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Tyler V. Friederich

*Washington University School of Law*

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# THE BOOGEYMAN: DEREK BOOGAARD AND THE DETRIMENTAL EFFECTS OF SECTION 301 PREEMPTION

## INTRODUCTION

This Note focuses on the preemptive effect of section 301 of the Labor Management Relations Act (LMRA)<sup>1</sup> in the suit against the National Hockey League (NHL) by the Estate of former NHL player Derek Boogaard.<sup>2</sup> The Note will contrast *Boogaard v. National Hockey League*, in which section 301 preempted the Estate's negligence claims, with several National Football League (NFL) cases. *Boogaard* will also be contrasted with *In re National Hockey League Players' Concussion Injury Litigation*, a similar case brought by a class of NHL players in which the court declared that section 301 did not preempt claims for negligence at the motion to dismiss stage.<sup>3</sup> The following analysis of section 301 preemption and *Boogaard* will reveal inequities and flaws inherent in section 301 preemption that should be removed by Congress. It also analyzes avenues future litigants may pursue to circumvent section 301 preemption altogether.

First, this Note will discuss Derek Boogaard's career as an NHL enforcer. Then, it will explain the history of the LMRA and section 301 preemption. A synopsis of relevant NFL cases will follow and provide examples of when section 301 has, and has not, preempted negligence claims brought by former players. Next, the Note will analyze *Boogaard* and contrast its outcome with the aforementioned NFL cases. An analysis of *Concussion Injury* will follow that discusses why its outcome differed from *Boogaard*. Finally, this Note will argue that the preemptive effect of section 301 did not serve its intended purpose in *Boogaard* and that Congress should place restrictions in its application—such as extending the statute of limitations period—and show how future NHL players can apply lessons learned from *Boogaard* and *Concussion Injury* to circumvent section 301 preemption in state-law tort claims.

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1. Section 301(a) of the LMRA provides an avenue for an employee to sue their employer for breach of a contract, such as a collective bargaining agreement. Section 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2012).

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

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

## I. MEET THE BOOGEYMAN, DEREK BOOGAARD

During the 1987–88 NHL season, players engaged in an astounding 1,183 fights in 841 games—an average of approximately 1.31 fights per game.<sup>4</sup> The number of fights has decreased significantly over the years, with a fight occurring only about once in three NHL games during the 2015–16 season.<sup>5</sup> Many of these bouts are fought by enforcers, players who “are seen as working-class superheroes—understated types with an alter ego willing to do the sport’s most dangerous work to protect others. And they are underdogs, men who otherwise might have no business in the game.”<sup>6</sup>

In a 2011 poll, NHL players voted Minnesota Wild enforcer Derek Boogaard as the league’s toughest player.<sup>7</sup> Known as “The Boogeyman” since his days as a minor league hockey player,<sup>8</sup> the intimidating and physically imposing 6’7”, 265 lb. Boogaard almost didn’t make the NHL.<sup>9</sup> But after making his NHL debut in 2005, Boogaard proceeded to play in the NHL for six years with the Minnesota Wild and New York Rangers.<sup>10</sup> During that time, Boogaard played in 277 NHL games, logging three goals and thirteen assists and amassing 589 penalty minutes—an impressive number for someone who played sparingly in a limited number of games.<sup>11</sup> On May 13, 2011, Boogaard’s life and NHL career came to a tragic end

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4. *NHL Fights per Game, Year-by-Year*, DROP YOUR GLOVES, <http://dropyourgloves.com/Fights/FightsPerGameChart.aspx?League=1> (last visited Aug. 18, 2017).

5. *Id.* There were 395 fights in 1,230 NHL games—an average of 0.32 fights per game.

6. John Branch, *Derek Boogaard: Blood on the Ice*, N.Y. TIMES (Dec. 4, 2011), [http://www.nytimes.com/2011/12/05/sports/hockey/derek-boogaard-blood-on-the-ice.html?pagewanted=4&\\_r=0](http://www.nytimes.com/2011/12/05/sports/hockey/derek-boogaard-blood-on-the-ice.html?pagewanted=4&_r=0).

7. *The Best and Worst, A Hockey Players’ Poll*, THE GLOBE AND MAIL (Jan. 30, 2011, 10:20 PM), <https://www.theglobeandmail.com/sports/hockey/ahockey-players-poll/article564149/> (asking 318 players a set of questions).

8. See Neil Davidson, *The Sad Rise and Fall of Derek Boogaard*, THE CANADIAN PRESS, GLOBAL NEWS (Oct. 7, 2014), <http://globalnews.ca/news/1603417/the-sad-rise-and-fall-of-hockeys-derek-boogaard/> (describing how scouts for a Western Hockey League team, the Regina Pats, claimed Boogaard’s junior rights and nicknamed him “The Boogeyman”); see also Branch, *supra* note 6 (stating that when Boogaard played for the Houston Aeros of the American Hockey League—an affiliate of the Minnesota Wild and one rung below the NHL level—the Aeros would replay Boogaard’s fights on the video board, labeled the “Boogeyman Cam”).

9. Branch, *supra* note 6 (“Boogaard had size and determination, but not much else, when the Wild chose him in the seventh round of the 2001 N.H.L. draft. He trained with a Russian figure skater. He continued lessons to bolster his boxing. He was sent for seasoning in the minor leagues, where Wild officials told the coaches to mold Boogaard into an N.H.L. enforcer . . . ‘We didn’t give him a chance, and we were the guys trying to help him,’ said Matt Shaw, who coached Boogaard in the minor leagues and the N.H.L. ‘Give him credit. This guy willed his way to the N.H.L.’”).

10. *Derek Boogaard*, NHL, <https://www.nhl.com/player/derek-boogaard-8469647?stats=career-r-nhl&season=20102011> (last visited Aug. 18, 2017). Boogaard played for the Rangers during the 2010–11 season after playing five seasons with the Minnesota Wild. *Id.*

11. *Id.*

when he died of an accidental pain medication overdose at the age of twenty-eight.<sup>12</sup>

Like other enforcers, Derek Boogaard struggled with injuries and attempted to conceal the many concussions he likely sustained during his NHL career.<sup>13</sup> His troubles with pain medication addiction began during the 2007–08 season with the Minnesota Wild, when doctors prescribed Boogaard pain medicine for his ailing back.<sup>14</sup> Engaging in fights and exposing himself to the dangers inherent in playing in the NHL only exacerbated the issue, as “Derek would have teeth knocked out and be prescribed vast amounts of painkillers by team doctors.”<sup>15</sup> The following year, doctors prescribed Boogaard with Percocet (a combination of acetaminophen and oxycodone) after he underwent surgery on his nose and shoulder.<sup>16</sup> Whether as a result of medication or concussions, Boogaard’s mental state began to suffer.<sup>17</sup> Later in 2009, “a doctor asked Boogaard to name every word he could think of that began with the letter R. He could not come up with any.”<sup>18</sup>

NHL team physicians “prescribed Boogaard a total of 1,021 pills during the 2008–09 season with the Minnesota Wild.”<sup>19</sup> Boogaard’s drug addiction ultimately led to his admittance into the NHL’s Substance Abuse Behavioral Health Program (SABH) in 2009.<sup>20</sup> Yet even while enrolled in the SABH, “there was little communication between doctors, so [Boogaard] would get a prescription from one doctor and then go to another for more pills.”<sup>21</sup>

After participating in an “Aftercare Program” upon release from the SABH, Boogaard ultimately relapsed in 2010.<sup>22</sup> Despite being notified of

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12. Davidson, *supra* note 8.

13. See Branch, *supra* note 6 (“There is no incentive to display weakness. Most enforcers do not acknowledge concussions, at least until they retire. Teams, worried that opponents will focus on sore body parts, usually disguise concussions on injury reports as something else. In Boogaard’s case, it was often ‘shoulder’ or ‘back,’ two chronic ailments . . .”).

14. *Id.* Boogaard’s back troubles likely began in the minor leagues, where “his back was so perpetually sore that he once could not stand up after lacing his skates.” *Id.*

15. Davidson, *supra* note 8.

16. Branch, *supra* note 6. Boogaard had nose surgery, then surgery on his shoulder seven days later. *Id.*

17. *Id.* At one point, “a neurologist asked Boogaard to estimate how many times his mind went dark and he needed a moment to regain his bearings after being hit on the head, probable signs of a concussion. Four? Five? Boogaard laughed. Try hundreds, he said.” *Id.*

18. *Id.*

19. Melanie Romero, *Check to the Head: The Tragic Death of NHL Enforcer, Derek Boogaard, and the NHL’s Negligence—How Enforcers Are Treated as Second-Class Employees*, 22 JEFFREY S. MOORAD SPORTS L.J. 271, 274 (2015).

20. *Id.* at 282.

21. Davidson, *supra* note 8. At one point, “Boogaard had at least 25 prescriptions for oxycodone and hydrocodone, a total of 622 pills from 10 doctors—eight Wild doctors, an oral surgeon in Minneapolis and a doctor from another team.” *Id.*

22. Romero, *supra* note 19, at 282. See also John Branch, *In Hockey Enforcer’s Descent, a Flood of Prescription Drugs*, N.Y. TIMES (June 4, 2012), <http://www.nytimes.com/2012/06/04>

the relapse by Boogaard's father, NHL physicians still prescribed Boogaard 366 pills during the 2010–11 season.<sup>23</sup> After six positive urine tests for Oxymorphone, Hydromorphone, and Hydrocode, the NHL finally admitted Boogaard into the SABH's Authentic Recovery Center for opioid dependence.<sup>24</sup> Even though Boogaard "resisted treatment and showed indifference in therapy sessions," he was released on his own recognizance "to attend his sister's college graduation."<sup>25</sup> One day later, Boogaard was found dead after he overdosed on pain medications.<sup>26</sup>

Posthumous tests indicated that Boogaard suffered from Chronic Traumatic Encephalopathy (CTE), a progressive neuro-degenerative disease.<sup>27</sup> CTE is likely caused, at least in part, by concussions.<sup>28</sup> The tests revealed that CTE mostly affected the areas of Boogaard's brain that "controlled judgment, inhibition, mood, behavior, and impulse control."<sup>29</sup>

Boogaard's Estate filed state-law negligence claims in Illinois against the NHL for failure to prevent over-prescription of addictive medications, failure to provide Boogaard with a chaperone upon his temporary release from the Authentic Recovery Center, and failure to warn Boogaard of the risks associated with leaving the facility.<sup>30</sup> The Estate also alleged that the NHL negligently monitored Boogaard for brain trauma during his career, ultimately leading to Boogaard's death.<sup>31</sup> On a motion to remand the case to state court, the court analyzed two of the Estate's claims and held that section 301—which provides an avenue for an employee to bring suit against their employer for a breach of contract between the employer and the employee's labor union—completely preempted those claims.<sup>32</sup>

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4/sports/hockey/in-hockey-enforcers-descent-a-flood-of-prescription-drugs.html (noting that Boogaard's father spoke with a Rangers senior official in October, 2010 about Boogaard's "renewed drug problem.").

23. *Id.*; see also Davidson, *supra* note 8 (Boogaard was "still getting pills from Wild doctors" after he signed with the Rangers).

24. Romero, *supra* note 19, at 282–83.

25. *Id.* at 283. However, it is interesting to note that an NHL substance abuse counselor exchanged seven texts with Boogaard the night before he died. Davidson, *supra* note 8.

26. Romero, *supra* note 19, at 283.

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

28. Mayo Clinic Staff, *Chronic Traumatic Encephalopathy*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/basics/definition/con-20113581> (last visited Aug. 18, 2017). Note that "CTE is a very controversial condition that is still not well understood. Researchers do not yet know the frequency of CTE in the population and do not understand the causes." *Id.*

29. Boogaard, 126 F. Supp. 3d at 1015–16.

30. Nelson v. Nat'l Hockey League, 20 F. Supp. 3d 650, 655 (N.D. Ill. 2014).

31. *Id.* at 653.

32. *Id.* at 652. The court only analyzed Counts III and IV to determine whether to remand the case to Illinois state court. Because the court found that Counts III and IV were preempted by section 301, it denied the Estate's motion to remand. *Id.* at 658–59. "Complete" preemption occurs where "certain federal statutes are construed to have such 'extraordinary' preemptive force that state-law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal

Because the NHL's Collective Bargaining Agreement (CBA) governed player safety, the preempted claims would need to be based on a breach of contract under section 301.<sup>33</sup> After the subsequent court in *Boogaard* determined that the remaining claims were also preempted by section 301, the Estate was left with no recourse or relief on those claims because the statute of limitations had already run.<sup>34</sup>

## II. HISTORY OF THE LMRA

Congress enacted the National Labor Relations Act (NLRA) “to give employees the right to collective bargaining.”<sup>35</sup> It can preempt state regulation when such regulation “interferes with the rights and duties of parties to a collective bargaining agreement.”<sup>36</sup> Section 301 of the LMRA provides an avenue for an employee to sue their employer for a violation of a CBA.<sup>37</sup> By enacting section 301, Congress intended to provide federal courts with jurisdiction to enforce CBAs and to “compel uniformity in the application of federal labor law.”<sup>38</sup>

Congress's power to preempt is derived from the Commerce Clause of the United States Constitution, which allows Congress “to regulate labor relations in industries affecting interstate commerce.”<sup>39</sup> Preemption occurs where “a local regulation . . . conflicts with federal law or would frustrate the federal scheme.”<sup>40</sup> Therefore, section 301 preempts a “state rule that purports to define the meaning or scope of a term in a contract suit” to ensure

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claims—i.e., completely preempted.” *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 (2d Cir. 2005). Complete preemption differs from “ordinary” preemption in that a case cannot be removed from state court to federal court if the defendant raises an ordinary preemption defense. *Id.* at 273; *see also* *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

33. *Id.* at 657–58.

34. *See infra* notes 183 and 186; *see also* *Boogaard*, 126 F. Supp. 3d at 1027.

35. Robert E. Oakes, *Miller v. AT&T Network Systems: Toward Consistency in Collective Bargaining Agreement Preemption of State Law Causes of Action*, 21 PAC. L. J. 201, 204 (1989).

36. *Id.* at 205.

37. Tara Selver, *Labor Law—The United States Supreme Court Alters National Labor Policy: Bowen v. United States Postal Service*, 16 N.M. L. REV. 153, 153 (1986) (noting that “Section 301 of the Labor Management Relations Act provides the basis for an employee’s right to sue the employer for violation of a collective bargaining agreement.”); *see also* Martha E. Lipchitz, *Section 301 of Labor Management Act Preempts State Discrimination Claims Requiring Interpretation of Corresponding Agreements—Fant v. New England Power Service Co.*, 239 F.3d 8 (1st Cir. 2001), 35 SUFFOLK U. L. REV. 429, 429 (2001) (stating that section 301 “provides a federal cause of action in suits alleging violations of a collective bargaining agreement (CBA)”).

38. Oakes, *supra* note 35, at 206; *see also* *Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (concluding that “in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules”).

39. Oakes, *supra* note 35, at 202–03. The Supremacy Clause also provides Congress with the power to preempt. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (“Congress’ power to preempt state law is derived from the Supremacy Clause of Art. VI of the Federal Constitution.”).

40. *Allis-Chalmers*, 471 U.S. at 209 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

uniformity of enforcement.<sup>41</sup> For instance, “when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law.”<sup>42</sup>

Initially, section 301 only preempted suits that alleged contract violations.<sup>43</sup> However, as the Court in *Allis-Chalmers Corp. v. Lueck* elucidated, “if the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations.”<sup>44</sup> That Court worried that litigants could otherwise circumvent the application of section 301 by masking contract claims as tort claims, thereby evading the uniform application of federal labor law.<sup>45</sup> For instance, in *Lingle v. Norge Division of Magic Chef, Inc.*, the plaintiff argued that her employer retaliated against her for filing a worker’s compensation claim, which constituted a state-law tort.<sup>46</sup> The Seventh Circuit held that section 301 preempted the plaintiff’s retaliatory discharge claim because “the facts underlying that claim were the same as those applicable to a grievance under the just cause provision of the [CBA].”<sup>47</sup> However, the Supreme Court disagreed, stating:

[E]ven if dispute resolution pursuant to a [CBA], on the one hand, or state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is ‘independent’ of the agreement for § 301 pre-emption purposes.<sup>48</sup>

Therefore, preemption will not necessarily result when a labor contract (such as a CBA) provides an employee with “a remedy for conduct that also

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41. *Id.* at 210.

42. *Id.* at 220. Section 301 enjoys a particularly broad scope because it was designed to favor arbitration. Arbitrators, and not the courts, are vested with authority to interpret labor contracts. Therefore, the “preference for arbitration further ensures that federal rather than state law will govern the construction of labor contracts.” Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. L. 429, 435 (1998).

43. *Allis-Chalmers*, 471 U.S. at 202.

44. *Id.* at 210. According to the Court, “questions relating to what parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.” *Id.* at 211. In *Allis-Chalmers*, the plaintiff brought a state-law tort claim against her employer, Allis-Chalmers, for bad-faith handling of an insurance claim. *Id.* at 205–06. Plaintiff filed a disability claim with the insurance company after getting injured on the job. *Id.* at 205. His claim was approved, and he received disability benefits, but Allis-Chalmers allegedly interfered with the payments. *Id.*

45. *Id.* at 212.

46. 486 U.S. 399, 399 (1988).

47. Befort, *supra* note 42, at 435.

48. *Lingle*, 486 U.S. at 409–10.

violates state law.”<sup>49</sup> Instead, preemption is only limited to circumstances in which courts are required to interpret the CBA to resolve the claim.<sup>50</sup> That is, if resolution of the claim requires the court to interpret the CBA itself, then the claim is preempted; however, if the claim can be resolved without interpreting the CBA, then the claim will *not* be preempted.<sup>51</sup> As the Court in *Allis-Chalmers* asserted, section 301 will preempt a tort claim that is “inextricably intertwined with consideration of the terms of the labor contract.”<sup>52</sup>

Thus, the analysis appears to be straightforward—whenever a state-law claim, including claims for tortious conduct, necessarily requires an interpretation of the CBA’s provisions in order to be resolved, the claim is preempted by section 301. However, as the following analysis of NFL cases and *Boogaard* will demonstrate, section 301 preemption can result in unforeseen and likely unintended negative consequences for litigants.

### III. DIFFERING RESULTS REGARDING SECTION 301 PREEMPTION FOR STATE/COMMON LAW CAUSES OF ACTION IN NFL CASES

Prior to *Boogaard*, several NFL players or their estates filed suit against the NFL and their respective teams for tortious conduct, including their failure to warn about the risks of concussions.<sup>53</sup> Many of these claims alleged that the NFL was negligent, and several cases demonstrated that even with a CBA in place, section 301 may not preempt those claims when a lack of connection exists between the claims and the CBA. Reasons that negated section 301 preemption included: 1) the NFL’s duties owed to the players did not arise out of the CBA;<sup>54</sup> 2) the CBA did not require a player to receive treatment at an NFL team’s facility;<sup>55</sup> and 3) while the NFL’s duty owed to the player could be ascertained by examining the NFL’s legal relationship with the player as established by the CBA, a separate state-law

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49. Befort, *supra* note 42, at 435.

50. *Id.* Claims typically preempted by section 301 include: “a. Claims concerning benefits provided under the terms of a collective bargaining agreement; b. Contract claims alleging that the employer breached a promise to an employee covered by a collective bargaining agreement; c. Tort claims alleging a failure of a union to fulfill duties under a collective bargaining agreement to maintain a safe working environment; and d. Claims alleging a breach of an implied covenant of good faith and fair dealing.” *Id.* at 436.

51. See *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc) (“If the plaintiff’s claim cannot be resolved without interpreting the applicable CBA . . . it is preempted. Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA . . . it is not preempted.”).

52. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

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

54. *Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1028 (E.D. Mo. 2014).

55. *Bentley v. Cleveland Browns Football Co.*, 958 N.E.2d 585, 590 (Ohio Ct. App. 2011).



claim also clearly defined the duties owed by the NFL to their players, independent of the CBA.<sup>56</sup>

However, section 301 preempted the state-law claims in other cases.<sup>57</sup> Section 301 preemption prevailed for the following reasons: 1) the extent of the duties allegedly breached by the NFL—by virtue of being the NFL player’s employer—required an analysis and interpretation of the CBA;<sup>58</sup> 2) because a sports league does not owe a common-law duty to protect players from mistreatment by individual teams, the extent of the duties voluntarily assumed by the league required an analysis and interpretation of the CBA;<sup>59</sup> and 3) consultation of the CBA was required because the player failed to show that his injuries were sustained when a CBA was not in effect.<sup>60</sup> An analysis of the cases in which section 301 did and did not preempt the claims follows below.

#### A. Instances of No Preemption under Section 301

##### 1. *Green v. Arizona Cardinals Football Club LLC*

In *Green v. Arizona Cardinals Football Club LLC*, three former football players and their wives sued the Arizona Cardinals and alleged that the team owed the players a duty to maintain a safe working environment, a duty not to expose them to unreasonable risks of harm, and a duty to warn them about the existence of concealed dangers after they sustained multiple concussions.<sup>61</sup> The court ruled that the Cardinals’ duties owed to the players did not arise out of the CBA and therefore could be evaluated without its interpretation.<sup>62</sup>

The court determined that the players’ negligence claims existed independently of the CBA and derived from common law duties to maintain a safe working environment, to refrain from exposing the players to unreasonable risks of harm, and to warn the players about dangers that were not reasonably foreseeable.<sup>63</sup> Despite the existence of a Joint Committee on Player Safety and Welfare established within the CBA, the court stated that

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56. *Williams v. Nat’l Football League*, 582 F.3d 863, 875–76 (8th Cir. 2009).

57. *See* cases cited *infra* notes 58–60.

58. *Williams*, 582 F.3d at 881.

59. *Dent v. Nat’l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*3–4 (N.D. Cal. Dec. 17, 2014).

60. *Duerson v. Nat’l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at \*2–3 (N.D. Ill. May 11, 2012).

61. *Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1024 (E.D. Mo. 2014). The players further alleged that the team “knew or should have known ‘for many years’ that the sort of brain trauma to which the Players were exposed can lead to neurological impairments, including Chronic Traumatic Encephalopathy (CTE).” *Id.*

62. *Id.* at 1020.

63. *Id.* at 1027.

“[m]ere reference to part of a CBA is insufficient for preemption; the relevant inquiry is whether the resolution of the claim depends upon the meaning of the CBA.”<sup>64</sup>

*Green* highlights an important aspect of section 301 preemption—although a CBA may appear to define certain duties owed to an employee (thus invoking preemption), preemption may be precluded due to preexisting common law duties derived from an employer-employee relationship.<sup>65</sup> Importantly, the court ruled that the CBA may not be used as a defense by the Cardinals to limit their duty of care.<sup>66</sup> That is, a CBA may not limit a duty of care (and invoke section 301 preemption) that is already prescribed by common law.

## 2. *Bentley v. Cleveland Browns Football Co.*

In *Bentley v. Cleveland Browns Football Co.*, Cleveland Browns player LeCharles Bentley filed a complaint against the Browns alleging fraud and negligent misrepresentation.<sup>67</sup> After relying on representations by the Browns that their training facility was world class, Bentley used the Browns’ training facility to receive physical therapy treatment and subsequently received a staph infection.<sup>68</sup>

The court held that Bentley’s claims did not implicate the CBA and were not dependent upon an analysis of the CBA.<sup>69</sup> The fact that “nothing in the CBA required Bentley to use the Cleveland Brown’s facility” proved to be central to the court’s reasoning.<sup>70</sup> The court noted that Bentley was free to choose any rehabilitation facility in the country and that doing so would not have contravened the CBA.<sup>71</sup>

*Bentley* introduces an important aspect to section 301 preemption: if a player is free to receive rehabilitation services at facilities unaffiliated with

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64. *Id.* at 1028.

65. *Id.* at 1029. According to the court, “the terms of the CBAs would not be part of the plaintiff’s claims, which derive from and can be adjudged in accordance with standards set forth in the Missouri common law.” *Id.*

66. *Id.* at 1030. Notably, the court determined that the players’ status as employees provided them with a right to rely on the Cardinals’ absence of a warning about the dangers of their profession, and that “[a]ny contractual terms that alter these common law rights would take the form of a defense and could not serve as the basis for removal.” *Id.*

67. *Bentley v. Cleveland Browns Football Co.*, 958 N.E.2d 585, 585 (Ohio Ct. App. 2011).

68. *Id.* at 587. Bentley alleged that the Browns’ head athletic trainer said the facility was a “world class facility” with a strong track record for successfully rehabilitating other Cleveland Browns players.” *Id.*

69. *Id.* at 589. The court followed precedent established in *Jurevicius v. Cleveland Browns Football Co., LLC*, 958 N.E.2d 585 (Ohio Ct. App. 2011), in which Jurevicius filed suit against the Browns for fraud and negligent misrepresentation after also receiving a staph infection at the Browns’ training facility.

70. *Id.* at 590.

71. *Id.*

the team/league, then interpretation or analysis of the CBA is not required even when a player ultimately chooses to receive rehabilitation treatment from the team/league.

### 3. *Williams v. National Football League*

In *Williams v. National Football League*, the NFL suspended several players after they tested positive for a banned substance.<sup>72</sup> The players' union alleged a breach of contract under the LMRA by the NFL, a violation of the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA), and a violation of the Minnesota Consumable Products Act.<sup>73</sup>

DATWA afforded an opportunity for employees to explain a positive drug test and have it verified by a confirmatory test before an employer could impose discipline.<sup>74</sup> DATWA specifically addressed CBAs, noting that it did not limit parties from agreeing to a drug testing program that met or exceeded the minimum standards set forth in DATWA.<sup>75</sup> The NFL argued that section 301 preempted the players' DATWA claim because the court would necessarily be required to "construe the terms" of the NFL's policy banning the use of certain substances "in order to determine whether its protections for players 'meets or exceeds' DATWA's protections."<sup>76</sup>

The court disagreed, explaining that if a CBA met or exceeded the protections set forth in DATWA, then an employee simply retains two possible claims—one for breach of contract under section 301 and one under DATWA.<sup>77</sup> Thus, section 301 preemption did not apply.<sup>78</sup> *Williams* is significant because it recognizes that separate state-law claims that clearly proscribe conduct by an employer may be litigated without section 301 preemption. Further, even if a violation of a state-law claim (such as DATWA) also constitutes a breach of the CBA, section 301 does not preempt the state-law claim so long as the claim does not require CBA interpretation—instead, the employee may retain two separate causes of action.

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72. *Williams v. Nat'l Football League*, 582 F.3d 863, 863 (8th Cir. 2009).

73. *Id.*

74. *Id.* at 874–75. "DATWA governs drug and alcohol testing in the Minnesota workplace by imposing 'minimum standards and requirements for employee protection' with regard to an employer's drug and alcohol testing policy . . . . DATWA also requires that an employer provide an employee, who tests positive for drug use, with 'written notice of the right to explain the positive test' . . . and the ability to 'request a confirmatory retest of the original sample at the employee's or job applicant's own expense . . . .'" *Id.* at 874.

75. *Id.* at 875.

76. *Id.*

77. *Id.* at 875–76.

78. *Id.* at 876.

## B. Instances of Preemption under Section 301

### 1. *Williams v. National Football League*

In *Williams*, the court found that claims for breach of fiduciary duty, negligence, and gross negligence were preempted by section 301.<sup>79</sup> The players alleged that the NFL knew that a certain product contained the banned substance bumetanide and failed to disclose this fact to the players.<sup>80</sup> The players asserted that the NFL's duty to disclose this information arose from their fiduciary duty as an employer under Minnesota law.<sup>81</sup> However, the court found that "whether the NFL or the individual defendants owed the Players a duty to provide such a warning cannot be determined without examining the parties' legal relationship and expectations as established by the CBA and the Policy."<sup>82</sup>

### 2. *Dent v. National Football League*

In *Dent v. National Football League*, NFL players sued the NFL and asserted several claims relating to improper administration of pain medications including fraud, negligent misrepresentation, and negligent hiring of medical personnel.<sup>83</sup> The NFL argued that the fraud and negligence claims were preempted by section 301.<sup>84</sup> The court found that no common law duty existed for a sports league to protect players from alleged mistreatment by individual teams<sup>85</sup> and concluded that to determine the extent of the NFL's negligence in failing to oversee the clubs' medication abuse, "it would be essential to take into account the affirmative steps the NFL has taken to protect the health and safety of the players, including the administration of medicine."<sup>86</sup> Because the CBA contained the duties owed

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79. *Id.* at 881.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Dent v. Nat'l Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at \*1 (N.D. Cal. Dec. 17, 2014). The pain medications included "opioids, Toradol, and other non-steroidal anti-inflammatory medications, local anesthetics, and combinations thereof—all in an effort to return players to the game, rather than allow them to rest and heal properly from serious, football-related injuries." *Id.* The other claims asserted included declaratory relief, medical monitoring, fraudulent concealment, negligence per se in relation to several federal and state laws, loss of consortium, and negligent retention of medical personnel. *Id.*

84. *Id.* at \*2.

85. *Id.* "There is simply no case law that has imposed upon a sports league a common law duty to police the health-and-safety treatment of players by the clubs." *Id.* at \*3.

86. *Id.* at \*7.

to its players and the affirmative steps the NFL undertook, section 301 preempted the common law negligence claims.<sup>87</sup>

### 3. *Duerson v. National Football League, Inc.*

In *Duerson v. National Football League, Inc.*, David Duerson committed suicide after sustaining multiple concussions during his NFL career.<sup>88</sup> The complaint alleged that the NFL failed to educate Duerson about the risks of sustaining concussions and continuing to play football after sustaining concussions.<sup>89</sup> Although the NFL contended that the estate's claims were dependent upon analysis of two of its CBAs,<sup>90</sup> the estate asserted that neither CBA was relevant because its allegations referenced a time period in which neither CBA was in effect.<sup>91</sup>

The court recognized that the complaint used the words "throughout his career"<sup>92</sup> and referred to other concussive episodes that occurred at unspecified times; therefore, the estate could not prove that CTE resulted from concussions sustained only when the CBAs were not in effect.<sup>93</sup>

The court then turned to whether the CBAs had to be interpreted to resolve the estate's claims.<sup>94</sup> The NFL identified several provisions within its CBA that outlined the NFL's duty, including a provision that required an NFL club's physician to advise the player of health problems and a provision that required clubs to have a board-certified orthopedic surgeon as a club physician.<sup>95</sup>

The court concluded because these provisions might "impose a duty on the NFL's clubs to monitor a player's health and fitness to continue to play

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87. *Id.* "The NFL addressed the problem of adequate medical care for players in at least one important and effective way, i.e., through a bargaining process that imposed uniform duties on all clubs—without diminution at the whim of individual state tort laws." *Id.*

88. *Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at \*1 (N.D. Ill. May 11, 2012). Duerson allegedly "'sustained at least three (3) documented concussive brain traumas, in 1988, 1990 and 1992, as well as numerous undocumented concussive brain traumas,'" and "played through the concussions because he was unaware that doing so could cause any harm." *Id.* at \*1.

89. *Id.*

90. *Id.* at \*2. The NFL referred to the 1982 CBA, which was in effect until 1986, and the 1993 CBA, which was in effect until 2000.

91. *Id.* Specifically, Duerson alleged that his complaint's allegations related "only to 1987 through 1993, years during which the CBAs were not in effect." *Id.*

92. *Id.* Duerson's complaint alleged that "'[t]he NFL failed to prevent, diagnose, and/or properly treat DAVE DUERSON's concussive brain traumas in 1988, 1990 and 1992 throughout his career.'" *Id.*

93. *Id.* The court stated that "it would be exceedingly implausible to contend that CTE was caused only by trauma suffered from 1987 through early 1993, and not by trauma from 1983 to 1986 or later in 1993. Any attempt to exclude head trauma suffered on certain dates from the claim would thus likely fail. Accordingly, the CBAs were in effect during at least some of the events alleged in the complaint." *Id.* at \*3.

94. *Id.*

95. *Id.* at \*4.

football,”<sup>96</sup> the CBA provisions would require interpretation. Although the court agreed with the estate that a duty to keep NFL players reasonably safe may have arisen apart from the CBA, section 301 still preempted the estate’s claim because the CBA required interpretation to determine the exact standard of care the NFL undertook.<sup>97</sup>

In contrast, the court noted that if the scope of a league’s duty of care, such as that in *Brown v. National Football League*, is based upon rules and manuals that are not contained within a CBA, then section 301 might not preempt the plaintiff’s claim.<sup>98</sup>

#### IV. ANALYZING WHY SECTION 301 PREEMPTED THE ESTATE’S NEGLIGENCE CLAIMS IN *BOOGAARD*

Although the court in *Boogaard* found that section 301 preempted all of the Estate’s claims, similar claims of negligence against the NHL alleged by a class of former NHL players in *Concussion Injury* survived section 301 preemption at the motion to dismiss stage.<sup>99</sup> A comprehensive analysis of *Boogaard* and how its outcome differed from the aforementioned NFL cases follows below. Then, an in-depth analysis will examine why the courts reached different conclusions on the negligence claims in *Boogaard* and *Concussion Injury*.

Boogaard’s Estate first brought a claim against the National Hockey League Players’ Association (NHLPA) for failing to file a grievance with the New York Rangers on the Estate’s behalf after the Rangers refused to pay out the remainder of Boogaard’s contract.<sup>100</sup> The NHLPA, as stipulated by the CBA, had only sixty days to file a grievance with the Rangers.<sup>101</sup> After the NHLPA advised the Estate that it would not be filing a grievance on its behalf, the Estate then had just six months to bring a claim against the NHLPA for a breach of their duty of fair representation.<sup>102</sup> When the Estate

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96. *Id.*

97. *Id.* “But preemption is still possible even if the duty on which the claim is based arises independently of the CBA, so long as resolution of the claim requires interpretation of the CBA.” *Id.*

98. *Id.* at \*5. In *Brown v. National Football League*, 219 F.Supp.2d 372 (S.D.N.Y. 2002), “the court held that a claim against the NFL for negligently overseeing a referee who threw a penalty flag into the plaintiff’s eye was not preempted” because the scope of the NFL’s duty was contained in rules and manuals, which were not contained within the CBA. *Duerson*, 2012 WL 1658353 at \*5.

99. *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F. Supp. 3d 856, 880 (D. Minn. 2016).

100. *See Boogaard [sic] v. Nat’l Hockey League Players Ass’n*, No. 2:12-cv-9128-ODW(FFM), 2013 WL 1164301, at \*1 (C.D. Cal. Mar. 20, 2013). Three seasons remained on Boogaard’s four-year contract with the New York Rangers.

101. *Id.* at \*1.

102. *Id.* at \*2. The NHLPA opted not to file a grievance after they learned that the treatment facility used by Boogaard refused to disclose Boogaard’s medical records without a court order. *Id.* A lawyer for the NHLPA advised Boogaard that the “NHL was freezing them out and that [the] NHLPA would have to take legal action against the doctor refusing to produce Boogaard’s medical records.” *Id.*

brought this claim against the NHLPA, the court dismissed it because the six-month statute of limitations had already run.<sup>103</sup> The Estate then filed state-law negligence claims against the NHL, which are explained in detail below.<sup>104</sup>

### A. *Boogaard v. National Hockey League*

Boogaard's Estate originally filed suit against the NHL in 2014.<sup>105</sup> The court found that the Illinois tort claims against the NHL for negligently failing to monitor and cure Boogaard's pain medication addiction while Boogaard was enrolled in the SABH Program were completely preempted by section 301 because the CBA incorporated the SABH Program.<sup>106</sup> Even after the case was removed to federal court and Minnesota state-law claims were added, the court in *Boogaard* still found that section 301 completely preempted the Estate's remaining claims.<sup>107</sup> Further, the court granted summary judgment to the NHL because even if the court analyzed the Estate's claims as section 301 breach of contract claims under the LMRA, the statute of limitations had already run.<sup>108</sup> As a result, section 301 preemption left the Estate without any recourse or relief on its original negligence claims.

The court utilized section 301 preemption analysis<sup>109</sup> and reiterated that the Estate's tort claims would only be preempted if they required CBA interpretation.<sup>110</sup> The Estate, like the plaintiffs in the NFL cases, argued that its claims—aside from Counts III and IV, which were already preempted by section 301—did not require any interpretation of the CBA.<sup>111</sup>

#### 1. *Counts V through VIII*

Counts V through VIII alleged that the NHL voluntarily assumed a duty to “keep [players] reasonably safe.”<sup>112</sup> The court quickly concluded that Counts V through VIII were preempted by section 301.<sup>113</sup> The court

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103. *Id.* at \*5. The NHLPA advised Boogaard's Estate on December 2, 2011 that it would not be filing the grievance. Boogaard's Estate filed the claim against the NHLPA on September 21, 2012.

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

105. *Nelson v. Nat'l Hockey League*, 20 F. Supp. 3d 650 (N.D. Ill. 2014).

106. *Id.* at 655, 657.

107. *Boogaard*, 126 F. Supp. 3d at 1014.

108. *Id.*

109. *See supra*, Part II discussion.

110. *Boogaard*, 126 F. Supp. 3d at 1017. The court quoted *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985), in asserting that a state-law claim will be preempted if it is “inextricably intertwined with consideration of the terms of [a] labor contract.” *Id.*

111. *Id.* at 1018.

112. *Id.* at 1019 (alteration in original).

113. *Id.* at 1018.

reasoned that because “[s]tate tort law generally does not impose any duty to act to protect others from harm,” the CBA would need to be interpreted to determine the duties and their scope that the NHL voluntarily assumed to protect Boogaard’s health.<sup>114</sup>

To support the conclusion that the NHL voluntarily assumed a duty to keep Boogaard reasonably safe, the Estate referenced actions taken by the NHL that, on the surface, do not appear to require any interpretation of the CBA.<sup>115</sup> For instance, the NHL penalized high sticking, kicking, tripping, and required helmets to be worn.<sup>116</sup> However, the court distinguished between voluntarily assuming a duty to keep players reasonably safe and voluntarily assuming a duty to protect players from specific harms.<sup>117</sup> It reasoned that because the CBA “exhaustively detail[ed] each party’s specific obligations to the others,” it required interpretation to determine the scope of the duties the NHL assumed.<sup>118</sup>

The Estate also argued that the NHL was negligent for failing to institute a “‘bench concussion assessment protocol’ and for allowing players to return after a concussion without first being cleared by an independent doctor as well as a team doctor.”<sup>119</sup> The NHL countered that because the CBA gave it no power over individual team doctors and the medical standards they used, it did not assume general duties to keep players reasonably safe and prevent brain trauma.<sup>120</sup> The court agreed, noting that “it is unlikely that the NHL would have assumed responsibility for ‘keeping players reasonably safe’ and ‘preventing brain trauma’ while simultaneously adopting a [CBA] that prohibited them from taking steps necessary to meet those responsibilities.”<sup>121</sup>

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114. *Id.* The court explained that “Illinois and Minnesota law recognize an exception to the general rule, called the voluntary undertaking doctrine, which provides that ‘liability can arise from the negligent performance of a voluntary undertaking.’ . . . Simply stated, the doctrine provides that if a person sets out to help someone, she assumes a duty to do so reasonably.” *Id.* (quoting *Pippin v. Chi Housing Auth.*, 399 N.E.2d 596, 599 (1979)).

115. *Id.*

116. *Id.* at 1019. Specifically, the NHL penalized high sticking in 1929, kicking in 1932, tripping in 1934, prohibited players on the bench from joining a fight in 1959, prohibited body contact during face-offs in 1964, and required helmets to be worn in 1979. *Id.*

117. *Id.* “Such an inquiry would entail considering all of the NHL’s relevant acts to determine whether it undertook to ‘keep [players] reasonably safe during their NHL careers,’ as Boogaard contends, or whether it undertook only to protect players from more specific harms, such as high sticking, kicking, and tripping.” *Id.* (alteration in original).

118. *Id.* “Thus, the specific acts by the NHL that Boogaard insists represent a broader and more generalized commitment to protect players from harm must be interpreted in context with the hyper-specific commitments that the NHL made in the CBA itself.” *Id.*

119. *Id.*

120. *Id.* at 1020. Article 16.11(e) of the CBA required the team doctor to “certify that a player was eligible for Injured Reserve. That could plausibly be taken to provide that teams were free to develop their own ‘medical standards’ for diagnosing injuries, including concussions, without the NHL’s interference.” *Id.* (citation omitted).

121. *Id.*



The Estate then argued that the NHL should have altered the rules on fighting to further protect its players. But the NHL again countered by asserting that the CBA precluded the NHL from changing the rules unilaterally without consent from the NHLPA.<sup>122</sup> The court again agreed, noting that the NHL's voluntarily assumed duties did not include an obligation to alter the playing rules to make the game safer.<sup>123</sup> Therefore, the court concluded that Counts V and VI were completely preempted by section 301 because the CBA required interpretation to ascertain the scope of the NHL's voluntarily assumed duties.<sup>124</sup> The court likewise concluded that Counts VII and VIII were completely preempted by section 301 because the NHL plausibly asserted that the CBA prevented it from prohibiting team doctors to administer Toradol.<sup>125</sup> Therefore, the court ruled that Counts V through VIII were preempted by section 301.<sup>126</sup>

## 2. Counts I and II

Ordinarily, it is a general rule that one is under no duty to act to protect another from harm.<sup>127</sup> While counts V through VIII alleged that the NHL voluntarily assumed a duty to protect Boogaard, Counts I and II alleged that the NHL "owed a duty to [Boogaard] to keep him reasonably safe during his NHL career and to refrain from causing an addiction to controlled substances."<sup>128</sup> Because the Estate did not allege that the NHL voluntarily assumed this duty, the court sought to find how the NHL might be charged

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122. *Id.* Article 30.3 of the CBA provides: "The NHL and its Clubs shall not . . . amend or modify the provisions (or portions thereof) of the League Rules or any of the League's Playing Rules in existence on the date of this Agreement which affect terms or conditions of employment of any Player, without the prior written consent of the NHLPA which shall not be unreasonably withheld." *Id.*

123. *Id.* "And if Article 30.3 meant that the NHL could not have more severely punished fighting without first haggling with the NHLPA, then it is unlikely that the NHL's voluntarily assumed duties included an obligation to change the rules of play to make the game safer by not changing the rules of play to further discourage fighting." *Id.*

124. *Id.* at 1021. The Prescription Medication Program, incorporated in the CBA, "extensively regulat[ed] when and how team doctors and trainers could administer prescription medications" and "explicitly prohibited team doctors from prescribing or otherwise dispensing drugs 'merely to enhance [an employee's] performance or to reduce fatigue.' . . . The Prescription Medication Program, together with Article 30.3's prohibition on unilateral amendments to important league rules, arguably implies that the NHL otherwise lacked the authority to direct how teams administered and tracked medications. That in turn arguably suggests that the NHL's voluntarily assumed duties did not include prohibiting team doctors from administering Toradol." *Id.* (alteration in original).

125. *Id.*

126. *Id.* at 1022. "Whether the NHL owed Boogaard a duty to take steps that Counts V through VIII fault it for failing to take depends largely on genuinely contested interpretations of the CBA. Those claims therefore are completely preempted." *Id.*

127. *Id.* at 1022-23.

128. *Id.* at 1022 (alteration in original).

with upholding this duty to protect Boogaard under the special relationship doctrine.<sup>129</sup>

Under the special relationship doctrine, the NHL might have had a duty to protect Boogaard because of the custodian-protectee exception.<sup>130</sup> Whether the NHL qualified as a custodian and Boogaard as a protectee depended on the NHL's "ability to control [Boogaard's] behavior and circumstances."<sup>131</sup> The court noted that because both the NHL and the Estate disputed the amount of control the CBA afforded the NHL over Boogaard, it would be necessary to interpret the CBA to "determine whether the NHL actually had a duty to protect Boogaard from addiction."<sup>132</sup> As a result, the court concluded that Counts I and II were also completely preempted by section 301.<sup>133</sup>

### *B. How Boogaard Differs from the NFL Cases*

The NFL cases discussed in Part IV offer further explanation of why the court preempted the Estate's claims, as the court in *Boogaard* referenced and distinguished several of these cases. For instance, the court suggested that an employer-employee relationship did not exist in *Boogaard*<sup>134</sup> and no state law imposed a duty on the NHL to protect Boogaard.<sup>135</sup> While the court did not reference all of the NFL cases, their outcomes may explain some of the court's reasoning, which is discussed in greater detail below.

Unlike *Green v. Arizona Football Club LLC*, the NHL's duties did not arise out of an employer-employee relationship and instead arose out of a CBA.<sup>136</sup> Because individual NHL teams (and not the NHL itself) employs

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129. *Id.* at 1023. Under the special relationship doctrine, "a private person has no duty to act affirmatively to protect another from criminal attack by a third person absent a 'special relationship' between the parties . . . . Historically, there have been four 'special relationships' which [the courts] have recognized, namely, common carrier-passenger, innkeeper-guest, business invitor-invitee, and voluntary custodian-protectee." *Id.* (alteration in original).

130. *Id.*

131. *Id.*

132. *Id.* at 1022. "The parties dispute the amount of control that the NHL had over Boogaard's welfare, and the focus of their dispute is on the terms of the 2005 CBA, so to decide whether the NHL was Boogaard's custodian, the court would have to interpret the CBA." *Id.* at 1023 (citation omitted). For instance, the court noted that the CBA included the Prescription Medication Program which, along with Article 30.3, "arguably could be read to divest the NHL of the authority to control players' medical treatment." *Id.*

133. *Id.* at 1024. "Accordingly, whether the NHL was Boogaard's custodian for purposes of Counts I and II depends largely on genuinely contested interpretations of the CBA, which means that those counts are completely preempted." *Id.*

134. *See infra* note 136.

135. *See infra* note 139.

136. *Boogaard*, 126 F. Supp. 3d at 1024 (explaining that unlike *Green*, there is a question in *Boogaard* regarding whether the NHL is Boogaard's employer—therefore, the CBA must be interpreted to specify the duties owed by the NHL to Boogaard); *Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1028 (E.D. Mo. 2014).

players, an employer-employee relationship between the NHL and Boogaard likely did not exist.<sup>137</sup> Although a special relationship between the NHL and Boogaard may exist under a custodian-protectee relationship, the court concluded that CBA interpretation would be required to determine whether this special relationship existed.<sup>138</sup>

In *Bentley v. Cleveland Browns Football Co.*, section 301 preemption did not apply because state law imposed a duty— independent of the CBA— on the NFL team not to misrepresent the quality of the training facility where Bentley was treated.<sup>139</sup> Unlike *Bentley*, the NHL’s SABH Program mandated Boogaard’s treatment.<sup>140</sup> The court in *Boogaard* did not analyze this mandated requirement in the context of *Bentley*. However, its silence on the issue suggests that the SABH’s presence in the CBA—coupled with the absence of Illinois or Minnesota state law that would impose a similar duty (as noted in *Bentley*) on NHL teams or doctors independent of the CBA—also differentiates *Boogaard* from *Bentley*.

In *Williams v. National Football League*, the players argued that the NFL violated a state statute (DATWA) that imposed duties on the NFL independent of the CBA.<sup>141</sup> In effect, the claims that directly related to the breach of those duties outlined in the statute were not preempted by section 301.<sup>142</sup> In contrast, Boogaard’s Estate did not allege any violation of a state statute that identified duties separate and distinct from those in the CBA, and therefore the court did not address *Williams*.

In *Dent v. National Football League*, the players alleged that the NFL improperly managed the administration of pain medications, including Toradol.<sup>143</sup> Similarly, Boogaard’s Estate alleged in Counts VII and VIII that

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137. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association, EXHIBIT 1 (July 22, 2005), <http://www.letsopens.com/NHL-2005-CBA.pdf> [hereinafter “2005 CBA”]; Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association, September 16, 2012 – September 15, 2022, EXHIBIT 1 (Feb. 15, 2013), [http://cdn.agilitycms.com/nhlpacom/PDF/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf) [hereinafter “2012 CBA”].

138. *Boogaard*, 126 F. Supp. 3d at 1023. Absent a special relationship, a party has no common law duty to protect others from harm. *Id.* (citing *Iseberg v. Gross*, 879 N.E.2d 278, 284 (Ill. 2007)). Because the existence of a custodial relationship depends on the amount of control the custodian (NHL) maintains over the protectee (Boogaard), the court concluded that the CBA would need to be interpreted. *Id.*

139. *Id.* at 1024. “As the court reasoned, there was no need to interpret the [CBA] to determine whether the team had a duty not to tell deliberate and material falsehoods because . . . Ohio law imposed that particular duty on everyone, independent of any [CBA].” *Id.*

140. See *Romero*, *supra* note 19, at 286. See also 2005 CBA, *supra* note 137, at Art. 47.3 (“All other forms of “substance abuse” and behavioral and domestic issues requiring employee assistance will continue to be handled through the NHL/NHLPA Program for Substance Abuse and Behavioral Health (the “SABH Program”).”).

141. *Williams v. Nat’l Football League*, 582 F.3d 863, 872–73 (8th Cir. 2009).

142. *Id.* at 876.

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

the NHL negligently failed to prevent team doctors from injecting Boogaard with Toradol.<sup>144</sup> While the court in *Boogaard* did not address *Dent*, the *Dent* court asserted that “no decision in any state . . . has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the league’s independent clubs.”<sup>145</sup> Therefore, like the NFL in *Dent*, the NHL is likely not bound by a separate duty independent of the CBA to protect Boogaard. Instead, the *Boogaard* court found that because the CBA established the right to medical care for Boogaard, it would need to be interpreted to resolve the claims.<sup>146</sup>

Finally, in *Duerson v. National Football League, Inc.*, the player’s estate argued that the NFL violated a duty—separate and independent of the CBA—to keep Duerson reasonably safe.<sup>147</sup> While the court agreed that this duty may have been imposed on the NFL, section 301 still preempted the claim because the CBA would need to be interpreted to identify the actual standard of care undertaken by the NFL.<sup>148</sup> Importantly, the *Duerson* court referenced a separate case (*Brown v. National Football League*) in which section 301 did not preempt the claim because the scope of the NFL’s duty of care was defined by reference to rules and manuals that were not contained within the CBA.<sup>149</sup>

Like *Duerson*, Boogaard’s Estate also argued that the NHL violated a duty to keep Boogaard reasonably safe.<sup>150</sup> Although the court in *Boogaard* did not directly address *Duerson*, it referenced and distinguished *Brown v. National Football League*, which did not allege the violation of a voluntarily assumed duty by the NFL to keep Brown safe.<sup>151</sup> Instead, Brown asserted that the NFL violated a duty not to unreasonably harm him.<sup>152</sup> *Brown* might

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144. *Boogaard*, 126 F. Supp. 3d at 1016.

145. *Dent*, 2014 WL 7205048 at \*3.

146. *Boogaard*, 126 F. Supp. 3d at 1021. The court determined that because the CBA incorporated the Prescription Medication Program—which the NHL asserted prevented it from “interfering with medical decisions regarding players”—the NHL therefore plausibly argued that its “voluntarily assumed duties did not include prohibiting team doctors from administering Toradol.” *Id.* As a result, the court concluded that “ascertaining the scope of the NHL’s voluntarily assumed duties would require interpreting the CBA” and therefore resulted in section 301 preemption. *Id.*

147. *Duerson v. Nat’l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353 at \*4 (N.D. Ill. May 11, 2012).

148. *Id.* As the court in *Duerson* explained, “[s]howing that a duty raised in a state-law tort claim originates in a CBA is certainly sufficient to require preemption.” *Id.* However, “[o]ther provisions in the CBAs also address player health and safety, and may be interpreted to impose a general duty on the NFL clubs to diagnose and treat ongoing conditions like the concussive trauma that led to Duerson’s CTE.” *Id.*

149. *Id.* at \*5 (referencing *Brown v. Nat’l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002)).

150. *Boogaard*, 126 F. Supp. 3d at 1019.

151. *Id.* at 1025. “None of the cited cases involved claims, like Boogaard’s, alleging a breach of a voluntarily assumed duty (Counts III through VIII) or a free-floating duty to act (Counts I and II) in a manner that would require interpretation of a [CBA].” *Id.*

152. *Id.* at 1025.

also be influential because rules and manuals helped define the scope of the NFL's duty, and those rules and manuals were not contained within the CBA.<sup>153</sup>

Like *Brown* and the NFL, the NHL's CBA does not include the rules of play.<sup>154</sup> However, the NHL asserted that a clause in the CBA specifically prevents it from altering the rules of play without consent from the NHLPA, and the court in *Boogaard* concluded that CBA interpretation would therefore be required to "ascertain[] the scope of the NHL's voluntarily assumed duties."<sup>155</sup> Because the NHL's CBA is very specific and detailed, it is more likely that the CBA will either define the scope of any duty that the NHL assumes or at least provide an argument by the NHL that it defines the scope of a duty.<sup>156</sup>

As evidenced, the NFL cases cited differ from *Boogaard* in many respects, and they provide insight as to why the court concluded that section 301 preempted all of the Estate's claims. However, a case that also asserted negligence claims against the NHL reached a different outcome than *Boogaard* at the motion to dismiss stage.<sup>157</sup> An analysis of that case is presented below.

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

In *Concussion Injury*, a class of former NHL players brought suit against the NHL for breaching its duty of reasonable care for player safety.<sup>158</sup> The players alleged that the NHL knew or should have known of evidence linking brain trauma to long-term neurological problems and that the NHL failed to protect the players and inform them of such dangers.<sup>159</sup> To support their contention, the players alleged that the NHL assumed this duty to

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153. *Duerson*, 2012 WL 1658353, at \*5.

154. See 2012 CBA, *supra* note 137; *Boogaard*, 126 F. Supp. 3d at 1020.

155. *Boogaard*, 126 F. Supp. 3d at 1021. The clause, Article 30.3 of the CBA, states: "The NHL and its Clubs shall not . . . amend or modify the provisions (or portions thereof) of the League Rules or any of the League's Playing Rules in existence on the date of this Agreement which affect terms or conditions of employment of any Player, without the prior written consent of the NHLPA which shall not be unreasonably withheld." *Id.* at 1020.

156. *Id.* See *infra* notes 199–200 and accompanying text.

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

158. *Id.* at 860–61. Six named plaintiffs sought to represent retired NHL players: Dan LaCouture, Michael Peluso, Gary Leeman, Bernie Nicholls, David Christian, and Reed Larson sought "to represent Class 1: All living Retired NHL Hockey Players who have not been diagnosed with dementia, ALS, Alzheimer's, Parkinson's, CTE, or other neurodegenerative disease or conditions (collectively, 'Brain Disease')." *Id.* at 860. Class 2 included "[a]ll living and deceased Retired NHL Hockey Players who have been diagnosed with a Brain Disease, and their Representative Claimants and Derivative Claimants, where such Brain Disease was not diagnosed at the time the player retired or otherwise permanently ceased playing professional hockey." *Id.*

159. *Id.*

protect players against head-trauma “by virtue of instituting a helmet requirement in 1979 and creating a Concussion Program in 1997 to research and study brain injuries in players.”<sup>160</sup> The court denied the NHL’s motion to dismiss, noting that section 301 preemption did not apply (yet) at this stage of the proceedings.<sup>161</sup>

The similarities between *Boogaard* and *Concussion Injury* are apparent: both alleged that the NHL breached its duty to keep players reasonably safe. Yet one case resulted in the invocation of section 301 while the other did not. Count III in *Concussion Injury* alleged that the NHL was negligent in ensuring the safety of NHL players.<sup>162</sup> Likewise, *Boogaard*’s Estate alleged that the NHL breached its duty to keep *Boogaard* reasonably safe.<sup>163</sup> Like *Boogaard*, the NHL in *Concussion Injury* argued that if a duty to keep the class of NHL players reasonably safe existed at all, then the CBA created that duty.<sup>164</sup>

The NHL contended that “the helmet requirement was implemented pursuant to a CBA between the NHL and the Player’s Union and [was] thus ‘necessarily’ based on a CBA.”<sup>165</sup> As for the Concussion Program, the NHL asserted that because it implemented the program via an agreement with the NHLPA, it was therefore based on the CBA.<sup>166</sup> The court disregarded these arguments<sup>167</sup> because the players’ complaint did not reference any CBA and the NHL did “not cite to any CBA provisions that purportedly imposed a duty upon which Plaintiffs’ claims are based.”<sup>168</sup>

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160. *Id.* at 861. The players also alleged that the NHL caused injuries and increased the risk of injury to the players by “refusing to cease its glorification of fist-fighting and violence in the NHL.” *Id.*

161. *Id.* at 882.

162. *Id.* at 861–62. “Plaintiffs allege that the NHL has ‘historically and voluntarily assumed an independent tort duty of reasonable care regarding player safety and head trauma’; has assumed a duty to ‘manage player safety, particularly with regard to head injuries and concussions’; and has ‘a duty of reasonable care to act in the best interests of the health and safety of NHL players[,] to provide truthful information to NHL players regarding risks to their health[,] and to take all reasonable steps necessary to ensure the safety of players.’” *Id.* (alteration in original).

163. *Boogaard v. Nat’l Hockey League*, 126 F. Supp. 3d 1010, 1022–23 (N.D. Ill. 2015).

164. *Concussion Injury*, 189 F. Supp. 3d at 868. “Defendant argues that Count III is preempted, first, because these alleged duties arose, if at all, under the CBAs entered into on their behalf by the Players’ Union, and, second, because an evaluation of the existence and extent of those duties would require interpretation of the terms of the CBAs.” *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 869. “[T]he Court cannot find from the face of the Amended Complaint, or any documents properly embraced by the pleadings, that Plaintiffs’ negligence claims are preempted on the grounds that the allegedly breached duties arose out of a CBA.” *Id.*

168. *Id.* The NHL relied on documents other than the CBA in contending that a duty to keep the players reasonably safe, if it existed at all, arose from the CBA. For instance, the NHL relied “on numerous other documents—meeting minutes, letters, memoranda, and reports dated between 1979 and 2013. But, these documents constitute cherry-picked evidence . . .” *Id.* Because these documents were outside the pleadings, the court concluded that it could “not rely on them as a basis for dismissing Plaintiffs’ claims at this stage of the proceedings.” *Id.*

The court also noted that because many of the plaintiff NHL players were retired, it was unclear which CBAs might apply to them; in effect, more discovery would be required.<sup>169</sup> Importantly, the court noted the players' efforts to show that the NHL's duty to protect them did not arise from the CBA.<sup>170</sup> The players acknowledged that while the NHL referenced CBA provisions regarding player health, safety, rules, and discipline, sources outside of the CBA evidenced an independent duty assumed by the NHL to keep the players reasonably safe.<sup>171</sup> For instance, the players referenced a presentation made to the NHL Board of Governors by the NHL Department of Player Safety which stated that "[t]he NHL has always assumed the responsibility of making the game safer through rule changes, medical treatment policies, equipment analysis, enhancements to the playing environment, and supplemental discipline."<sup>172</sup>

Given that neither the pleadings nor the documents referenced by the players referenced a CBA, the court could not determine at this stage in the proceedings that interpretation of the CBA would be required to resolve the claims.<sup>173</sup> The court reasoned that:

[T]he mere fact that a CBA creates rights or duties similar to those on which a state-law claim is based, or that the parties involved in the dispute are subject to a CBA, or that the event giving rise to the dispute may be subject to a CBA's grievance procedures, is not sufficient to trigger preemption.<sup>174</sup>

The court also analyzed and distinguished *Boogaard*. Although the duties the Estate alleged the NHL violated in *Boogaard* "had relevant and direct counterparts in the CBA—i.e., the duty to prevent painkiller addiction

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169. *Id.* at 870. The court differentiated *Allis-Chalmers Corp. v. Lueck* and *United Steelworkers of Am. v. Rawson*, noting that in those cases the Supreme Court ruled that section 301 preemption applied to the plaintiffs' claims after full discovery ensued. *Id.* at 869. In contrast, the current case "seeks dismissal of Plaintiffs' negligence claims based solely on the Amended Complaint and a handful of cherry-picked documents that are not embraced by the pleadings. This record is insufficient to form the basis of the court's opinion on this matter." *Id.* at 872. The court further noted that the plaintiff in the two cases specifically alleged that the defendants negligently performed a provision of the relevant CBA, whereas in the current case the plaintiffs did not reference the CBA at all. *Id.*

170. *Id.* at 876.

171. *Id.* at 874–76. The players, for example, asserted that health and safety provisions in the CBA were only tangentially related to their claims and did not eradicate an independently assumed duty by the NHL to inform them of other dangers. *Id.* at 868.

172. *Id.* at 874 (alteration in original). The players also referenced a Concussion Program document that described the NHL's formation of the Concussion Committee, a letter from the NHL to the NHLPA in which the NHL asserted that it was not required to negotiate with the NHLPA to institute a helmet requirement, and an e-mail from the NHL Deputy Commissioner (Bill Daly) to the NHLPA asserting that the NHL could enact rule changes without NHLPA approval. *Id.*

173. *Id.*

174. *Id.* at 875.

versus the CBA's Prescription Medication Program,"<sup>175</sup> the players in *Concussion Injury* alleged that the NHL breached a duty that "runs straight from Defendant to the players."<sup>176</sup> Therefore, the claims did not (preliminarily) require CBA interpretation.<sup>177</sup>

*D. Result of Boogaard: a Different Kind of Boogeyman*

Although the *Boogaard* court concluded that section 301 preempted all of the Estate's claims, the case did not end there.<sup>178</sup> The court then attempted to analyze the preempted claims under the LMRA and section 301 as a breach of the CBA.<sup>179</sup> The CBA provided that the NHLPA must either first bring suit on the Estate's behalf or notify the Estate that it would not bring suit<sup>180</sup>—only then may the Estate bring its own claim against both the NHL for breach of the CBA and perhaps against the NHLPA for a breach of its duty of fair representation (this type of suit is called a hybrid contract/duty-of-fair representation claim).<sup>181</sup>

Because the CBA required arbitration to resolve a dispute concerning issues that involve the CBA, the Estate's claims could only survive as a hybrid claim.<sup>182</sup> Unfortunately for the Estate, a six-month statute of limitations—which began when the Estate learned that the NHLPA would not file a grievance on its behalf—applies to hybrid claims.<sup>183</sup> In addition to the six-month statute of limitations, the CBA itself mandated that the NHLPA must file a grievance on behalf of the player within sixty days of learning facts that gave rise to the claim.<sup>184</sup> The statute of limitations would have therefore barred the Estate's claims against the NHL eight months after Boogaard's death.<sup>185</sup> Because the Estate did not initiate claims against the

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175. *Id.* at 878.

176. *Id.* at 879.

177. *Id.* In *Concussion Injury*, the claims were much broader, indicating a breach of the duty of reasonable care to "act in the best interests of the health and safety of NHL players by providing truthful information to the players regarding the neurological risks of head injuries suffered while playing hockey in the NHL." *Id.* at 878–79.

178. *Boogaard v. Nat'l Hockey League*, 126 F. Supp. 3d 1010, 1025 (N.D. Ill. 2015). The court noted that "[c]ompletely preempted claims are not automatically dismissed, but rather generally are treated as if they alleged breach of a collective bargaining agreement in violation of § 301." *Id.*

179. *Id.*

180. *Id.*

181. *Id.* "However, if the union either decides not to pursue a grievance or pursues a grievance and loses, the employee may bring suit in federal court alleging both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement, in what is called a 'hybrid contract/duty-of-fair representation claim.'" *Id.*

182. *Id.* at 1026.

183. *Id.* The six-month statute of limitations may also begin once the arbitrator rules in favor of the NHL if the NHLPA did indeed choose to file a grievance.

184. *Id.* at 1027.

185. *Id.*



NHL until almost two years after Boogaard's death, the statute of limitations precludes the Estate from initiating section 301 claims against the NHL.<sup>186</sup>

After the ruling in *Boogaard*, the Estate filed an amended complaint with additional claims that it argued were not preempted by section 301.<sup>187</sup> Because the statute of limitations on state-law tort claims has not yet run, the Estate may file amended complaints which allege different causes of action that do not require interpretation of the CBA. Therefore, while the Estate is precluded from receiving relief on section 301 claims and on its original negligence claims that were preempted by section 301, it may prevail in asserting that the NHL violated or breached duties that are not dependent upon interpretation of the CBA.<sup>188</sup> On June 5, 2017, the court dismissed the Estate's remaining claims with prejudice, in part due to the Estate's failure to show that the NHL owed Boogaard any legal duties.<sup>189</sup>

#### V. PROPOSAL TO CHANGE SECTION 301 AND STRATEGIES TO CIRCUMVENT SECTION 301 PREEMPTION IN FUTURE LITIGATION

##### A. Proposal to Change Section 301 Statute of Limitations

As the *Boogaard* case demonstrates, section 301 preemption may result in an ironic scheme in which the LMRA may not afford relief that the plaintiff could otherwise receive under a state-law tort claim.<sup>190</sup> Because state-law tort claims are subject to a much longer statute of limitations

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186. *Id.* "There is no indication in the record that the NHLPA pursued a grievance related to these claims, and it is inconceivable that Boogaard's representatives did not learn about the NHLPA's decision not to pursue a grievance until nearly a year and a half after his death." *Id.*

187. *Boogaard v. Nat'l Hockey League*, 211 F. Supp. 3d 1107 (N.D. Ill. 2016). Boogaard's amended complaint included twelve counts, eight of which were ruled to be preempted by section 301 because they were "essentially identical to the first amended complaint's eight counts." *Id.* at 1111. The court ruled that the first four counts, however, were not preempted by section 301 because they alleged that the NHL "actively harmed Boogaard," reasoning that "[e]very person has a duty not to act unreasonably in a way that injures others." *Id.*

188. *Id.* For instance, the Estate's amended complaint alleged that the NHL took active steps to promote violence in the NHL through promotions of documentaries, stories, network segments, and films that glorified fighting. The Estate also alleged that the NHL "actively and unreasonably harmed Boogaard by implicitly communicating that head trauma is not dangerous." *Id.* at 1112.

189. *Boogaard v. Nat'l Hockey League*, 2017 WL 2424152 (N.D. Ill. June 5, 2017).

190. *Boogaard*, 126 F. Supp. 3d at 1027. If not for section 301 preemption, some of the Estate's claims could have survived as state-law tort claims, in which case the statute of limitations would not have run. *See id.* at 1018–21 (explaining that Counts V through VIII alleged the violation of voluntarily assumed duties by NHL, which are cognizable under Illinois and Minnesota tort law); *see also id.* at 1022–23 (explaining that Counts I and II alleged the violation of duty to protect Boogaard by NHL due to existence of special relationship with Boogaard—both Illinois and Minnesota tort law recognize the custodian-protector special relationship); *see also id.* at 1027 (recognizing that the Estate brought suit against the NHL less than two years after Boogaard's death); *see infra* note 191 (explaining that the statute of limitations in Illinois and Minnesota is two years for tort claims). Even if the state-law tort claims were also barred by the statute of limitations, Boogaard's section 301 hybrid claims are subject to a much shorter statute of limitations period of six months. *See infra* note 191.

period than section 301 claims, the Estate could not receive relief on its original claims against the NHL.<sup>191</sup> Ironically, the LMRA was designed—in part—to produce the opposite effect. Congress passed the LMRA to:

[P]romote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce*, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.<sup>192</sup>

In *Boogaard*, the Estate must have filed suit against the NHL for a breach of the LMRA under section 301 within six months of receiving notification that the NHLPA did not file a grievance on its behalf.<sup>193</sup> As explained above, many of the Estate's claims simply alleged state-law tort claims against the NHL, which would have otherwise been subject to a two-year statute of limitations period.<sup>194</sup> But because these claims were preempted by section 301 and filed after the six-month statute of limitations period ran, the Estate could not prevail.<sup>195</sup>

When parents learn that their child has died of an accidental drug overdose, the notion of complex litigation may not arise for months. Even after six months, families of deceased players are likely still grieving the loss of their loved ones, and the prospect of bringing suit may not materialize.<sup>196</sup> Like the Estate, many families may spend months simply trying to seek answers.<sup>197</sup> The original purposes of the NLRA and section

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191. The statute of limitations period for personal injuries in Illinois is two years. 735 ILL. COMP. STAT. 5/13-202 (2016). The statute of limitations period for personal injuries in Minnesota is also two years. MINN. STAT. ANN. § 541.07 (West 2016).

192. National Labor Relations Act, 29 U.S.C. § 141 (2012) (emphasis added).

193. *Boogaard*, 126 F. Supp. 3d at 1025–26.

194. See *supra* note 191 and accompanying text.

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

196. Boogaard's father learned about five months after Boogaard's death that doctors diagnosed Boogaard with CTE after examining his brain. John Branch, *Derek Boogaard: A Brain 'Going Bad'*, N.Y. TIMES (Dec. 11, 2005), [http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=all&_r=0). "It was then that Len Boogaard stopped listening. Something occurred to him that he did not expect. For months, he could not bear the thought of his son's death. Suddenly, he was forced to imagine the life his son might have been left to live." *Id.*

197. *Id.* Boogaard's father, a police officer, did not hear from the New York Rangers for several months after his son's death. His father instead resorted to investigating his son's relationships, phone records, and paper trails to "link the history of his son's prescriptions to vague diagnoses in team medical reports." *Id.*

301 are not being enhanced via a six-month statute of limitations on hybrid claims, which could otherwise be filed as common law negligence claims subject to a statute of limitations of two years or more.<sup>198</sup> Instead of protecting and granting more power to individual employees, section 301—through its preemptive effect—provides even more power to the employer.<sup>199</sup> To be clear, the Estate’s claims of negligence against the NHL were subject to a six-month statute of limitations only because the CBA meticulously detailed the extent of the NHL’s voluntary duties to keep Boogaard safe and included an arbitration provision which required the NHLPA to act first on the Estate’s behalf.<sup>200</sup>

One counterpoint to section 301’s negative preemptive effect is that it may encourage employers to draft more extensive and specific CBAs. In being more specific and detailed, employers may voluntarily assume particular duties of care, reduce ambiguities in disputes involving the CBA, and take a more active role in the welfare of their employees. On the other hand, common law negligence claims are more likely to be preempted by section 301 and transformed into claims for breach of contract.<sup>201</sup>

Therefore, the NHL may argue that it assists players like Boogaard by assuming certain duties to protect, such as providing a medical treatment and rehabilitation program.<sup>202</sup> But the notion that a breach of this duty should result in a shorter statute of limitations merely because the CBA outlines the scope of that duty is untenable. In passing section 301, Congress aimed to ensure that federal courts retain jurisdiction over CBAs and uniformly apply federal labor law instead of inconsistent local state laws.<sup>203</sup>

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198. See *Labor Management Relations Act: What Was the Purpose of the Labor Management Relations Act?*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (June 1, 2012), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/lmrarequirements.aspx>; see also Oakes, *supra* note 35. Purposes of passing the NLRA include providing employees more freedoms and rights, including the right to associate and self-organize. While the LMRA largely shifted the emphasis from protection of employee rights to enhanced restrictions on unions, section 301 was implemented to apply federal law consistently.

199. See 2012 CBA, *supra* note 137; *Boogaard*, 126 F. Supp. 3d at 1019. By drafting the CBA in a “hyper-specific” manner, the NHL essentially guaranteed that many negligence claims would be preempted by section 301 and therefore subject to a six-month statute of limitations. See also Romero, *supra* note 19, at 307 (“Because courts have broadly interpreted CBAs and their contractual nature, claims that would normally fall under tort law are deemed to be subject to arbitration.”).

200. *Boogaard*, 126 F. Supp. 3d at 1025–26 (explaining that under section 301 claims, because the CBA included an arbitration provision, Boogaard needed to wait until the NHLPA either filed suit on his behalf and lost or notified Boogaard that it would not file suit. Only then may Boogaard file suit against both the NHLPA and the NHL, which would be subject to a six-month statute of limitations period).

201. See *Boogaard*, 126 F. Supp. 3d at 1019.

202. See 2012 CBA, *supra* note 137.

203. See Oakes, *supra* note 35, at 206; see also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (noting that section 301 represented a “congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts”); see also

It is doubtful that a short six-month statute of limitations period was a chief concern among the framers of the LMRA in ensuring that courts consistently apply federal labor law. Congress can still ensure that courts consistently apply the law by simply extending the section 301 statute of limitations period to two years.<sup>204</sup>

### *B. The Sixty-Day CBA Provision Should Be Prohibited*

Certain CBA provisions should be prohibited as void as against public policy. For instance, the NHL CBA provided that before the Estate could file a grievance/claim against the NHL, the NHLPA must first file a grievance on behalf of the Estate within sixty days.<sup>205</sup> While this provision may be appropriate in circumstances relating directly to business operations (for instance, when a player disputes the method or amount of salary/bonus paid or if the player disputes a suspension levied against him), it hardly seems appropriate in cases of death. When a player dies, it is highly questionable that the deceased's estate should be prohibited from filing a grievance/claim on behalf of the deceased until the NHLPA has done so first. Even though the NLRA was enacted to expand the rights of employees to collectively bargain, it allows for the inclusion of inequitable CBA provisions that unreasonably restrict not only the rights of employees, but the rights of the employees' families to bring suit.<sup>206</sup>

The NHL's CBA provides more power to the players' union at the expense of the individual employee. Because Congress passed the NLRA in part "to curtail certain private sector labor and management practices, which can harm the general welfare of workers," it appears that the provision at issue directly counters Congress's intent.<sup>207</sup> The sixty-day statute of limitations also effectively means that unless the player or the player's estate files suit in court within eight months of the event upon which the grievance is based, the claims that require CBA interpretation are forever barred as section 301 claims.

### *C. How NHL Players Can Circumvent Section 301 Preemption on Negligence Claims*

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Local 174 v. Lucas Flour Co., 369 U.S. 95, 104 (1962) (asserting that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules").

204. The statute of limitations for the majority of states is two years or more for torts. *See Chart: Statutes of Limitation in All 50 States*, NOLO (last updated Sep. 18, 2015), <http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html>.

205. 2005 CBA, *supra* note 137, at Art. 17.2(a)–(b).

206. *See* Oakes, *supra* note 35, at 204.

207. *National Labor Relations Act*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Aug. 20, 2017).

The cases analyzed throughout this Note provide insight into the methods players can employ to circumvent section 301 preemption. As evidenced, the paramount and most obvious method of circumventing section 301 preemption is to assert a claim that will not require interpretation of the CBA. However, this is easier said than done. *Concussion Injury* shows that, at the very least, players can survive a motion to dismiss when the face of the complaint does not include any reference to a CBA.<sup>208</sup> For negligence claims, this may be difficult if the CBA is very specific regarding the duties that are voluntarily assumed by the league.<sup>209</sup> Therefore, the complaint must specifically note that the general duties of care assumed by the NHL either arose independently of any CBA provision or arose solely under state law.<sup>210</sup>

Although the CBA may contain provisions that outline the NHL's voluntarily assumed duties of care, players can attempt to invoke these duties by instead referring to other sources that also define their scope.<sup>211</sup> For instance, leaked e-mails by the NHL reveal that they conducted and then ceased a Concussion Study Group.<sup>212</sup> Players may therefore be able to show that the NHL assumed a duty of care independent of the CBA by specifying outside documents that purport to identify the scope of the NHL's duty. This strategy was successful in *Brown v. National Football League*, where the player referenced rules and manuals that were not contained within the CBA.<sup>213</sup> However, the Estate attempted this same method when it pointed to NHL rules that penalized high sticking and fighting to no avail.<sup>214</sup>

Despite the Estate's attempt, the court still concluded that the claims were preempted by section 301 because they required CBA interpretation to determine whether the NHL's duties were limited to protecting players from high sticks or whether the NHL's duties were more expansive.<sup>215</sup> However, *Concussion Injury* shows that reference to other documents may suffice, at least at the motion to dismiss stage. Additionally, instead of alleging that the NHL breached a duty to keep players reasonably safe, players can allege that the NHL actively took steps to harm individual

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

209. *See* *Boogaard v. Nat'l Hockey League*, 126 F. Supp. 3d 1010, 1019 (N.D. Ill. 2015); *supra* note 199 and accompanying text.

210. *See* *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (holding that the claims asserting violations of DATWA, a state statute, were not preempted by section 301).

211. *See generally* *Concussion Injury*, 189 F. Supp. 3d at 859–60.

212. Josh Cooper, *Globe and Mail Publishes Searchable NHL Concussion Emails*, YAHOO! SPORTS (Mar. 30, 2016 2:09 AM), <http://sports.yahoo.com/blogs/nhl-puck-daddy/searchable-nhl-concussion-lawsuit-emails--correspondence-published-070940232.html>.

213. *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002); *see supra* note 98 and accompanying text.

214. *Boogaard*, 126 F. Supp. 3d at 1018.

215. *Id.* *See supra* note 117 and accompanying text.

players.<sup>216</sup> The Estate employed this method in its amended complaint, which survived section 301 preemption.<sup>217</sup>

Players can also attempt to circumvent section 301 preemption by alleging that the NHL violated a state law or statute. The court in *Williams* concluded that even if a CBA defines the scope of a duty of care that directly matches or exceeds the duty of care outlined in a state law or statute, then the employee simply retains two possible claims—one for a breach of contract under section 301 and one under the state law or statute.<sup>218</sup> *Williams* went even further and clarified that even if the league asserts that the CBA requires consultation to determine if the statute governs the league's conduct, section 301 preemption still doesn't apply because mere reference to or consultation of the CBA is not enough to warrant preemption.<sup>219</sup>

If the plaintiffs are retired players, they can attempt to circumvent section 301 preemption by showing that the CBA was not in effect at the time their cause of action accrued.<sup>220</sup> However, the players must be careful to specify the exact time period in which the injuries were sustained. If the complaint refers to the entire player's career, references a time period in which a CBA was in effect, or is otherwise ambiguous as to when the injuries were sustained, the court is likely to conclude that the claims are preempted by section 301.<sup>221</sup>

### CONCLUSION

Derek Boogaard died due to an accidental overdose of prescription painkillers.<sup>222</sup> Because of section 301's preemptive effect, the Estate's negligence claims were transformed into breach of contract claims, which are subject to only a six-month statute of limitations, when they otherwise

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216. See *Boogaard v. Nat'l Hockey League*, 211 F. Supp. 3d 1107, 1111 (N.D. Ill. 2016).

217. *Id.*

218. *Williams v. Nat'l Football League*, 582 F.3d 863, 875–76 (8th Cir. 2009).

219. *Id.* at 876. The court quoted *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988), stating “Section 301 preempts a state law claim if its ‘resolution . . . depends upon the meaning of a collective-bargaining agreement.’” *Id.* (emphasis added). It further quoted *Trs. of Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 330 (8th Cir. 2006) when it asserted that “the Supreme Court has distinguished those which require interpretation or construction of the CBA from those which only require reference to it.” *Id.* (alteration in original).

220. See *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 189 F. Supp. 3d 856 (D. Minn. 2016) (noting that retired players may not be subject to any CBA). *But see* *Smith v. Nat'l Football League Players Ass'n*, No. 14 C 10559, 2014 WL 6776306 at \*7 (E.D. Mo. Dec. 2, 2014) (noting that “[t]he fact Plaintiffs are now retirees does not preclude preemption of claims based on events which occurred while Plaintiffs were members of the bargaining unit”).

221. See *Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012); *supra* note 92 and accompanying text.

222. See *Romero*, *supra* note 19, at 272–73.

would have been subject to a two-year statute of limitations period.<sup>223</sup> The court converted an otherwise common law tort claim to a section 301 claim—a claim under the NLRA, which Congress theoretically passed to enhance the power and rights of employees.<sup>224</sup>

Unfortunately, section 301 preemption resulted in detrimental effects that Boogaard likely did not bargain for when he signed on to the CBA, and effects that the Estate likely did not foresee when Boogaard died. For the Estate and others, section 301 preemption represents a boogeyman that deteriorates the rights of employees. Congress can utilize their power to correct this wrong and restore the vision and purpose of the LMRA by extending the six-month statute of limitations and prohibiting certain CBA provisions as void as against public policy. Otherwise, players can utilize various methods to circumvent section 301 preemption.

In entering a final judgment against the Estate and in favor of the NHL, the judge asserted “[a]lthough judgment is entered in the NHL’s favor, this opinion should not be read to commend how the NHL handled Boogaard’s particular circumstances—or the circumstances of other NHL players who over the years have suffered injuries from on-ice play.”<sup>225</sup> Admonishing the actions of the NHL does not suffice; Congress and the courts would be wise to alleviate the burdens NHL players (and others) face when they attempt to bring tort claims against their employers.

*Tyler V. Friederich\**

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223. See *Boogaard v. Nat’l Hockey League*, 126 F. Supp. 3d 1010 (N.D. Ill. 2015); see also 735 ILL. COMP. STAT. 5/13-202 (2016); MINN. STAT. ANN. § 541.07 (West 2016).

224. See *Labor Management Relations Act*, *supra* note 198 and accompanying text; Oakes, *supra* note 35.

225. *Boogaard v. Nat’l Hockey League*, 2017 WL 2424152 at \*10 (N.D. Ill. June 5, 2017).

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