴ *Id.* at 1121–22.

¹⁷⁵ *Id.* at 1123–25.

¹⁷⁶ *Id.* at 1125.

¹⁷⁷ Third Amended Class Action Complaint, *Dent v. Nat'l Football League*, 384 F. Supp. 3d 1022 (N.D. Cal. 2019) (No. C-14-2324) [hereinafter *Dent Plaintiffs' Third Amended Complaint*].

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.* at 4.

¹⁸⁰ *Id.*

recovering from injury. The complaint also stated that team doctors and trainers knew they would be replaced if they allowed players to rest and recover, rather than rushing them back onto the field to bring the club revenue.¹⁸¹ As a result, the complaint alleged that the NFL cultivated a culture that encouraged the administration of dangerous opioid and painkillers to players in order to bring the league maximum revenue.¹⁸²

The complaint as amended also included medical records showing the frequency with which painkillers were administered to each of the players.¹⁸³ Often the records were incomplete, with dosages missing.¹⁸⁴ Documents and team professionals' statements showed that the teams and the league were aware of the mishandling of painkillers.¹⁸⁵ Bud Carpenter, a long-time Buffalo Bills trainer, stated that he witnessed team doctors give players injections without identifying the medication or its side effects.¹⁸⁶ One memorandum from the Atlanta Falcons said in part, "there is no evidence that the doctor actually knows what medication has been given to the players."¹⁸⁷ This lack of care allegedly continued even after the Drug Enforcement Agency ("DEA") investigated the clubs and is indicative of the NFL's laissez faire attitude toward opioids in its pursuit of higher revenues.¹⁸⁸

Unfortunately, the new information in the amended complaint did not survive the NFL's subsequent motion to dismiss for failure to state a claim.¹⁸⁹ Judge Alsup found that the players had failed to plead what the Ninth Circuit said was needed of them: that the NFL—not the individual clubs—had distributed controlled

¹⁸¹ *Id.*

¹⁸² *Id.* at 5–6.

¹⁸³ *Id.* at 8–38.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 56–66.

¹⁸⁶ Rick Maese, *NFL Abuse of Painkillers and Other Drugs Described in Court Filings*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/sports/redskins/nfl-abuse-of-painkillers-and-other-drugs-described-in-court-filings/2017/03/09/be1a71d8-035a-11e7-ad5b-d22680e18d10_story.htm [<https://perma.cc/9UF7-D6Q6>].

¹⁸⁷ Dent Plaintiffs' Third Amended Complaint, *supra* note 177, at 63.

¹⁸⁸ *Id.* at 66.

¹⁸⁹ *Dent v. Nat'l Football League*, 384 F. Supp. 3d 1022, 1035 (N.D. Cal. 2019).

substances and prescription drugs.¹⁹⁰ The court was not persuaded that the “return to play” business plan was enough to transform the actions of team doctors and trainers into the actions of the league.¹⁹¹ Additionally, Judge Alsup found that the plaintiffs failed to allege that the NFL had provided direct medical care or treatment to players that violated drug laws.¹⁹² In doing so, the court rejected the argument that the NFL had voluntarily assumed any duty to ensure that the clubs complied with the drug laws,¹⁹³ or that there was any special relationship between the players and the league.¹⁹⁴

This second dismissal has been appealed to the Ninth Circuit.¹⁹⁵ The same three judge panel that decided the first appeal heard oral argument on March 12, 2020.¹⁹⁶ Even if the panel sides with the players, ample time stands in the way of relief as a trial would still need to be held.

2. *Evans v. Ariz. Cardinals, LLC, et al.*

In 2015, a second group of former players and family members of former players filed a second suit in the Northern District of California.¹⁹⁷ Learning from the *Dent* preemption dismissal, this

¹⁹⁰ *Id.* at 1027.

¹⁹¹ *Id.* at 1029.

¹⁹² *Id.* at 1030. The plaintiffs alleged violations of various federal and state drug laws. At the federal level, these laws include the Comprehensive Drug Abuse Prevention and Control Act (the “Act”), specifically provisions in Title II, codified as 21 U.S.C. § 801, et seq.; the Controlled Substances Act; The Food, Drug, and Cosmetic Act (the “FDCA”); and regulations promulgated pursuant to these authorities. *See* Plaintiffs’ Third Amended Complaint, *supra* note 177, at 42.

¹⁹³ *Dent*, 384 F. Supp. 3d at 1033.

¹⁹⁴ *Id.* at 1034.

¹⁹⁵ *See* Brief for Plaintiffs-Appellants, *Dent v. Nat’l Football League* (9th Cir. 2019) (No. 19-16017).

¹⁹⁶ United States Court of Appeals for the Ninth Circuit, *15-15143 Richard Dent v. NFL*, YOUTUBE (Dec. 15, 2016),

https://www.youtube.com/watch?v=0gvVpIviwKw&feature=emb_title

[perma.cc/ZMW5-772T]; United States Court of Appeals for the Ninth Circuit, *19-16017 Richard Dent v. NFL*, YOUTUBE (Mar. 12, 2020).

https://www.youtube.com/watch?v=MfL9j6DI-Y8&feature=emb_title

[<https://perma.cc/76AW-CPYV>]. Judge Tallman replaced Judge Kozinski on the original panel after Judge Kozinski retired. *Id.*

¹⁹⁷ Class Action Complaint and Demand for Jury Trial, *Evans v. Ariz. Cardinals, LLC, et al.* (N.D. Cal. 2015) (No. 3:16-cv-01030) [hereinafter *Evans Class Action Complaint*].

time the plaintiffs named each individual team, rather than the NFL itself, as defendants to avoid a preemption challenge.¹⁹⁸ The claims in this lawsuit were similar to those in *Dent*. The *Evans* plaintiffs alleged intentional misrepresentation against the teams because the athletes suffered injuries that the clubs exacerbated through administering medications to keep them on the field.¹⁹⁹ The complaint similarly contained numerous accounts of team medical personnel providing players with opioids and other prescription painkillers, without informing them of the name of the medication or warning them of any side effects, so the players could continue to play.²⁰⁰

The lead plaintiff, Etopia Evans, represented her late husband Charles Evans's estate.²⁰¹ The plaintiffs claimed that the NFL fostered a culture in which club employees—general managers, coaches, doctors, trainers, and the players themselves—have a financial interest in returning players to the field as soon as possible.²⁰² Throughout Evans's career, team doctors and trainers gave him pills and injections to help him play through pain.²⁰³ After his football career, he became addicted to painkillers.²⁰⁴ Charles Evans died of an enlarged heart in 2008, eight years after retiring from football and without a family history of heart issues.²⁰⁵ Similarly, former offensive lineman Jerry Wunsch recalled trainers walking up and down the aisles on return flights from away games handing out unmarked envelopes full of painkillers.²⁰⁶ Prior to a game in 2003, Seahawks head coach Mike Holmgren asked Wunsch if he was able to play through an injury.²⁰⁷ After Wunsch replied that he did not think so, Coach Holmgren called Seahawks trainer Sam Ramsden

¹⁹⁸ See *id.* at 2–8; see also Sheilla Dingus, *Painkiller Abuse in the NFL Part III: A Tale of Two Lawsuits*, ADVOC. FOR FAIRNESS IN SPORTS (Jan. 31, 2017), <https://advocacyforfairnessinsports.org/current-litigation/nfl-painkiller-lawsuits/painkiller-abuse-in-the-nfl-part-iii-a-tale-of-two-lawsuits/> [https://perma.cc/352V-Q37F].

¹⁹⁹ Evans Class Action Complaint, *supra* 197, at 10.

²⁰⁰ See *id.* at 10–64.

²⁰¹ *Id.*

²⁰² *Id.* at 31–42.

²⁰³ *Id.* at 57.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 58.

²⁰⁶ *Id.* at 63.

²⁰⁷ *Id.*

and asked, “what can we do to help Mr. Wunsch play today?”²⁰⁸ Ramsden called team doctors, who gave Wunsch a Toradol shot and 750 milligrams of Vicodin.²⁰⁹ When the medication began to wear off at half time, he received an additional 750 milligrams of Vicodin so he could play in the second half of the game.²¹⁰ The doctors administered these medications despite the fact that Wunsch was already prescribed other anti-inflammatories.²¹¹ The “return to play” policy led doctors and trainers to give players dangerous quantities and combinations of drugs, placing the players’ health second to profits.²¹²

The clubs brought a motion to dismiss based on Section 301 preemption.²¹³ Unlike in *Dent*, however, Judge Alsup here denied the motion.²¹⁴ He found that the *Evans* complaint differed in two ways.²¹⁵ First, the complaint was addressed to the individual clubs, not the NFL.²¹⁶ Second, the conduct alleged in the complaint was intentional—rather than negligent—conduct.²¹⁷ As a result, the claims fell into the illegality exception to Section 301.²¹⁸ The court also rejected the club’s motion to dismiss as barred by the statute of limitations on the limited record before it.²¹⁹ The players later filed an amended complaint, adding a civil RICO claim²²⁰ as well as a state law conspiracy claim.²²¹ These claims aimed to address the

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 63–64.

²¹⁰ *Id.* at 64.

²¹¹ *Id.*

²¹² *See Id.* at 32.

²¹³ *See* Motion to Dismiss, *Evans v. Ariz. Cardinals, LLC*, 231 F. Supp. 3d 342 (N.D. Cal. 2017) (No. C–16–01030), 2016 WL 3566945, at *2.

²¹⁴ *Id.* at *5.

²¹⁵ *Id.* at *3.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at *4. In *Cramer v. Consol. Freightways, Inc.*, the court emphasized that Section 301 does not permit parties to a CBA to contract for or immunize what is illegal. *Id.* at *4 (citing *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir. 2001)).

²¹⁹ *Id.* at *4.

²²⁰ *Evans v. Ariz. Cardinals, LLC*, 231 F. Supp. 3d 342, 346 (N.D. Cal. 2017). To show a RICO claim, the plaintiffs were required to show that the clubs (1) conducted or conspired to conduct (2) an enterprise (3) through a pattern (4) of racketeering activity (known as “predicate acts”) (5) causing injury to plaintiffs’ “business or property.” *Id.*

²²¹ *Id.*

“return to play” policy, in which teams conspired to give increasing amounts of pain medication to players to keep them on the field and increase profits.²²²

In response, the clubs moved to dismiss the amended complaint.²²³ This time the court sided with the clubs, finding that the four-year statute of limitations had run on the RICO claim.²²⁴ The court also dismissed the conspiracy claims, stating that no facts in the amended complaint showed “any agreement or understanding between the clubs to adhere to a return-to-play practice or policy.”²²⁵ As to the intentional misrepresentation and concealment claims, the court granted the motion to dismiss for all but eight teams.²²⁶ The court found that claims had been adequately pled against only those teams, but granted leave for the plaintiffs to amend the complaint to better plead their claims against the remaining teams.²²⁷

The players filed a second amended complaint on March 10, 2017 to better satisfy the court as to the claims against the other clubs.²²⁸ The clubs again moved to dismiss.²²⁹ On May 15, 2019, Judge Alsup granted the clubs’ motion to dismiss and summary judgment motion for a majority of the claims.²³⁰ The court found that the claims of intentional misrepresentation against only twelve

²²² See Plaintiffs’ Second Amended Complaint at 22, *Evans v. Ariz. Cardinals, LLC*, 252 F. Supp. 3d 855 (N.D. Cal. 2017) (No. 3:16-cv-01030) [hereinafter *Evans Second Amended Complaint*].

²²³ *Evans*, 231 F. Supp. 3d at 346.

²²⁴ *Id.* at 347. The limitations period for civil RICO claims is four years. It begins to run when a plaintiff knows or should know of their underlying injury. *Id.* at 346–47. The Ninth Circuit affirmed the dismissal of the RICO claims in a February 6, 2019 memorandum. *Evans v. Ariz. Cardinals, LLC*, 761 F. App’x 701, 703 (9th Cir. 2019).

²²⁵ *Evans*, 231 F. Supp. 3d at 356.

²²⁶ *Id.* at 355. “The foregoing specific allegations indicate that the Lions, Raiders, Broncos, Packers, Seahawks, Dolphins, Chargers, and Vikings drove certain plaintiffs to return to play at the cost of their health or safety, contrary to the clubs’ representations that they would prioritize the latter. The amended complaint therefore pleads claims of intentional misrepresentation and concealment as to those specific clubs and plaintiffs with particularity.” *Id.*

²²⁷ *Id.* at 357.

²²⁸ *Evans Second Amended Complaint*, *supra* note 222, at 2.

²²⁹ *Evans v. Ariz. Cardinals, LLC*, 252 F. Supp. 3d 855, 857 (N.D. Cal. 2017).

²³⁰ *Id.* at 857.

of the thirty-two teams were adequately pled under Rule 9(b)²³¹ and further that only the claims of Alphonso Carreker and Reggie Walker survived summary judgment.²³² The remaining players' claims were barred by the statute of limitations.²³³

In an order dated July 21, 2017, Judge Alsup granted the clubs' motion for summary judgment on the intentional misrepresentation claims against the three remaining defendants.²³⁴ The court found that the workers' compensation statutes in California, Colorado, and Wisconsin—homes to the three remaining defendant clubs—provided exclusive remedies for Carreker's and Walker's claims.²³⁵ This was the final blow to the players' case, ending the *Evans* litigation.²³⁶

These lawsuits drew attention to the league's drug administration practices. The Drug Enforcement Agency ("DEA") launched a probe into claims that NFL players had been illegally given painkillers to keep them on the field.²³⁷ The DEA also investigated whether athletic trainers, who lack the proper medical license, administered drugs.²³⁸ Agents interviewed team doctors and trainers from multiple clubs as part of the investigation.²³⁹ The NFL claimed

²³¹ *Id.* at 864. "Rule 9(b) provides, 'In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.' Such averments of fraud must be accompanied by 'the who, what, when, where, and how' of the alleged misconduct." *Evans*, 231 F. Supp. 3d at 351–52 (quoting FED. R. CIV. P. 9(b)).

²³² *Evans*, 252 F. Supp. 3d at 865. See generally *Alphonso Carreker Stats*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/C/CarrAl20.htm> [<https://perma.cc/P4DZ-TMGG>]; *Reggie Walker Stats*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/W/WalkRe00.htm> [<https://perma.cc/BT6L-YEDQ>].

²³³ *Evans*, 252 F. Supp. 3d at 864.

²³⁴ *Evans v. Ariz. Cardinals, LLC*, 262 F. Supp. 3d 935, 942 (N.D. Cal. 2017). Alphonso Carreker had claims against both the Denver Broncos and Green Bay Packers. Reggie Walker's claim was against the San Diego (now Los Angeles) Chargers. *Id.* at 937–38.

²³⁵ *Id.* at 939–942.

²³⁶ *Id.* at 942.

²³⁷ Susan Candiotti, *DEA Probing Alleged Prescription Drug Abuse in NFL, Source Says*, CNN (July 15, 2014), <https://www.cnn.com/2014/07/14/us/dea-drug-probe-nfl/index.html> [<https://perma.cc/9DZ4-9V8Z>].

²³⁸ Mary Kay Mallonee & Mariano Castillo, *DEA Questions Team Doctors After NFL Games*, CNN (Nov. 17, 2014), <https://www.cnn.com/2014/11/16/us/dea-nfl-investigation/index.html> [<https://perma.cc/4NPJ-KZ3H>].

²³⁹ *Id.*

that it was complying with the law, pointing to a 1994 letter from the DEA that stated team doctors could administer drugs on road trips.²⁴⁰ However, this ignored the fact that the DEA had warned the NFL against this practice in 2011.²⁴¹ In 2015, the league finally changed its drug policy to require the use of local doctors to administer prescription medication to traveling teams,²⁴² but mishandling of painkillers persisted.²⁴³

The two player lawsuits demonstrate the extent and seriousness of the pain management crisis in the NFL. Both complaints contain harrowing stories detailing players' struggles with pain both during and after their playing careers.²⁴⁴ The most significant cause of these issues is the "return to play" culture that pervades the NFL and its clubs.²⁴⁵ All actors in the NFL—owners, general managers, coaches, and medical personnel—have financial incentives for players to return to the field as soon as possible after injury, even if it jeopardizes their long term health. Players too are driven to risk their health and return to the field early because if they are unable to perform, they may be out of a job.²⁴⁶ The result of these strong financial incentives is a culture that tolerates, if not encourages, the overuse and abuse of opioids and other prescription painkillers among players. While the former players in *Dent* and *Evans* sought to bring attention to and obtain relief for the harm they suffered as a result

²⁴⁰ Rick Maese, *In Letter to Congress, NFL Says Doctors Were Following DEA Guidance*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/sports/redskins/in-letter-to-congress-nfl-says-doctors-were-following-dea-guidance/2017/04/20/81c1294a-2608-11e7-a1b3-faff0034e2de_story.html [https://perma.cc/HVR5-42UL].

²⁴¹ *Id.*

²⁴² Rick Maese, *In Meeting with DEA, NFL Says It Has a 'Compliance Plan' for Prescription Drug Handling*, WASH. POST (June 2, 2017), https://www.washingtonpost.com/sports/redskins/nfl-met-with-dea-on-prescription-drug-handling/2017/06/02/b919c724-47b6-11e7-bcde-624ad94170ab_story.html [https://perma.cc/Y8N6-B84Q].

²⁴³ Lindsey Adler, *Lawsuit: DEA Warnings Didn't Stop NFL Doctors from Repeatedly Breaking Federal Drug Law*, DEADSPIN (Mar. 10, 2017, 3:42 PM), <https://deadspin.com/lawsuit-dea-warnings-didnt-stop-nfl-doctors-from-repea-1793165928> [https://perma.cc/Y6DU-UCPX].

²⁴⁴ See *Dent* Plaintiffs' Second Amended Complaint, *supra* note 7, at 4; *Evans* Class Action Complaint, *supra* note 197, at 58.

²⁴⁵ See *Dent* Plaintiffs' Second Amended Complaint, *supra* note 7, at 4; *Evans* Class Action Complaint, *supra* note 197, at 66.

²⁴⁶ Plaintiffs' Class Action Complaint and Demand for Jury Trial, *supra* note 18, at 34.

of the “return to play” policy, the outcomes demonstrate that this is a difficult task.

B. Inability to Remedy the “Return to Play” Culture in the Courts

Despite the variety of claims the players brought in their suits, they have been unable to obtain relief in court. The player complaints in both suits persuasively described the “return to play” culture of the NFL, but neither prevailed.²⁴⁷ In *Dent*, the players named the NFL itself as the defendant.²⁴⁸ The court found that while the league had an incentive to facilitate a “return to play” business plan, the players had not shown that the NFL itself had distributed drugs negligently or violated drug laws in pursuit of such a plan.²⁴⁹ They failed to show that the NFL in some way directed or instructed teams in their distribution of prescription painkillers.²⁵⁰ In *Evans*, the court dismissed the claims because it was unpersuaded that there was an “agreement or understanding between the clubs to adhere to a return-to-play practice or policy.”²⁵¹

The outcome of these two cases shows the difficulty of obtaining relief for the harmful effects of the “return to play” culture in court. First, the naturally aligned financial incentives of the NFL and its constituent clubs prevent players from demonstrating the meeting of the minds necessary to succeed on various conspiracy claims. The players showed that the incentives of the league, club management, and medical personnel are aligned in such a way as to create an environment where they hurried players back to the field by taking large quantities of prescription painkillers. All involved stood to gain from the huge profits the NFL generated when players were on the field and performing for fans on game day, rather than sitting injured on the sidelines. The difficulty lies in showing the presence of an agreement between these parties to foster such a culture to succeed on claims in court.²⁵²

²⁴⁷ *Id.* at 35–36; *Dent* Plaintiffs’ Third Amended Complaint, *supra* note 177, at 1–8.

²⁴⁸ *Dent* Plaintiffs’ Second Amended Complaint, *supra* note 7, at 1.

²⁴⁹ *Dent v. Nat’l Football League*, 384 F. Supp. 3d 1022, 1031 (N.D. Cal. 2019).

²⁵⁰ *Id.* at 1029.

²⁵¹ *Evans v. Ariz. Cardinals Football Club, LLC*, 231 F. Supp. 3d 342, 356 (N.D. Cal. 2017).

²⁵² *Id.*

The players had the benefit of discovery in two separate suits but were unable to show that the NFL directed teams to administer excessive amounts of opioids or that the teams agreed among themselves to do so.²⁵³ The players likely could not show either an explicit agreement to adhere to a “return to play” policy between the clubs or direct evidence that the NFL instructed the clubs to administer opioids and other drugs in excessive quantities because there was none.

Rather, each club’s individual economic incentives encouraged it to administer excessive amounts of opioids, Toradol, and other painkillers to players. As a result, team professionals kept players on the field to continue accumulating revenue. Since all thirty-two clubs have similar interests, there was no need to come to an agreement to do something that would individually benefit them. Additionally, because the clubs’ incentives were aligned with those of the NFL, the latter had no need to direct teams as to how they should administer painkillers to keep players on the field and for revenue thriving. All involved likely decided to put player health second to profits, whether consciously or not, because it was in their economic interest to do so. Without evidence of an explicit agreement, claims in future lawsuits that require a meeting of the minds are similarly likely to fail—again, leaving the players with no relief for the harms they suffered.

Second, the statute of limitations represents a barrier for players to achieve recourse from the courts because many of their ailments only manifest themselves years after retirement. Once the players realize the extent of their injuries and the connection to painkillers, the statute of limitations has oftentimes already lapsed. As a result, they struggle to even have the opportunity to present their claims against the league and clubs in court, as occurred in *Evans*.²⁵⁴

Workers’ compensation is a third hurdle players face. A judge may find that workers’ compensation, rather than the courts, provides the proper remedy for players’ injuries, as Judge Alsup

²⁵³ *Dent*, 384 F. Supp. 3d at 1035; *Evans*, 231 F. Supp. 3d at 356.

²⁵⁴ *Id.* at 347.

did in for Alphonso Carreker and Reggie Walker in *Evans*.²⁵⁵ Players may still face difficulty getting relief through workers' compensation because of statutes of limitation for bringing claims or maximum age cutoffs for claims by professional athletes.²⁵⁶ Moreover, the NFL has lobbied states to change their laws to make it more difficult for players to bring workers' compensation claims.²⁵⁷ Such lobbying efforts resulted in a change to California's workers' compensation statute.²⁵⁸ Previously, California was one of the few states that allowed players to bring workers' compensation claims for cumulative trauma, as opposed to discrete single-event injuries.²⁵⁹ This rule is even applied to those players who only played games in the states as members of a visiting team.²⁶⁰ The new California law bars such claims, removing yet another avenue for players to get relief.²⁶¹ The clubs (and their insurers) may also challenge a workers' compensation award in court, putting another roadblock between players and a remedy.²⁶² These obstacles demonstrate that the courts offer little opportunity for players to obtain relief for harm they have already suffered.

²⁵⁵ *Evans v. Ariz. Cardinals, LLC*, 252 F. Supp. 3d 855, 865 (N.D. Cal. 2017).

²⁵⁶ Sarah Farrell, *Ex-NFL Players Seek Worker's Compensation for Head Injuries with Mixed Results*, GLOBAL SPORTS MATTERS (Aug. 14, 2019), <https://globalsportmatters.com/health/2019/08/14/former-nfl-players-seek-workers-compensation-for-head-injuries/> [<https://perma.cc/DF75-F3JW>].

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Marc Lifsher, *Pro Athletes Nationwide Cashing in on California Workers' Comp*, SEATTLE TIMES (Feb. 23, 2013), <https://www.seattletimes.com/nation-world/pro-athletes-nationwide-cashing-in-on-california-workers-comp/> [<https://perma.cc/9BTU-2KV2>].

²⁶⁰ *Id.*

²⁶¹ Armand Emamdjomeh and Ken Bensinger, *NFL Workers' Comp Victory Comes at a Price*, L.A. TIMES (Feb. 1, 2014), <https://www.latimes.com/business/la-fi-nfl-claims-20140201-dto-htmstory.html> [<https://perma.cc/L2LG-HK45>].

²⁶² Louise Esola, *NFL Player's Cumulative Injury Comp Claim in California Denied*, BUS. INS. (June 29, 2018, 1:29 PM), <https://www.businessinsurance.com/article/20180629/NEWS08/912322353/NFL-player-Larry-Triplett-cumulative-injury-comp-claim-in-California-denied> [<https://perma.cc/VUQ8-K87U>].

C. *Shortcomings of the New CBA and Possible Preemption Concerns*

1. Inadequate Medical Care

As discussed above, the new 2020 CBA includes a significantly expanded article thirty-nine which covers player medical care. Among the additions is the new Prescription Medication and Pain Management Program in section twenty, which establishes a Joint Pain Management committee to set guidelines for club medical personnel to follow when administering pain medication to players. The committee is also tasked with tracking all prescriptions issued by NFL team doctors. Section twenty also requires teams to provide player education about prescription pain medication and hire a pain management specialist.²⁶³

While the Joint Pain Committee and pain medication guidelines are steps in the right direction, they fail to address the “return to play” culture. Team management and physicians still have economic incentives to return players to the field as soon as possible. The CBA states that the Joint Pain Committee guidelines must reflect the FDA mandate that players receive warnings about provided prescription drugs.²⁶⁴ While this sounds like a significant improvement, this FDA requirement was already in place during the period covered by the lawsuits.²⁶⁵ The NFL physicians still did not follow the regulation.²⁶⁶ Providing players with education about prescription painkillers may allow them to make informed decisions, but it does not remove the pressure to return to the field quickly. Players may still turn to powerful, dangerous painkillers to keep playing out of fear of losing their job or roster spot.

Section twenty does provide an enforcement procedure that can punish clubs for failing to follow the Joint Pain Committee guidelines and reporting requirements.²⁶⁷ This procedure again facially appears like a win for the players, but a deeper look reveals

²⁶³ See *supra* text accompanying notes 99–100.

²⁶⁴ NFL CBA 2020, *supra* note 89, at 237–38.

²⁶⁵ See Dent Plaintiffs’ Second Amended Complaint, *supra* note 7, at 12.

²⁶⁶ Dent Plaintiffs’ Third Amended Complaint, *supra* note 177, at 10.

²⁶⁷ NFL CBA 2020, *supra* note 89, at 239–41.

that it is not. While any player, the NFLPA, or NFL management council may trigger the procedure by filing a complaint, economic incentives will likely prevent them from doing so. Players have very little to gain from filing a complaint, but a lot to lose. They run the risk of being ostracized by the league or labeled as a troublemaker, putting future employment in jeopardy. The NFLPA will likely only file a complaint at the request of a player, but for the same reasons a player may fear his identity will be revealed. The NFL Management Council has even less of an incentive to file a complaint because they work for the teams. Additionally, the discipline a club would face is light, likely only a fine, which is paltry in comparison to what they gain by putting players back on the field with the aid of painkillers.

Finally, section twenty and article thirty-nine overall present significant preemption concerns. Under Section 301 of the LMRA, state law claims may be preempted if it is necessary to reference a collective bargaining agreement to adjudicate the claims.²⁶⁸ Section 301 preemption has been used repeatedly to defend against lawsuits²⁶⁹ brought by players, notably in the well-publicized Chronic Traumatic Encephalopathy (“CTE”) lawsuit that ultimately led to the \$765 million settlement in 2013.²⁷⁰ The increase in the size of article thirty-nine in the 2020 CBA—from three and a half in the 2011 CBA to twenty-seven pages in the 2020 agreement—and the addition of section twenty greatly expands the universe of issues that will require interpretation of the CBA in litigation. For instance, courts will need to analyze section twenty, which did not exist at the time of the *Dent* or *Evans* lawsuits, to determine the clubs’ responsibilities regarding prescription pain medication. This will result in the preemption of any state law claims related to opioid distribution and handling. Similarly, the grievance and enforcement procedure in section twenty also points in favor of preemption because courts may find that the player can obtain the appropriate remedy through the enforcement process without the need for litigation.

²⁶⁸ See *infra* Part I.D.

²⁶⁹ See Dulgarian, *supra* note 75, at 214–18.

²⁷⁰ Telis, *supra* note 149, at 1845.

2. Medical Marijuana Remains Unavailable

The 2020 CBA also includes changes to the league's Substance Abuse Policy. However, under the new policy marijuana remains a banned substance.²⁷¹ The league did make some concessions with its marijuana policy, such as shrinking testing windows, raising the threshold for a positive test, and eliminating suspensions.²⁷² However, the problem remains that marijuana is still a banned substance and unavailable as an alternative to opioids and other painkillers.²⁷³

By disallowing alternatives such as medical marijuana under the Substance Abuse Policy, the league forces players to rely on dangerous painkillers and opioids to manage their pain. The policy states that the substance abuse "can lead to on-the-field injuries...and to personal hardship,"²⁷⁴ and also notes that substance abuse has tragically led to the death of several NFL players.²⁷⁵ The *Dent* and *Evans* litigations illustrate that dangerous and powerful opioids and painkillers, which the policy effectively dictates that players use, cause those exact harms. However, studies have shown that marijuana can alleviate chronic pain, leading to less of a need for dangerous opioids.²⁷⁶ Left without access to these alternatives, players are forced to continue to take dangerous prescription painkillers that can mask injuries that can lead to further harm.

The league's attitude toward marijuana is anachronistic. The sole side-effect of marijuana mentioned in the 2020 CBA is schizophrenia, harkening back to the views portrayed in the 1936 film *Reefer Madness*.²⁷⁷ The league justifies its ban of marijuana by citing concern over player health while embracing the use of far more dangerous opioids and painkillers.²⁷⁸ As long as the league continues to list marijuana on its banned substances list, players

²⁷¹ NFL SUBSTANCE ABUSE POL'Y, *supra* note 103, at 7.

²⁷² Anderson, *supra* note 109.

²⁷³ *Id.*; Paylor, *supra* note 111; Florio, *supra* note 112.

²⁷⁴ NFL SUBSTANCE ABUSE POL'Y, *supra* note 103, at 1.

²⁷⁵ *Id.*

²⁷⁶ Thomas, *supra* note 116.

²⁷⁷ REEFER MADNESS (George A. Hirliman Productions 1936).

²⁷⁸ Smith, *supra* note 127; Steve Politi, *NFL to Players in Pain: Get Hooked on Opioids Rather than Try Marijuana*, NJ.COM (May 8, 2018), https://www.nj.com/giants/2018/05/mike_james_marijuana_fight_nfl_column_politi.html [<https://perma.cc/KM25-G485>].

will continue to face increased risk due to opioids and prescription pain medication.

3. Insufficient Retirement Benefits

As the *Dent* and *Evans* lawsuits show, many former players suffer from significant health problems due to painkiller use during their careers.²⁷⁹ However, their pain does not end with their careers.²⁸⁰ Players who meet the vesting requirement—three years under the 2020 CBA—continue to receive health insurance for five years after they retire.²⁸¹ Those players who fail to qualify find themselves without any health insurance after they hang up their cleats.²⁸² This leaves many players with significant pain from injury exacerbated by opioids and painkillers, but no way to receive treatment.²⁸³ Additionally, many of the players' injuries do not manifest until years later, leaving them without recourse due to the statute of limitations even if they had met the vesting requirement.²⁸⁴ Unless they find a new job, secure insurance through another employer, or purchase health insurance on their own, these players are often left without coverage.

The players who are unable to work due to injuries may have no other choice but to file disability or workers' compensation claims. In both cases, they often face opposition from the league and their former clubs.²⁸⁵ The NFL's disability board denies nearly sixty percent of all claims.²⁸⁶ Even those players who successfully navigated the league's arcane disability filing procedure will receive reduced benefits due to the new social security offset provision in the 2020 CBA.²⁸⁷ Whereas before players received NFL disability payment *plus* their social security disability, now they receive

²⁷⁹ See generally *Dent* Plaintiffs' Second Amended Complaint, *supra* note 7, at 4; Plaintiffs' Class Action Complaint and Demand for Jury Trial, *supra* note 18, at 63.

²⁸⁰ See generally *Cottler et al.*, *supra* note 63, at 193.

²⁸¹ *Jenkins & Maese*, *supra* note 134.

²⁸² *See id.*

²⁸³ *See Bieler*, *supra* note 57.

²⁸⁴ *Jenkins & Maese*, *supra* note 134.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Borges*, *supra* note 138.

NFL disability *minus* the amount of their social security benefits.²⁸⁸ This new provision reduces the resources available to former players struggling with pain and puts a significant burden on the families who were counting on those benefits. Additionally, players often find themselves facing difficulty in obtaining workers' compensation because they must battle their former employers who challenge their claims—as of 2013, the league was fighting over 3,000 claims.²⁸⁹ Players also face statute of limitations and ever-changing state laws, thanks to NFL lobbying efforts.²⁹⁰

The NFL boasts that it has one of the most robust benefit plans of any profession, but even still it does not adequately address the needs of its former players.²⁹¹ There are approximately 18,000 former players who cannot afford their own health care.²⁹² Many of these players have injuries that are a result of opioid and painkiller use during their careers.²⁹³ Without changes to the benefits offered to former players in the next CBA, that number will continue to increase.

As shown in the *Dent* and *Evans* litigation, players face significant challenges in obtaining relief for opioid related harms in court.²⁹⁴ Statutes of limitation and preemption, particularly in light of changes to the 2020 CBA, threaten the success of future litigation.²⁹⁵ Although the 2020 CBA includes alterations aimed at addressing the opioid issue, it still falls short and leaves the players shouldering the burden of the opioid problem. It does not do enough to address the conditions that make it difficult for players to avoid harm in the first instance, or through means other than the courts. First, team physicians, trainers, and management still face a conflict of interest when it comes to player medical care. Similarly, health insurance is limited to five years post-retirement and even then only

²⁸⁸ *Id.*

²⁸⁹ Jenkins & Maese, *supra* note 134.

²⁹⁰ *See supra* Section I.A.

²⁹¹ Jenkins & Maese, *supra* note 134.

²⁹² *See Id.*

²⁹³ Cottler et al., *supra* note 63, at 193.

²⁹⁴ *See Dent v. Nat'l Football League*, 902 F.3d 1109 (9th Cir. 2018); *Evans v. Ariz. Cardinals, LLC*, 252 F. Supp. 3d 855 (N.D. Cal. 2017).

²⁹⁵ Farrell, *supra* note 256.

for players who meet the vesting requirements.²⁹⁶ Along the same lines, filing an NFL disability claim remains complicated, but still successful players will see their benefits cut due to the new social security offset provision.²⁹⁷ Finally, former players who file workers' compensation claims face challenges by their former teams that delays, if not totally thwarts, their ability to obtain relief.²⁹⁸ The NFL and NFLPA must incorporate changes to future CBAs to better care for and prevent opioid related harm to both active and former players.

III. REMEDIES

To fully address the opioid and painkiller problem in the NFL, the remedies must eliminate the “return to play” policy described in *Dent* and *Evans*. They must also provide alternatives to these dangerous substances, as well as aid former players who are already suffering from opioid use to obtain the needed treatment. The NFL should adopt the following key remedies for current players: creating an independent health care system and allowing players to have access to medical marijuana as alternatives to opioids and Toradol. For retired players, increasing access to post-retirement health care and disability benefits is of paramount importance. Due to the difficulty, if not impossibility, of obtaining relief through the courts, it is of vital importance that the NFLPA negotiate to have such remedies included in the next CBA. Procedural hurdles in court will remain, but addressing the above issues in the CBA will reduce the need for judicial remedies by preventing harm before it occurs and providing more benefits to aid players after their careers are over.

A. Independent Medical Care

The “return to play” plan that was the focal point of the *Dent* and *Evans* litigation shows that conflicts of interest are a significant

²⁹⁶ Jenkins & Maese, *supra* note 134.

²⁹⁷ Borges, *supra* note 138.

²⁹⁸ See *Evans*, 252 F. Supp. 3d at 855.

problem in the NFL's handling of opioids.²⁹⁹ Under the current medical system in the NFL, team physicians are employed directly by the team.³⁰⁰ Due to the pressure from their employers to quickly return players to the field, even the most well-intentioned team physician risks subconsciously putting the player's health second to their own job security. This culture exacerbates the over-prescription of opioids and painkillers by team doctors.

To prevent such results, the NFL and NFLPA should implement a system of independent medical treatment for players. A Harvard Medical School study, funded in part by the NFLPA, recommended increasing the independence of team physicians.³⁰¹ Under this system one set of doctors, the "Players' Medical Staff," would be responsible for providing player treatment.³⁰² These doctors would be selected and reviewed by a new "Medical Committee" comprised of representatives from the NFL and NFLPA.³⁰³ The committee would also set physician compensation, which teams would continue to be responsible for paying.³⁰⁴ Rather than working for the club, however, the physicians' sole responsibilities would be to the players.³⁰⁵ Medical treatment would be provided without any communication or input from the team,³⁰⁶ allowing doctors to only consider the best interests of the players. Although they would be compensated by the teams, these doctors would only be reviewed and potentially fired by the joint Medical Committee, relieving them of the conflict of interest.³⁰⁷ Part of this review would evaluate whether the doctor has followed all legal and ethical requirements in distributing prescription pain medication.³⁰⁸ A second set of doctors, the "Club Evaluation Doctor[s]," would be responsible for evaluating players for

²⁹⁹ See Dent Plaintiffs' Third Amended Complaint, *supra* note 177 at 2; Plaintiffs' Class Action Complaint and Demand for Jury Trial, *supra* note 18, at 43–51.

³⁰⁰ See NFL CBA 2020, *supra* note 89.

³⁰¹ Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, 7 HARV. J. SPORTS & ENT. L. 1, 116 (2016).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

business purposes,³⁰⁹ such as administering a pre-employment physical exam.³¹⁰ They would advise teams as to the potential usefulness of a player to the club³¹¹ and the wisdom of offering a contract or not, which would be in-dependent of the Players' Medical Staff's determinations.³¹² These doctors would not provide any treatment whatsoever to players.³¹³

The NFL has already acknowledged the efficacy of an independent approach to medical care in another context: concussions.³¹⁴ As part of the NFL's concussion protocol, three independent neurotrauma consultants monitor all games from the sideline looking for players exhibiting signs of concussions.³¹⁵ This independent specialist exists to avoid the pressures that a team-affiliated physician may have to put a player back on the field despite concussion symptoms.³¹⁶ The independent physician in the painkiller context would achieve the same goal as an independent team physician specialist in the concussion setting: removing any potential conflict of interest.

Unfortunately, the NFL issued a response to the Harvard study stating that they do not believe there is an "inherent conflict of interest" in medical care.³¹⁷ The NFL listed advances in medical care over the years, ironically highlighting the independent neurologists in the concussion protocol as a key improvement while simultaneously stating that there is no need for independent medical

³⁰⁹ *Id.* at 119.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See Chris Mortensen, *NFL Adds Neurotrauma Consultants as Part of Revised Concussion Protocol*, ABC NEWS (Dec. 24, 2017, 11:49 AM), <https://abcnews.go.com/Sports/nfl-adds-neurotrauma-consultants-part-revised-concussion-rotocol/story?id=51979198> [<https://perma.cc/M78F-9UL4>].

³¹⁵ *NFL Head, Neck and Spine Committee's Concussion Protocol Overview*, PLAYSMARTPLAYSAFE.COM (June 22, 2019), <https://www.playsmartplaysafe.com/newsroom/videos/nfl-head-neck-spine-committees-concussion-protocol-overview/> [<https://perma.cc/QMH9-7Z8J>].

³¹⁶ See *id.*

³¹⁷ Letter from Jeffrey A. Miller, NFL Executive Vice President Health & Safety Initiatives, to Christopher R. Duebert, et al. (Nov. 1, 2016).

care overall.³¹⁸ NFLPA executive director DeMaurice Smith's statements also indicate that he is hesitant to advocate for any measure that limits the clubs' ability to hire their own team doctors.³¹⁹ At a symposium at the University of Houston, Smith was asked whether the NFLPA believes there is an inherent conflict of interest in NFL medical care.³²⁰ He responded that the Hippocratic oath was sufficient to address those concerns,³²¹ despite the NFLPA's own 2013 poll indicating that seventy-eight percent of players do not trust team medical staffs.³²² He also compared health care in the NFL to that of a large university, saying "[w]e would never say we need to come up with a committee of students and the university to create a neutral health care system."³²³

Negotiations for the next CBA will not begin until the end of the decade.³²⁴ In the intervening years, the players must garner support to implement an independent medical system in the next agreement. Such a system is in the best interest of both the players and of the league because, first, the risk of player health being put second to profits is greatly reduced, ensuring that the players will receive proper care and face fewer difficulties later in life. The league will also benefit. Eliminating the conflict of interest will reduce potential lawsuits about medical care as well as possibly lessen the volume of players who will need disability or workers' compensation due to higher quality care.

B. Medical Marijuana as an Opioid Alternative

Another change that would benefit active players is permitting the use of medical marijuana as an alternative to opioids and

³¹⁸ *Id.*

³¹⁹ See Robert Klemko, *The NFL Can't Outrun a Legacy of Abuse*, SPORTS ILLUSTRATED (Mar. 28, 2017), <https://www.si.com/nfl/2017/03/28/nfl-toradol-lawsuit-painkillers-nflpa-union-team-doctor-conflict-interest> [<https://perma.cc/BNZ3-YEM2>].

³²⁰ *See id.*

³²¹ *See id.*

³²² Marc Sessler, *NFLPA: 78 Percent of Players Don't Trust Team Doctors*, NFL.COM (Jan. 31, 2013), <https://www.nfl.com/news/nflpa-78-percent-of-players-don-t-trust-team-doctors-0ap1000000133534> [<https://perma.cc/96RY-GG3Z>].

³²³ Klemko, *supra* note 319.

³²⁴ See generally NFL CBA 2011, *supra* note 79; NFL CBA 2020, *supra* note 89 (CBAs released approximately every ten years).

painkillers. Some current players, such as star wide receiver DeAndre Hopkins, believe that allowing these alternatives can only help.³²⁵ Tennessee Titans linebacker Derrick Morgan signed a letter in conjunction with Doctors for Cannabis Regulation³²⁶ requesting that the NFL consider changes to its marijuana policy.³²⁷ Another recently retired player, Eugene Monroe, has written about and discussed how marijuana helped his body recover from the physical toll of his NFL career.³²⁸ Even prominent owner of the Dallas Cowboys Jerry Jones has shown support for dropping the league's prohibition on marijuana.³²⁹

In addition, many former players tout the benefits of marijuana for pain management.³³⁰ Franco Harris, Todd Herremanns, Ryan O'Callaghan, and Randy Moss all support medical marijuana use.³³¹ Another retired player, Terrell Davis, said that medical marijuana derivative products such as cannabidiol ("CBD") have allowed him to live normally without the need for opioids or

³²⁵ See Conway, *supra* note 115.

³²⁶ See generally DR.'S FOR CANNABIS REGUL., <https://dfer.org/> [<https://perma.cc/7WWH-RYZ3>]; Monroe, *infra* note 328 and accompanying text.

³²⁷ See Annie Bach Yen Nguyen, *The Alternative to Opioids: Marijuana's Ability to Manage Pain Caused by Injuries Sustained in the National Football League*, 19 TEX. REV. ENT. & SPORTS L. 63, 70 (2019).

³²⁸ See Albert Breer, *Eugene Monroe Believes the NFL Will Soon Allow Marijuana Use—But at What Cost?*, SPORTS ILLUSTRATED (May 30, 2019), <https://www.si.com/nfl/2019/05/30/eugene-monroe-nfl-marijuana-policy-pain-management> [<https://perma.cc/KE8A-M3YQ>]. See also Eugene Monroe, *My Body Remembers*, THE PLAYERS TRIB. (Aug. 3, 2017), <https://www.theplayerstribune.com/en-us/articles/eugene-monroe-nfl-opioids-cannabis-my-body-remembers> [<https://perma.cc/T9DY-E4GR>] (Monroe "speaks on behalf of Doctors for Cannabis Regulation.").

³²⁹ See Nguyen, *supra* note 327, at 70–71.

³³⁰ See Tyler Clifford, *NFL should let players use CBD for pain management, says Hall of Fame rusher Terrell Davis*, CNBC (Aug. 28, 2019, 4:33 PM), <https://www.cnbc.com/2019/08/28/terrell-davis-says-nfl-should-let-players-use-cbd-for-pain-management.html> [<https://perma.cc/R3SX-WLXP>]; Scott Keys, *Former NFL players call for medical marijuana to be taken off banned list*, THE GUARDIAN (Jan. 3, 2016, 8:00 AM), <https://www.theguardian.com/sport/2016/jan/03/former-nfl-players-call-for-medical-marijuana-to-be-taken-off-banned-list> [<https://perma.cc/JK2Y-DJ3P>]; Freeman, *supra* note 115.

³³¹ See Nguyen, *supra* note 327, at 70.

painkillers.³³² Former Hall of Famer Jack Ham even claims that medical marijuana helped him overcome his opioid addiction.³³³

Studies support Ham's claim, finding that treatment consisting of a combination of marijuana and opioids may allow for lower doses of opioids to be administered, lessening side effects.³³⁴ Harvard Medical School conducted a study in 2015 that examined twenty-eight clinical trials of medical marijuana and found strong evidence that its use aids in the treatment of chronic pain and other ailments.³³⁵ Another review of similar studies found that "THC and cannabinoids may [even] be superior to opioids in alleviating" some pain.³³⁶ Despite the promise that these alternatives show, they are banned under the NFL's Substance Abuse Policy.³³⁷

Other professional sports leagues do not take a similarly hard stance against marijuana. The Canadian Football League ("CFL") does not test for marijuana at all.³³⁸ Along the same lines, the National Hockey League ("NHL") tests a portion of player samples as part of its Substance Abuse and Behavioral program, but carries no penalty for a positive test.³³⁹ Finally, Major League Baseball ("MLB") recently announced that it would no longer test players for

³³² See Clifford, *supra* note 330.

³³³ See Nguyen, *supra* note 327, at 70.

³³⁴ See *id.* at 74.

³³⁵ See *id.* at 72–73.

³³⁶ *Id.* at 73 (quoting J. Manzanres et al., *Role of the Cannabinoid System in Pain Control and Therapeutic Implications for the Management of Acute and Chronic Pain Episodes*, 4 CURRENT NEUROPHARMACOLOGY 239, 248 (2006)).

³³⁷ See NFL SUBSTANCE ABUSE POL'Y, *supra* note 103, at 1. Marijuana is explicitly banned under the policy. Although CBD is not explicitly addressed, many such products, even those that are advertised as THC free, may contain trace amounts of the substance, making them risky for active players to use. See also Rick Maese, *An NFL Running Back Says He Needs One Thing to Continue His Football Career: Weed*, WASH. POST (May 1, 2018, 12:44 PM), <https://www.washingtonpost.com/news/sports/wp/2018/05/01/an-nfl-running-back-says-he-needs-one-thing-to-continue-his-football-career-weed/> [https://perma.cc/WK9B-33Y5].

³³⁸ Donovan Bennett, *Cannabis & the CFL: Randy Ambrosie on What Legalization Means for the CFL*, SPORTSNET (Oct. 15, 2018, 3:17 PM), <https://www.sportsnet.ca/football/cfl/cannabis-cfl-randy-ambrosie-legalization-means-cfl/> [https://perma.cc/756L-L8Y8].

³³⁹ See Emily Kaplan, *Is the NHL the Future of Marijuana in Pro Sports? Why It Could Be*, ESPN (Mar. 7, 2019), https://www.espn.com/nhl/story/_/id/26046596/is-nhl-future-marijuana-pro-sports-why-be [https://perma.cc/NLL3-ZK96].

marijuana, including minor leaguers who are not a party to the MLB CBA.³⁴⁰ These leagues' approaches to marijuana show that there is no inherent reason to test for marijuana. Under a similar policy, NFL players would be able to use medical marijuana as an alternative to opioids without fear of league punishment. Given the high rate of injury³⁴¹ and the extent of the opioid problem in the NFL, the league should adopt one of the above softer approaches.

If the NFL is hesitant to remove marijuana from its banned substance list completely, another approach would be to expand players' ability to receive therapeutic use exemptions. Former running back Mike James attempted to obtain such a TUE for medical marijuana.³⁴² The league denied his request, stating that their medical advisers did not agree with James' doctor that marijuana was essential for him and that his diagnosis of chronic pain was sufficient for a TUE.³⁴³ TUEs for medical marijuana are an uphill battle for players because of the leagues' skepticism about marijuana and CBD.³⁴⁴ Players also face difficulty obtaining TUEs because of the requirement that no other non-banned alternative treatment will be available in order to qualify for one. Because opioids themselves are a non-banned treatment available to players, they cannot get a TUE for medical marijuana. The NFL should adjust its TUE policy to permit players who want to avoid powerful opioid or NSAID painkillers to use medical marijuana as an alternative.

³⁴⁰ See Mark Osborne, *MLB Removes Marijuana from Drugs of Abuse; Will Now Test for Opioids*, ABC NEWS (Dec. 12, 2019, 4:25 PM), <https://abcnews.go.com/Sports/mlb-removes-marijuana-drugs-abuse-now-test-opioids/story?id=67696240> [https://perma.cc/WEL9-UZDT] (stating that it will treat marijuana-induced conducts similarly to alcohol-induced conducts and that players may face "mandatory evaluation, voluntary treatment, and possibility of discipline by Player's Club or the Commissioner's Office."); Mike Axisa & Dayn Perry, *MLB's New Drug Program Will Test Players for Opioids; Minor-Leaguers Will no Longer be Tested for Marijuana*, CNN SPORTS (Dec. 12, 2019, 2:58 PM), <https://www.cbssports.com/mlb/news/mlbs-new-drug-program-will-test-players-for-opioids-minor-leaguers-will-no-longer-be-tested-for-marijuana/> [perma.cc/43CU-KUHJ].

³⁴¹ See Deubert et al., *supra* note 301, at 54.

³⁴² See Maese, *supra* note 337; Conway, *supra* note 117.

³⁴³ Maese, *supra* note 342.

³⁴⁴ See Kyle Jaeger, *NFL Says 'Hype' Over CBD Isn't Backed by Science*, MARIJUANA MOMENT (Jan. 16, 2020), <https://www.marijuanamoment.net/nfl-says-hype-over-cbd-isnt-backed-by-science/> [https://perma.cc/9PB9-D4RP].

There have already been small steps forward, such as a willingness to explore alternatives as shown by a recent NFL and the NFLPA forum to discuss CBD.³⁴⁵ The two sides are also committed to conducting joint research into opioid alternatives, including marijuana, under the new CBA.³⁴⁶ With so much scientific evidence supporting the use of medical marijuana, and so many current and former players showing support, the NFL must adjust its harsh stance on the subject.

C. Increased Retirement Benefits

The NFL should remove the vesting requirement players must reach to qualify for post-retirement health insurance and the five-year limit on the duration of those benefits. Lifetime health insurance would help retired players address the harmful effects of prior opioid use during their careers more fully. Many players have passionately advocated for such changes to their post-career benefits.³⁴⁷ In a letter to Commissioner Roger Goodell, one group of hall of famers promised to boycott future hall of fame induction ceremonies until their demands for increased benefits are met.³⁴⁸ Chief among these demands is lifetime healthcare.³⁴⁹ Removing the vesting requirement and five-year limit will allow a greater number of players to keep their insurance and get treatment before problems become debilitating and lead to further opioid use and dependence.

Since other leagues have adopted lifetime health insurance for former players, this proposal is a feasible solution. MLB players have the option to buy into their health insurance plan for life after

³⁴⁵ See Judy Battista, *NFL, NFLPA Hold Forum on CBD Use for Pain Management*, NFL.COM (Jan. 14, 2020, 4:08 AM), <https://www.nfl.com/news/nfl-nflpa-hold-forum-on-cbd-use-for-pain-management-0ap3000001096643> [https://perma.cc/T2VF-LFGC]. Although the NFL met with industry leaders, it remains committed to its stance that cannabis is not strong enough to support its use as an alternative treatment despite being a promising product. *Id.*

³⁴⁶ See *Id.*

³⁴⁷ See Nate Jackson, *The NFL Broke Former Players like Me. Here's One Way to Fix Us*, DEADSPIN (Oct. 23, 2018, 1:28 PM), <https://deadspin.com/the-nfl-broke-former-players-like-me-heres-one-way-to-1829914431> [https://perma.cc/6BD2-HZ7P].

³⁴⁸ See ASSOC. PRESS, *N.F.L. Hall of Famers Demand Health Insurance and Share of Revenue*, N. Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/sports/football/nfl-hall-of-fame-eric-dickerson.html> [https://perma.cc/3WRK-T4MH].

³⁴⁹ See *id.*

retirement.³⁵⁰ The NHL, the league with the most comparable injury rate to the NFL, offers players who have participated in at least 160 games—about two seasons—to continue buying into their health insurance for life post-retirement.³⁵¹ Similarly, the NBA's Retiree Medical Plan provides former players lifetime health insurance free of charge.³⁵² All of these plans greatly exceed the plan offered by the NFL. While offering free health care to NFL players would be costly, the players could buy into the plan just as they do in the MLB to offset some of the cost.³⁵³ Other revenue streams could also be diverted to fund such a plan. Implementing lifetime health insurance will take careful planning, but the retired players will benefit greatly and the league would also gain an advantage by avoiding future lawsuits from players who have no other recourse for relief.

The league can similarly improve benefits in player pensions. Pensions, like health insurance, are limited to players who meet the vesting requirement.³⁵⁴ By contrast, NHL and MLB players are eligible for pension plans as long as they played a single day in the league.³⁵⁵ Increasing the number of players who are eligible for pensions—a planned benefit for which the NFL can calculate costs—may offset the expense of providing other unplanned benefits such as disability benefits, of which the total is uncertain because the NFL cannot determine now who will need disability later.³⁵⁶ This could allow for the new social security disability offset provision to be removed in the next CBA, returning players to the amount of benefits they received under the 2011 CBA. Disability benefits could also be streamlined to allow players to more easily access a system that has been described by experts as arcane and

³⁵⁰ See CHRISTOPHER R. DEUBERT ET AL., *COMPARING HEALTH-RELATED POLICIES & PRACTICES IN SPORTS: THE NFL AND OTHER PROFESSIONAL LEAGUES* 128 (Petrie-Flom Ctr. for Health Law Policy, Biotechnology, and Bioethics, 2017).

³⁵¹ See *id.* at 93.

³⁵² *Id.*

³⁵³ See *e.g.*, Jackson, *supra* note 347.

³⁵⁴ See NFL CBA 2020, *supra* note 89, at 301.

³⁵⁵ DEUBERT ET AL., *supra* note 350.

³⁵⁶ See *id.* at 129.

difficult to navigate.³⁵⁷ With more players receiving pensions, there will likely be less of a need both for disability benefits overall and complex administrative processes to secure them.

Increasing retired players' benefits will not be cheap, but a league that takes in tens of billions of dollars per year can assess its budget to procure the necessary funds. Since the players are the ones who generate the revenue, they should share in the reward. The NFL and the NFLPA have a decade to formulate a strategy to implement greater retired player benefits in the next CBA. Given the sacrifice the players made in service of the league's success, their long-term health should be among the top priorities during those negotiations.

CONCLUSION

The *Dent* and *Evans* lawsuits demonstrate the limitations of finding relief in the NFL through the courts, and the shortcomings of the new CBA to remedy the opioid problem. The NFL and NFLPA must take action to address this issue in the next CBA. Without the players, there is no NFL. Players devote their lives to the league, training long hours during the season and offseason so they can perform at an elite level each week for the fans and their teams. The NFL's current failure to address the opioid crisis signals fans that they are indifferent to their players' wellbeing as long as profits are high. While the NFL remains popular and its fanbase is extremely loyal, participation in youth football programs has been steadily declining due in part to parents' concerns over the health risks the game poses.³⁵⁸ Super Bowl and regular season viewership have also declined in recent years, with some speculating that concerns over the league's handling of health and

³⁵⁷ Ken Belson, *He Signed the Denial Letter. Now He Helps Former N.F.L. Players Get Benefits*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/sports/football/nfl-retirement-benefits.html> [https://perma.cc/8FBP-6GQA].

³⁵⁸ Bob Cook, *The Slow Drip of Football's Youth Participation Decline Continues Apace*, FORBES (Apr. 19, 2019), <https://www.forbes.com/sites/bobcook/2019/04/19/the-slow-drip-of-footballs-youth-participation-decline-continues-apace/#2a0c4e7b65cc> [https://perma.cc/9QH9-FER5].

safety issues are partly to blame.³⁵⁹ Adopting the solutions proposed here will protect players who have dedicated their lives to the game, while simultaneously alleviating these fans' concerns.

³⁵⁹ See Dante Chinni & Sally Bronston, *Concussions and Protests: Football's Popularity Drops*, NBC NEWS (Feb. 4, 2018), <https://www.nbcnews.com/storyline/super-bowl/concussions-protests-football-s-popularity-drops-n844506> [<https://perma.cc/EP82-UPGS>]; Sarah Perez, *Super Bowl LIII Set Streaming Records, While TV Viewership Saw Massive Drop*, TECHCRUNCH (Feb. 5, 2019, 10:02 AM), <https://techcrunch.com/2019/02/05/super-bowl-liii-set-streaming-records-while-tv-viewership-saw-massive-drop/#:~:text=According%20to%20the%20measurement%20firm's,from%202017's%20game%20on%20Fox> [<https://perma.cc/GR4K-WQWE>].