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902 F.3d 1109
United States Court of Appeals, Ninth Circuit.

Richard DENT; Jeremy Newberry; Roy Green; J. D. Hill; Keith Van Horne; Ron Stone; Ron Pritchard; James McMahon; Marcellus Wiley; Jonathan Rex Hadnot, Jr., on Behalf of Themselves and all Others Similarly Situated, Plaintiffs-Appellants,
v.
NATIONAL FOOTBALL LEAGUE, a New York unincorporated association, Defendant-Appellee.

No. 15-15143
|
Argued and Submitted December 15, 2016, San Francisco, California
|
Filed September 6, 2018

Synopsis

Background: Retired professional football players filed putative class action alleging that professional football league distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that manner in which those drugs were administered left players with permanent injuries and chronic medical conditions. The United States District Court for the Northern District of California, No. 3:14-cv-02324-WHA, William Alsup, J., 2014 WL 7205048, dismissed complaint, and players appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:

[1] Labor Management Relations Act (LMRA) did not preempt players' negligence per se claim;

[2] LMRA did not preempt players' negligent hiring and retention claim;

[3] LMRA did not preempt players' negligent misrepresentation claim; and

[4] LMRA did not preempt players' fraud and fraudulent concealment claims.

Reversed and remanded.

West Headnotes (27)

[1] Labor and Employment
Preemption
States
Labor and Employment

Labor Management Relations Act (LMRA) preempts state law claims founded directly on rights created by collective bargaining agreements, and also claims substantially dependent on analysis of collective bargaining agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[2] Labor and Employment
Preemption
States
Labor and Employment

Labor Management Relations Act (LMRA) does not preempt state law claims where rights at issue are conferred by state law, independent of collective bargaining agreements and matter at hand can be resolved without interpreting collective bargaining agreements. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[3] Labor and Employment
Preemption
States
Labor and Employment

To determine whether state-law claims are preempted by Labor Management Relations Act (LMRA), court must first ask whether cause of action involves rights conferred upon employee by virtue of state law, not by collective bargaining agreement (CBA), and if rights at issue exist solely as result of CBA, then claim is preempted, but if right

exists independently of CBA, court must ask whether litigating state law claim nonetheless requires interpretation of CBA, such that resolving entire claim in court threatens proper role of grievance and arbitration. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[4] **Labor and Employment**
Preemption
States
Labor and Employment

Hypothetical connection between claim and collective bargaining agreement's terms is not enough to preempt state law claim pursuant to Labor Management Relations Act (LMRA); claims are only preempted to extent that there is active dispute over meaning of contract terms. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[5] **Labor and Employment**
Preemption
States
Labor and Employment

Defense based on collective bargaining agreement does not give rise to preemption pursuant to Labor Management Relations Act (LMRA). Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[6] **Labor and Employment**
Preemption
States
Labor and Employment

Provision of collective bargaining agreement (CBA) does not trigger preemption pursuant to Labor Management Relations Act (LMRA) when it is only potentially relevant to state law claims, without any guarantee that interpretation or direct reliance on CBA terms will occur; rather, adjudication of claim must require interpretation of CBA provision. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[7] **Labor and Employment**
Preemption
States
Labor and Employment

Merely consulting collective bargaining agreement (CBA) to, for example, calculate damages or ascertain that issue is not addressed by CBA, does not constitute "interpretation" of CBA for preemption purposes. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[8] **Labor and Employment**
Preemption
States
Labor and Employment

Need for purely factual inquiry that does not turn on meaning of any provision of collective bargaining agreement is not cause for preemption under Labor Management Relations Act (LMRA). Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[9] **Labor and Employment**
Preemption
States
Labor and Employment

Forum preemption inquiry under Labor Management Relations Act (LMRA) is not inquiry into claim's merits; it is inquiry into claim's legal character—whatever its merits—so as to ensure it is decided in proper forum. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[10] **Negligence**
Elements in general

To state claim for negligence in California, plaintiff must establish following elements: (1) defendant had duty, or obligation to conform to certain standard of conduct for protection of others against unreasonable risks, (2) defendant breached that duty, (3) that breach proximately caused plaintiff's injuries, and (4) damages.

Cases that cite this headnote

[11] **Negligence**
Violations of statutes and other regulations
Negligence
Nature and form of remedy

Under California law, negligence per se is doctrine, not independent cause of action.

Cases that cite this headnote

[12] **Negligence**
Violations of statutes and other regulations
Negligence
Proximate cause

Under California law, defendant's violation of statute can give rise to presumption that it failed to exercise due care if it violated statute, ordinance, or regulation of public entity, that violation proximately caused injury resulted from occurrence of nature that statute, ordinance, or regulation was designed to prevent, and person who suffered injury was one of class of persons for whose protection statute, ordinance, or regulation was adopted. West's Ann.Cal. Evid. Code § 699(a).

Cases that cite this headnote

[13] **Negligence**
Necessity and Existence of Duty
Negligence
Contractual duty
Negligence
Duty based upon statute or other regulation

Under California law, duty of care may arise through statute or by contract, and may also be based on general character of activity in which defendant engaged.

Cases that cite this headnote

[14] **Negligence**
Necessity and Existence of Duty

Under California law, when deciding whether duty of care exists, factors that court may consider include: foreseeability of harm to plaintiff, degree of certainty that plaintiff suffered injury, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's conduct, policy of preventing future harm, extent of burden to defendant and consequences to community of imposing duty to exercise care with resulting liability for breach, and availability, cost, and prevalence of insurance for risk involved.

Cases that cite this headnote

[15] **Labor and Employment**
Preemption
States
Labor and Employment

Labor Management Relations Act (LMRA) did not preempt retired professional football players' negligence per se claim based on professional football league's alleged distribution of controlled substances and prescription drugs to them in violation of state and federal laws; players' right to receive medical care from league that did not create unreasonable risk of harm did not arise from collective bargaining agreements (CBA), lack of reasonable care in handling, distribution, and administration of controlled substances could foreseeably harm individuals who took them, whether league breached its duty to handle drugs with reasonable care could be

determined by looking to statutes at issue, and establishing causation would not require interpretation of CBAs. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 101 et seq., 21 U.S.C.A. § 801 et seq.; Federal Food, Drug, and Cosmetic Act § 1 et seq., 21 U.S.C.A. § 301 et seq.; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Cal. Bus. & Prof. Code § 4000 et seq.

Cases that cite this headnote

[16] **Labor and Employment**
Validity or Propriety

Parties to collective bargaining agreement cannot bargain for what is illegal.

Cases that cite this headnote

[17] **Labor and Employment**
Negligent Hiring
Labor and Employment
Negligent retention

Under California law, employer may ordinarily be liable to third person for employer's negligence in hiring or retaining employee who is incompetent or unfit.

Cases that cite this headnote

[18] **Labor and Employment**
Negligent Hiring
Labor and Employment
Negligent retention

Under California law, there are two elements necessary for duty to arise in negligent hiring and negligent retention cases—existence of employment relationship and foreseeability of injury.

Cases that cite this headnote

[19] **Labor and Employment**
Preemption
States
Labor and Employment

Labor Management Relations Act (LMRA) did not preempt retired professional football players' claim that professional football league negligently hired and retained incompetent individuals charged with overseeing, evaluating, and recommending changes to distribution of controlled substances and prescription drugs to players, even though parties' collective bargaining agreements (CBA) contained provisions regarding medical care, where CBAs only imposed such obligations on teams, and did not require league to hire employees to treat players or oversee distribution of medications. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[20] **Fraud**
Statements recklessly made;negligent misrepresentation

To state claim for negligent misrepresentation under California law, plaintiff must allege misrepresentation of past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on fact misrepresented; ignorance of truth and justifiable reliance on misrepresentation by party to whom it was directed; and resulting damage.

Cases that cite this headnote

[21] **Fraud**
Statements recklessly made;negligent misrepresentation

Under California law, responsibility for negligent misrepresentation rests upon existence of legal duty owed by defendant to injured person.

Cases that cite this headnote

[22] **Labor and Employment**
Preemption
States
Labor and Employment

Labor Management Relations Act (LMRA) did not preempt retired professional football players' claim that professional football league negligently misrepresented risks associated with controlled substances and prescription drugs that it allegedly distributed to them, despite league's contention that it was impossible to assess whether players reasonably relied on its representations without interpreting collective bargaining agreement (CBA) provisions related to team doctors' disclosure obligations; whether league made false assertions, whether it knew or should have known they were false, whether it intended to induce players' reliance, and whether players justifiably relied on its statements to their detriment, were all factual matters that could be resolved without interpreting CBAs, and CBAs did not address who was responsible for disclosing risks of prescription drugs provided to players by league. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[23] Fraud

Reliance on Representations and Inducement to Act

Under California law, plaintiffs asserting negligent misrepresentation claims are denied recovery for lack of justifiable reliance only if their conduct is manifestly unreasonable in light of their own intelligence or information.

Cases that cite this headnote

[24] Fraud

Elements of Actual Fraud

Under California law, elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.

Cases that cite this headnote

[25] Fraud

Fraudulent Concealment

Under California law, elements of fraudulent concealment are (1) concealment or suppression of material fact; (2) by defendant with duty to disclose fact to plaintiff; (3) defendant intended to defraud plaintiff by intentionally concealing or suppressing fact; (4) plaintiff was unaware of fact and would not have acted as he or she did if he or she had known of concealed or suppressed fact; and (5) plaintiff sustained damage as result of concealment or suppression of fact.

Cases that cite this headnote

[26] Labor and Employment

Preemption

States

Labor and Employment

Labor Management Relations Act (LMRA) did not preempt retired professional football players' claims against professional football league for fraud and fraudulent concealment, based on its purported failure to warn them of substantial risk of causing addictions and related physical and mental health problems arising from its alleged distribution of controlled substances and prescription drugs to players, despite league's contention that it was impossible to assess whether players reasonably relied on its representations without interpreting collective bargaining agreement (CBA) provisions related to team doctors' disclosure obligations, where players' claims were about league's conduct, and resolving claims would not require interpreting CBA provisions regarding team doctors' disclosure obligations. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

[27] Labor and Employment

Preemption

States

Labor and Employment

Preemption under Labor Management Relations Act (LMRA) extends only as far as necessary to protect role of labor arbitration in resolving disputes over collective bargaining agreements. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Cases that cite this headnote

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Appeal from the United States District Court for the Northern District of California, William Alsup, District Judge, Presiding, D.C. No. 3:14-cv-02324-WHA

Before: Richard C. Tallman,[*] Jay S. Bybee, and N. Randy Smith, Circuit Judges.

OPINION

TALLMAN, Circuit Judge:

This appeal requires us to decide whether a variety of state-law claims brought ***1114** against the National Football League (NFL) by former professional football players are preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 141.

The district court held that the players' claims are preempted and dismissed their suit. We disagree. As pled, the players' claims neither arise from collective bargaining agreements (CBAs) nor require their interpretation. Therefore, we reverse and remand for further proceedings.

I

The NFL is an unincorporated association of thirty-two independently owned and operated football "clubs," or teams. The NFL "promotes, organizes, and regulates professional football in the United States," *Williams v. Nat'l Football League*, 582 F.3d 863, 868 (8th Cir. 2009), but it does not employ individual football players; they are employees of the teams for whom they play.

Richard Dent is a retired football player who played on four different NFL teams during his fourteen-year career. During that time, doctors and trainers allegedly gave him "hundreds, if not thousands" of injections and pills containing powerful painkillers in an effort to keep him on the field. According to Dent, he was never warned about the potential side effects or long-term risks of the medications he was given, and he ended his career with an enlarged heart, permanent nerve damage in his foot, and an addiction to painkillers.

Since 1968, the NFL, its member teams, and NFL players have been bound by a series of CBAs[1] negotiated by the NFL Players' Association (the players' bargaining unit) and the NFL Management Council (the teams' bargaining unit).[2] Since 1982, the CBAs have included provisions regarding "players' rights to medical care and treatment." Those provisions have changed somewhat over the years, but generally speaking, they have required teams to employ board-certified orthopedic surgeons and trainers who are certified by the National Athletic Trainers Association, and they have guaranteed players the right to access their medical records, obtain second opinions, and choose their own surgeons. The CBAs impose certain disclosure requirements on team doctors; for example, the 1982 CBA established that "[i]f a Club physician advise[d] a coach or other Club representative of a player's physical condition which could adversely affect the player's performance or health, the physician [would] also advise the player." The 1993 CBA added the requirement that "[i]f such condition could be significantly aggravated by continued performance, the physician [would] advise the player of such fact in writing." The 2011 CBA established that team physicians "are required

to disclose to a player any and all information about the player's physical condition" that the physicians disclose to coaches or other team representatives, "whether or not such information affects the player's performance or health."

In 2014, Dent and nine other retired players filed a putative class action suit against the NFL in the Northern District of California, seeking to represent a class of more than 1,000 former players. They alleged that since 1969, the NFL has distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that the manner in which these drugs were administered ***1115** left the players with permanent injuries and chronic medical conditions.

Like Dent, the other named plaintiffs allege that during their years in the NFL, they received copious amounts of opioids, non-steroidal anti-inflammatory medications, and local anesthetics. The complaint claims the NFL encouraged players to take these pain-masking medications to keep players on the field and revenues high, even as the football season got longer and the time between games got shorter, increasing their chances of injury. According to the players, they "rarely, if ever, received written prescriptions ... for the medications they were receiving." Instead, they say they were handed pills in "small manila envelopes that often had no directions or labeling" and were told to take whatever was in the envelopes. During their years of consuming these powerful medications, it is further alleged that no one from the NFL warned them about potential side effects, long-term risks, interactions with other drugs, or the likelihood of addiction. The plaintiffs claim that as a result of their use (and overuse) of these drugs, retired players suffer from permanent orthopedic injuries, drug addictions, heart problems, nerve damage, and renal failure.

Each team hires doctors and trainers who attend to players' medical needs. Those individuals are employees of the teams, not the NFL. But the players' Second Amended Complaint (SAC) asserts that the NFL itself directly provided medical care and supplied drugs to players. For example, the SAC alleges that:

- "The NFL directly and indirectly supplied players with and encouraged players to use opioids to manage pain before, during and after games in a manner the NFL knew or should have known constituted a misuse of the medications and violated Federal drug laws."
- "The NFL directly and indirectly administered Toradol on game days to injured players to mask their pain."
- "The NFL directly and indirectly supplied players with NSAIDs, and otherwise encouraged players to rely upon NSAIDs, to manage pain without regard to the players' medical history, potentially fatal drug interactions or long-term health consequences of that reliance."
- "The NFL directly and indirectly supplied players with local anesthetic medications to mask pain and other symptoms stemming from musculoskeletal injury when the NFL knew that doing so constituted a dangerous misuse of such medications."
- "NFL doctors and trainers gave players medications without telling them what they were taking or the possible side effects and without proper recordkeeping. Moreover, they did so in excess, fostering self-medication."
- "[M]edications are controlled by the NFL Security Office in New York ...."
- "The NFL made knowing and intentional misrepresentations, including deliberate omissions, about the use and distribution of the Medications."

The named plaintiffs sought to represent a class of plaintiffs who had "received or were administered" drugs by anyone affiliated with the NFL or an NFL team. They filed claims for negligence per se, negligent hiring and retention, negligent misrepresentation, fraudulent concealment, fraud, and loss of consortium. They sought relief including damages, injunctive relief, declaratory relief, and medical monitoring.

The NFL filed two motions to dismiss, one arguing that the players' claims were preempted by § 301 of the LMRA and the other arguing that the players failed to ***1116** state a claim and their claims were time barred. The district court held a hearing on the preemption issue. It granted the NFL's motion to dismiss on preemption grounds and denied the NFL's other motion to dismiss as moot. The players timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's finding of preemption under § 301. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001), *as amended* (Aug. 27, 2001).

II

[1] **[2]** Section 301 of the LMRA is a jurisdictional statute that has been interpreted as "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." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032 (9th Cir. 2016) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)). Congress intended for § 301 to "protect the primacy of grievance and arbitration as the forum for resolving CBA disputes and the substantive supremacy of federal law within that forum." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 920 (9th Cir. 2018) (en banc) (emphasis omitted). Accordingly, § 301 preempts state-law claims "founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " [3] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987)). Conversely, claims are not preempted where the rights at issue are "conferred by state law, independent of the CBAs" and "the matter at hand can be resolved without interpreting the CBAs." *Burnside*, 491 F.3d at 1058.

[3] We conduct a two-step inquiry to determine whether state-law claims are preempted by § 301. First, we ask whether the cause of action involves "rights conferred upon an employee by virtue of state law, not by a CBA." *Id.* at 1059. If the rights at issue "exist[ ] solely as a result of the CBA, then the claim is preempted, and our analysis ends there." *Id.*

[4] Second, if the right exists independently of the CBA, we "ask whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." *Schurke*, 898 F.3d at 921. A claim that requires interpretation of a collective bargaining agreement is preempted. *Burnside*, 491 F.3d at 1059–60. " 'Interpretation' is construed narrowly; it means something more than 'consider,' 'refer to,' or 'apply.' " *Schurke*, 898 F.3d at 921. (quotation omitted). At this second step, "claims are only preempted to the extent that there is an active dispute over the meaning of contract terms. A *hypothetical* connection between the claim and the terms of the CBA is not enough to preempt the claim ...." *Id.* (quotations omitted).

[5] **[6]** "The plaintiff's claim is the touchstone" of the § 301 preemption analysis; "the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer*, 255 F.3d at 691. Therefore, a defense based on a CBA does not give rise to preemption. ***1117** *Caterpillar*, 482 U.S. at 398–99, 107 S.Ct. 2425. Moreover, "a CBA provision does not trigger preemption when it is only *potentially* relevant to the state law claims, without any guarantee that interpretation or direct reliance on the CBA terms will occur." *Humble v. Boeing Co.*, 305 F.3d 1004, 1010 (9th Cir. 2002). Rather, "adjudication of the claim must require interpretation of a provision of the CBA." *Cramer*, 255 F.3d at 691–92.

[7] **[8]** Merely consulting a CBA (to, for example, calculate damages or ascertain that an issue is not addressed by the CBA) does not constitute "interpretation" of the CBA for preemption purposes. *See Livadas v. Bradshaw*, 512 U.S. 107, 125, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *Cramer*, 255 F.3d at 693. Similarly, "[t]he need for a purely factual inquiry" that "does not turn on the meaning of any provision of a collective bargaining agreement ... is not cause for preemption" under § 301. *Burnside*, 491 F.3d at 1072 (quotation omitted); *see also Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) ("Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement.").

[9] In sum, for each of the players' claims, we must determine whether the claim arises from the CBAs and, if not, whether establishing the elements of the claim will require interpretation of the CBAs. *Burnside*, 491 F.3d at 1059–60. Because this case was decided on a motion to dismiss, as we perform this analysis we must take the SAC's allegations as true and construe them in the light most favorable to the plaintiffs. *See, e.g.*, *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). We must also be mindful of the fact that the "LMRA

§ 301 forum preemption inquiry is not an inquiry into the merits of a claim; it is an inquiry into the claim's 'legal character'—whatever its merits—so as to ensure it is decided in the proper forum." *Schurke*, 898 F.3d at 924 (quoting *Livadas*, 512 U.S. at 123–24, 114 S.Ct. 2068). Therefore, "[o]ur only job is to decide whether, as pleaded, the claim in this case is 'independent' of the CBA in the sense of 'independent' that matters for preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.' " *Id.* (alteration omitted) (quoting *Lingle*, 486 U.S. at 407, 108 S.Ct. 1877).

A

[10] To state a claim for negligence in California,[4] a plaintiff must establish the following elements: (1) the defendant had a duty, or an "obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks," (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158 Cal.App.4th 983, 70 Cal.Rptr.3d 519, 530 (2008)).

[11] The plaintiffs have styled their negligence claim as one for "negligence per se," but under California law, negligence per se is a doctrine, not an independent cause of action. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal.App.4th 1256, 45 Cal.Rptr.3d 222, 244–45 (2006). Therefore, we construe the players' claim as a traditional negligence claim, but apply the negligence per se doctrine.

***1118** **[12]** Under that doctrine, a statute may establish the standard of care. Therefore, the defendant's violation of a statute can give rise to a presumption that it failed to exercise due care if it "violated a statute, ordinance, or regulation of a public entity," that violation proximately caused an injury, the injury "resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent," and the person who suffered the injury "was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." Cal. Evid. Code § 699(a); *see also Elsner v. Uveges*, 34 Cal.4th 915, 22 Cal.Rptr.3d 530, 102 P.3d 915, 927 (2004). Many state and federal laws govern the administration of controlled substances to alleviate pain.

The players argue that they were injured by the NFL's "provision and administration" of controlled substances without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks, and that this conduct violated the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq.*; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq.*

The district court believed that the "essence" of the plaintiffs' negligence claim "is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment." However, as we read the complaint, the plaintiffs are not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances, and therefore its actions directly injured players. The SAC alleges that the NFL "directly and indirectly supplied players" with drugs. It also alleges that the NFL implemented a "League-wide policy" regarding Toradol, that "medications are controlled by the NFL Security Office in New York," that "the NFL coordinat[ed] the illegal distribution of painkillers and anti-inflammatories for decades," and that "NFL doctors and trainers" gave players medications "without telling them what they were taking or the possible side effects."[5]

With that reading of the complaint in mind, we turn to the question whether the plaintiffs' negligence claim is preempted.

The first question is whether the right at issue—the players' right to receive medical care from the NFL that does not create an unreasonable risk of harm—arises from the CBAs. *See Burnside*, 491 F.3d at 1059. It does not. The CBAs do not require the NFL to provide medical care to players, and the players are not arguing that they do. They are not arguing that the NFL violated the CBAs at all, but that it violated state and federal laws governing prescription drugs.

The next question is whether the plaintiffs' claim nevertheless requires interpretation of the CBAs. *See id.* To answer it, we ask whether the plaintiffs can make out each element of a prima facie case for negligence without interpretation of the CBA.

[13] **[14]** As for the first element, "[a] duty of care may arise through statute or by contract." *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 157 Cal.Rptr. 407, 598 P.2d 60, 62 (1979). It may also be based on "the general character of the activity in which the defendant engaged." *Id.* California courts consider several factors when deciding whether a duty exists, including

> ***1119** the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Regents of Univ. of Cal. v. Superior Court, 230 Cal.Rptr.3d 415, 413 P.3d 656, 670 (2018) (quoting *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, 564 (1968)). These factors "must be evaluated at a relatively broad level of factual generality." *Id.* (quotation omitted).

[15] Here, any duty to exercise reasonable care in the distribution of medications does not arise through statute or by contract; no statute explicitly establishes such a duty, and as already noted, none of the CBAs impose such a duty. However, we believe that a duty binding on the NFL —or any entity involved in the distribution of controlled substances—to conduct its activities with reasonable care arises from "the general character of [that] activity." *See J'Aire Corp.*, 157 Cal.Rptr. 407, 598 P.2d at 62. Applying the *Rowland* factors, lack of reasonable care in the handling, distribution, and administration of controlled substances can foreseeably harm the individuals who take them. That's why they're "controlled" in the first place—overuse or misuse can lead to addictions and long-term health problems. *See, e.g.*, 21 U.S.C. §§ 801(2), 812. These types of injuries can be established with certainty, and they are closely connected to the misuse of controlled substances. Carelessness in the handling of dangerous substances is both illegal and morally blameworthy, given the risk of injury it entails. Imposing liability on those involved in improper prescription-drug distribution will prevent harm by encouraging responsible entities to ensure that drugs are administered safely. And it will not represent an undue burden on such entities, which should already be complying with the laws governing prescription drugs and controlled substances. Thus, we conclude that to the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care.

Of course, establishing that an entity owes a duty does not necessarily establish what standard of care applies, or whether it was breached. But when it comes to the distribution of potentially dangerous drugs, minimum standards are established by statute. The Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq.*; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq.*, set forth requirements governing how drugs are to be prescribed and labeled.[6] 21 U.S.C. §§ 331, 352, 353(b)(1), 825, 829. Therefore, under the plaintiffs' negligence per se theory, whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at issue. There is no need to look to, let alone interpret, the CBAs.

As for causation, whether the NFL's alleged violation of the statutes caused the plaintiffs' injuries is a "purely factual question[ ]" that "do[es] not 'requir[e] a court ***1120** to interpret any term of a collective-bargaining agreement.' " *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) (quoting *Lingle*, 486 U.S. at 407, 108 S.Ct. 1877).

The Eighth Circuit reached a similar conclusion in *Williams*, 582 F.3d 863. There, NFL players who had been suspended after testing positive for a banned substance brought a variety of claims against the NFL, including common-law claims and a state-law claim based on a Minnesota statute governing drug testing. *Id.* at 872–73. The NFL argued that all the claims were preempted by § 301, but the Eighth Circuit held that the statutory claim was not preempted, because "a court would have no need to consult the [CBA] in order to resolve the Players' [statutory] claim." *Id.* at 876. Instead, "it would

compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with [the statute's] requirements." *Id.* Similarly, here, a court would have no need to consult the CBAs to resolve the plaintiffs' negligence claim. Instead, it would compare the NFL's conduct with the requirements of state and federal laws governing the distribution of prescription drugs.

We recognize that the Eighth Circuit held that the *Williams* plaintiffs' common-law claims, including a negligence claim, were preempted by § 301. *Id.* at 881–82. But that negligence claim is distinguishable from the claim here. There, the plaintiffs argued that the NFL was negligent because it failed to warn players that a certain supplement contained a banned substance. *Id.* at 881. But the players had procured the supplements on their own; in fact, they were taking supplements *against* the advice of the NFL. *Id.* at 869. The Eighth Circuit held that under these circumstances, determining whether the NFL had a duty to warn players about the supplement would require "examining the parties' legal relationship and expectations as established by the CBA and the [Drug] Policy," which explicitly stated that players who took supplements did so "at [their] own risk." *Id.* at 869, 881.

Here, on the other hand, no examination of the CBAs is necessary to determine that distributing controlled substances is an activity that gives rise to a duty of care. The NFL has a duty to avoid creating unreasonable risks of harm when distributing controlled substances that is completely independent of the CBAs. Therefore, unlike in *Williams*, no CBA interpretation is required to determine whether the NFL owed the players a duty and whether it breached that duty. [7]

[16] The NFL argues that to determine what duty, if any, it owed plaintiffs, a court must "interpret the CBAs to determine the scope of the obligations the NFL and Clubs have adopted vis a vis the individual clubs' physicians and trainers." Similarly, ***1121** the district court noted that the CBAs place medical disclosure obligations "squarely on Club physicians, not on the NFL." But the *teams'* obligations under the CBAs are irrelevant to the question of whether the *NFL* breached an obligation to players by violating the law. The parties to a CBA cannot bargain for what is illegal. *Allis-Chalmers*, 471 U.S. at 212, 105 S.Ct. 1904; *see also Cramer*, 255 F.3d at 695. Therefore, liability for a negligence claim alleging violations of federal and state statutes does not turn on how the CBAs allocated duties among the NFL, the teams, and the individual doctors. Regardless of what (if anything) the CBAs say about those issues, if the NFL had any role in distributing prescription drugs, it was required to follow the laws regarding those drugs. To the extent that the plaintiffs allege they were injured by the NFL's violation of those laws, their claims can be assessed without any interpretation of the CBAs.

The district court also stated that the negligence claim was preempted because "in deciding whether the NFL has been negligent ... it would be necessary to consider the ways in which the NFL has indeed stepped forward and required proper medical care," i.e., the provisions of the CBAs that establish minimum standards for the medical care teams provide to players. We are not so sure. The negligence analysis is not an equation, whereby one careless act can be canceled out by a careful act in a related arena—especially when the careful act is to be performed by a different party. In other words, the fact that the CBAs require *team* doctors to advise players in writing if a medical condition "could be significantly aggravated by continued performance" does not address the *NFL's* liability for injuring players by illegally distributing prescription drugs.

We express no opinion regarding the merits of the plaintiffs' negligence claim, which will require the players to establish that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries. Perhaps plaintiffs can prove these elements; perhaps not. That must await completion of discovery. We hold only that the plaintiffs' negligence claim regarding the NFL's alleged violation of federal and state laws governing controlled substances is not preempted by § 301.

We do note that at many points in the SAC, the plaintiffs appear to conflate the NFL and the teams. But the plaintiffs are pursuing a theory of direct liability, not vicarious liability. And they have attempted to vindicate virtually identical claims against the clubs themselves in separate litigation. [8] Therefore, on remand, any further proceedings in this case should be limited to claims arising from the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees. We leave it to the district court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL.

B

[17] **[18]** Ordinarily, "[a]n employer may be liable to a third person for the employer's ***1122** negligence in hiring or retaining an employee who is incompetent or unfit." *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 91 Cal.Rptr.3d 864, 868 (2009) (quotation omitted). To establish liability, a plaintiff must demonstrate the familiar elements of negligence: duty, breach, proximate causation, and damages. *Id.* There are "two elements necessary for a duty to arise in negligent hiring and negligent retention cases—the existence of an employment relationship *and* foreseeability of injury." *Id.* at 870–71 (quoting *Abrams v. Worthington*, 169 Ohio App.3d 94, 861 N.E.2d 920, 924 (2006)).

The SAC alleges that "NFL doctors and trainers gave players medications without telling them what they were taking or the possible side effects and without proper recordkeeping." It also alleges that the NFL hired individuals "charged with overseeing, evaluating, and recommending changes to distribution of Medications," and that the NFL knew or should have known that those individuals were incompetent. As a result, the players say they were "deceived about the nature and magnitude of the dangers to which they were subjected by the Medications" and ultimately injured.

If the NFL did in fact hire doctors and trainers to treat players, or hire individuals to oversee the league's prescription-drug regime, there is clearly an employment relationship between the NFL and those individuals. Injury arising from their incompetence is foreseeable, given the dangers associated with controlled substances. *See* 21 U.S.C. §§ 801(2), 812. Therefore, to the extent that the NFL employed such individuals, it had a common-law duty to use reasonable care in hiring and retaining them.

[19] That duty did not arise from the CBAs, which do not require the NFL to hire employees to treat players or oversee the distribution of medications. Nor does determining whether the NFL breached that duty require interpreting the CBAs, which—because they do not require the NFL to hire such employees in the first place—do not specify any qualifications for them. Thus, the plaintiffs' negligent hiring and retention claims are not preempted by § 301. *See Burnside*, 491 F.3d at 1059; *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 999 (9th Cir. 2007) (holding plaintiff-employees' negligent hiring, training, and supervision claims were not preempted because they did "not invoke or refer to any duty arising from the CBA" and did not require interpretation of the CBA).

The NFL has not identified CBA provisions whose interpretation would be *required* in order to adjudicate the negligent hiring and retention claims. *See Cramer*, 255 F.3d at 691–92. The NFL argues, and the district court held, that a court could not assess these claims without interpreting various CBA provisions regarding medical care, including the requirement that each team retain a "board-certified orthopedic surgeon" and that all full-time trainers be "certified by the National Athletic Trainers Association." But those provisions relate to the *teams*' obligations, not the NFL's.

We recognize that it is not entirely clear that the NFL *did* hire doctors, trainers, or individuals to supervise medications. The complaint provides very little detail about the employees who were purportedly "charged with overseeing" medication distribution, and the SAC is devoid of any allegation of an agency relationship that would render the NFL liable for the conduct of particular doctors who treated specific players.

But if the plaintiffs have failed to make the factual allegations necessary to support their claim, that is a pleading problem, not a preemption problem. The issue in this appeal is not whether plaintiffs have ***1123** plausibly pled the NFL's liability, but whether plaintiffs' claims *as pled* are preempted. *See Schurke*, 898 F.3d at 924. We hold that the players' negligent hiring and retention claims are not preempted, because they can be evaluated without interpreting the CBAs.

C

[20] **[21]** To state a claim for negligent misrepresentation, a plaintiff must allege "[m]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage." *Shamsian v. Atlantic*

Richfield Co., 107 Cal.App.4th 967, 132 Cal.Rptr.2d 635, 647 (2003). As with all negligence claims, "responsibility for negligent misrepresentation rests upon the existence of a legal duty ... owed by a defendant to the injured person." *Eddy v. Sharp*, 199 Cal.App.3d 858, 245 Cal.Rptr. 211, 213 (1988).

The plaintiffs argue that the NFL "continuously and systematically" misrepresented the risks associated with the medications at issue, that they reasonably relied on those misrepresentations, and they were injured as a result.

[22] As we have said, none of the CBA provisions address the NFL's responsibilities with regard to the distribution of prescription drugs. Thus, any duty the NFL had to act with reasonable care when making representations regarding the medications arises from state law, not the CBAs. Therefore, the question is whether assessing the plaintiffs' negligent misrepresentation claim will require interpretation of the CBAs. *See Burnside*, 491 F.3d at 1059. We hold that it will not.

Whether the NFL made false assertions, whether the NFL knew or should have known they were false, whether the NFL intended to induce players' reliance, and whether players justifiably relied on the NFL's statements to their detriment, are all factual matters that can be resolved without interpreting the CBAs. *See Galvez v. Kuhn*, 933 F.2d 773, 778 (9th Cir. 1991) ("[T]he question in this case is simply a factual issue and one of intent .... Interpretation of the CBA can hardly help resolve these factual questions."). As for the NFL's duty, if the players are correct that the NFL directly supplied drugs to them, then the NFL certainly owed them a duty to exercise reasonable care when making representations about those drugs. *See Shamsian*, 132 Cal.Rptr.2d at 647; *see also Garcia v. Superior Court*, 50 Cal.3d 728, 268 Cal.Rptr. 779, 789 P.2d 960, 964 (1990) (holding that although a parole officer had no duty to make disclosures about the dangerousness of a parolee, once he chose to do so, he "had a duty to use reasonable care").

The NFL argues that assessing the scope of the NFL's duty would require interpreting CBA provisions related to medical care, including those that give players the right to access medical facilities, view their medical records, and obtain second opinions. But these provisions do not relate to the *NFL's* duty to use reasonable care when making representations about the safety of medications.

[23] The NFL also argues that it is impossible to assess whether the plaintiffs reasonably relied on the NFL's representations without interpreting CBA provisions related to team doctors' disclosure obligations. But California law does not require a detailed weighing of various parties' disclosure responsibilities to determine whether reliance was justified; the question is whether the "circumstances were such to make it reasonable for [the plaintiffs] to accept [the defendants'] statements ***1124** without an independent inquiry or investigation." *See Goonewardene v. ADP, LLC*, 5 Cal.App.5th 154, 209 Cal.Rptr.3d 722, 744 (2016) (quoting *OCM Principal Opportunities Fund, L.P. v. CIBC World Mkts. Corp.*, 157 Cal.App.4th 835, 864, 68 Cal. Rptr. 3d 828 (2007)). Plaintiffs are denied recovery for lack of justifiable reliance "only if [their] conduct is manifestly unreasonable in the light of [their] own intelligence or information." *OCM Principal*, 68 Cal.Rptr.3d at 865 (quotation marks and citation omitted). We need only "look to" the CBAs to determine that none of them contain any provisions that would render reliance on the NFL's representations regarding prescription drugs manifestly unreasonable. *See Cramer*, 255 F.3d at 692.

We acknowledge that two of our sister circuits have held misrepresentation claims by NFL players preempted because determining whether players' reliance was reasonable would require interpreting the CBAs. *See Williams*, 582 F.3d at 881; *Atwater*, 626 F.3d at 1183. But in both of those cases, specific provisions in the CBAs arguably rendered the players' reliance on the NFL's representations unreasonable, which meant that interpretation of the CBAs would be required to assess the plaintiffs' claims.

In *Atwater*, players brought claims based on the NFL's alleged negligence in conducting background checks on potential financial advisers. 626 F.3d at 1174–75. But the CBA provision that dealt with the relevant program explicitly stated that players were "solely responsible for their personal finances." *Id.* at 1181. The Eleventh Circuit held that determining whether the plaintiffs' reliance on the NFL's representations was reasonable would require interpreting that particular provision. *Id.* at 1182.

In *Williams*, players argued that the NFL owed them a duty to disclose that a certain dietary supplement contained a banned substance, even though the NFL

itself "strongly encourage[d] [players] to avoid the use of supplements altogether." 582 F.3d at 869, 881. But the NFL's drug policy, which had been incorporated into the CBA, stated that "if you take these products, you do so AT YOUR OWN RISK!" and that "a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance." *Id.* at 868. The Eighth Circuit stated that the reasonableness of the players' reliance on the absence of a warning about the supplement could not "be ascertained apart from [those] terms of the Policy." *Id.* at 882.

Here, unlike in *Atwater* or *Williams*, no CBA provisions directly address the subject of the litigation: who was responsible for disclosing the risks of prescription drugs provided to players by the NFL. In *Atwater* and *Williams*, the nature of the claims and the content of the CBAs meant that adjudicating the claim would require interpreting the CBAs. But here, no provisions of the CBAs even arguably render the players' reliance on the NFL's purported representations unreasonable.[9] ***1125** Therefore, interpretation of the CBAs will not be required, and the negligent misrepresentation claim is not preempted.

D

[24] **[25]** The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) "intent to defraud, i.e., to induce reliance;" (4) justifiable reliance; and (5) resulting damage. *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal.4th 951, 64 Cal.Rptr.2d 843, 938 P.2d 903, 917 (1997). The elements of fraudulent concealment are "(1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal.App.4th 124, 189 Cal.Rptr.3d 31, 60 (2015).

[26] The players can establish each of these elements without relying on the CBAs. The SAC alleges that "[t]he NFL knew, or should have known, that its provision and administration of Medications ... created a substantial risk of causing addictions and related physical and mental health problems." It also alleges that the NFL intentionally withheld this information from players with the intent to deceive them.

The NFL has not identified any CBA provisions that must be interpreted in order to resolve the players' fraud claims. As with the negligent misrepresentation claim, the NFL argues that assessing whether the NFL had a duty to make disclosures, and whether the players reasonably relied on the NFL's representations, would require interpreting CBA provisions requiring team doctors to make certain disclosures. But as explained above, because the players' claims are about the NFL's conduct, resolving these claims does not require interpreting CBA provisions regarding *team* doctors' disclosure obligations.

E

The players' loss of consortium claim, as well as their requests for declaratory judgment and medical monitoring, are derivative of their other claims. Because we hold that their claims are not preempted, we reverse the district court's dismissal of the derivative claims and remand.

F

The NFL argues that we should affirm the dismissal of all claims on the ground that the players failed to exhaust the grievance procedures required by the CBAs. For more than forty years, each CBA has included provisions that require players to follow certain dispute-resolution procedures for "[a]ny dispute ... involving the interpretation or application of, or compliance with, provisions of [the CBA]."

However, the players are not arguing that the NFL failed to comply with the terms of the CBA. Nor do their claims require the interpretation or application of the CBAs, for the reasons already described. Therefore, we reject the NFL's argument that we should affirm the dismissal of the plaintiffs' claims on this ground.

III

[27] Preemption under § 301 "extends only as far as necessary to protect the role ***1126** of labor arbitration in resolving CBA disputes." *Schurke*, 898 F.3d at 913-14. As pled, the players' claims do not constitute a dispute over the rights created by, or the meaning of, the CBAs. Their claim is that when the NFL provided players with prescription drugs, it engaged in conduct that was completely outside the scope of the CBAs. The meaning of CBA terms governing team doctors' disclosure obligations, the qualifications of team medical personnel, and players' rights to obtain second opinions or examine their medical records is simply irrelevant to the question of whether the NFL's conduct violated federal laws regarding the distribution of controlled substances and state law regarding hiring, retention, misrepresentation, and fraud. Therefore, no interpretation of the terms of the CBAs is necessary, and there is no danger that a court will impermissibly invade the province of the labor arbitrator. *See id.* at 921-22.

We express no opinion about the ultimate merits of the players' claims. They may be susceptible either to a motion for a more definite statement under Rule 12(e) or a motion to dismiss for failure to state a claim under Rule 12(b)(6), and they may not survive summary judgment under Rule 56. But the fact that the claims may have been inadequately pled is not a reason for finding them preempted. The complaint alleges claims that do not arise from the CBAs and do not require their interpretation. Therefore, they are not preempted by § 301.

Each party shall bear its own costs.

REVERSED and REMANDED.

All Citations

902 F.3d 1109, 212 L.R.R.M. (BNA) 3045, 169 Lab.Cas. P 11,128, 18 Cal. Daily Op. Serv. 8910, 2018 Daily Journal D.A.R. 8983

Footnotes

* Judge Tallman was drawn to replace Circuit Judge Alex Kozinski when Judge Kozinski retired. Judge Tallman has read the briefs and viewed the digital recording of oral argument. The panel has also reconferenced on the case.

1 There have been two periods of time when a CBA was not in force: from August 1987 to March 1993, and from March 2011 to August 2011. Those gaps in CBA coverage are irrelevant to this action.

2 Until 2011, the NFL itself was not a signatory to the CBAs. However, even prior to 2011, the CBAs were binding on all the relevant entities, including the NFL.

3 Section 301 preemption has a long history, which we will not fully recount here. An interested reader may refer to our opinions in *Kobold*, 832 F.3d 1024, *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053 (9th Cir. 2007), and *Cramer*, 255 F.3d 683, for more information on the history of the LMRA and the development of the preemption doctrine.

4 Because plaintiffs seek to represent a nationwide class but have not identified the specific states whose laws govern their claims, we follow the district court in applying California law for illustrative purposes.

5 The NFL argues that the doctors and trainers who actually provided medications to players were employees of the teams, not the NFL. But at this stage of the litigation, we must take the allegations in the SAC as true. *See Kwan*, 854 F.3d at 1096.

6 The NFL argues that these statutes do not apply to the NFL. But this argument goes to the merits of the plaintiffs' negligence per se theory and not to § 301 preemption. We need not and do not consider it here.

7 The NFL also points to *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010). There, the Eleventh Circuit held that a negligence claim arising from the NFL's vetting of financial advisors was preempted by § 301. But in *Atwater*, the NFL's duty to perform such vetting arose from the CBA itself, so the claim was preempted at the first step of the *Burnside* analysis. *See id.* The Eleventh Circuit did go on to say that even if the duty at issue had not arisen from the CBA, it would "still have to consult the CBA to determine the scope of the legal relationship between Plaintiffs and the NFL and their expectations based upon that relationship." *Id.* at 1182. But in that case, the CBA explicitly stated that players were "solely responsible for their personal finances," *id.* at 1181; interpreting that provision would be necessary to establishing the scope of the NFL's duty. Here, there is no analogous CBA provision that must be interpreted in order to establish the scope of the NFL's duty as it concerns the provision of prescription drugs to players.

8 *See Evans v. Arizona Cardinals Football Club, LLC*, No. C 16-01030, 2016 WL 3566945 (N.D. Cal. July 1, 2016) (holding that players' claims against teams were not preempted by § 301, and denying teams' motion to dismiss); *Evans v. Arizona Cardinals Football Club, LLC*, 252 F.Supp.3d 855 (N.D. Cal. May 15, 2017) (granting teams' motion to dismiss players'

amended complaint as to certain claims, and granting summary judgment for teams on some remaining claims); *Evans v. Arizona Cardinals Football Club, LLC*, 262 F.Supp.3d 935 (N.D. Cal. July 21, 2017) (granting summary judgment for teams on all remaining claims), *appeal docketed*, No. 17-16693 (9th Cir. 2017).

9 The only possible exception to this statement is a disclaimer in the 2011 CBA which states that nothing in the agreement should "be deemed to impose or create any duty or obligation upon either the League or the [players' union] regarding diagnosis, medical care and/or treatment of any player." But the plaintiffs assert claims arising between 1969 and 2012, and the 2011 CBA provision would apply to only a sliver of those claims. Moreover, if the NFL undertook to provide direct medical care and treatment to players, as the plaintiffs allege, then the disclaimer—which only states that nothing *in the CBA* should be interpreted as giving rise to duties regarding medical care—would not relieve the NFL of its duty not to misrepresent the effects of the drugs it was giving to players. *Cf. Cramer*, 255 F.3d at 697 ("Because a CBA cannot validly sanction illegal action, we hold the terms of the CBA were irrelevant to plaintiffs' claim.").

2018 WL 3421343
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
This Document Relates to All Actions

MDL No. 14-2551 (SRN/BRT)
|
Signed 07/13/2018

Synopsis

Background: Former professional hockey player brought action against professional hockey league, seeking medical monitoring relief on behalf of proposed class of all living retired professional hockey players. Plaintiff moved for class certification and for appointment as representative of a class of all living retired professional hockey players, and for certification of class of all retired professional hockey players who were clinically diagnosed with Neurological Disease, Disorder, or Condition (NDDC).

Holdings: The District Court, Susan Richard Nelson, J., held that:

[1] Minnesota's choice of law principles favored applying law of place where each member of proposed class played during career or place where each member currently lived rather than law of professional hockey league's state;

[2] individualized legal issues substantially predominated over common legal issues precluding certification of class; and

[3] certification of issue class was not warranted.

Motion denied.

West Headnotes (29)

[1] Federal Civil Procedure
Class Actions

Class actions are an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Fed. R. Civ. P. 23.

Cases that cite this headnote

[2] Federal Civil Procedure
In general;certification in general

Class certification is proper only if the district court is satisfied, after a rigorous analysis, that the prerequisites of the rule governing class certification have been satisfied. Fed. R. Civ. P. 23.

Cases that cite this headnote

[3] Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

Class certification requirement that common questions predominate over individual questions tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[4] Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

The predominance requirement for class certification is not satisfied if individual questions overwhelm the questions common to the class. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[5] Declaratory Judgment
Representative or class actions

Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

A class seeking certification on basis that party opposing class has acted or refused to act on grounds that apply generally to the class, so that final injunctive

relief of corresponding declaratory relief is appropriate respecting the class as a whole, need not establish that common question predominate over individual questions, but at the same time, the class claims must be cohesive. Fed. R. Civ. P. 23(b)(2), 23(b)(3).

Cases that cite this headnote

[6] Declaratory Judgment

Representative or class actions

Federal Civil Procedure

Common interest in subject matter, questions and relief;damages issues

Cohesiveness requirement for class seeking certification on basis that party opposing class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief of corresponding declaratory relief is appropriate respecting the class as a whole, is more stringent than the predominance and superiority requirements for maintaining a class action, because such class is mandatory and does not include an opt-out provision. Fed. R. Civ. P. 23(b)(2), 23(b)(3).

Cases that cite this headnote

[7] Federal Civil Procedure

Common interest in subject matter, questions and relief;damages issues

Federal Civil Procedure

In general;certification in general

District courts must perform a rigorous analysis before determining that issues common to the class predominate over issues that differ among individual class members as would support class certification. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[8] Federal Civil Procedure

Common interest in subject matter, questions and relief;damages issues

Federal Civil Procedure

In general;certification in general

Inquiry into whether common questions predominate over individual questions, as would support class certification, is more demanding than the otherwise rather similar commonality requirement for class certification in that, when determining whether common questions predominate, a court must conduct a limited preliminary inquiry, looking behind the pleadings, but that inquiry should be limited to determining whether, if the plaintiffs' general allegations are true, common evidence could suffice to make out a prima facie case for the class. Fed. R. Civ. P. 23(a), 23(b)(3).

Cases that cite this headnote

[9] Federal Civil Procedure

Common interest in subject matter, questions and relief;damages issues

Where the resolution of a common issue breaks down into an unmanageable variety of individual legal and factual issues, the predominance requirement for class certification is not satisfied. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[10] Federal Courts

Conflict of Laws;Choice of Law

A district court sitting in diversity must apply the conflict of law rules for the state in which it sits.

Cases that cite this headnote

[11] Action

What law governs

Minnesota uses a three-step choice of law analysis, first inquiring whether differing state laws present an outcome-determinative conflict and whether each law constitutionally may be applied to the case at hand, and then deciding whether the rule of law at issue is substantive or procedural; if the issue is substantive, the court applies

a multi-step choice-of-law analysis, which includes application of five choice-influencing considerations, to determine which state's law applies, but if the issue is procedural, then Minnesota applies its own law.

Cases that cite this headnote

[12] Action

What law governs

Under Minnesota choice-of-law principles, five factors court sitting in diversity must apply in determining which state's law applies when issue are substantive are: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law.

Cases that cite this headnote

[13] Torts

What law governs

Under Minnesota choice-of-law principles, predictability of results factor that court sitting in diversity must apply in determining which state law applies when issue is substantive is typically not relevant in tort cases because the parties in such cases are not alleged to have acted in reliance on any state's laws.

Cases that cite this headnote

[14] Action

What law governs

Under Minnesota choice-of-law principles, maintenance of interstate order factor that court sitting in diversity must apply in determining which state law applies when issue is substantive weighs in favor of the state which has the most significant contacts with the facts relevant to the litigation.

Cases that cite this headnote

[15] Action

What law governs

Under Minnesota choice-of-law principles, in applying advancements of the forum's governmental interest factor for determining which states law should apply, courts must determine which state's law to apply based on the relative policy interests of the two states.

Cases that cite this headnote

[16] Action

What law governs

Under Minnesota choice-of-law principles, application of the better rule of law factor for determining which state's law applies when issue is substantive applies only if the first four factors of the five factors court sitting in diversity must apply in determining which state's law applies when issue are substantive do not resolve the choice-of-law question.

Cases that cite this headnote

[17] Federal Civil Procedure

Employees

Minnesota choice-of-law principles favored applying law of place where each member of proposed class of professional hockey players played during his career or state where the member currently lived, rather than in professional hockey league's state, precluding a finding that common legal issues predominated as required to certify class in hockey players' action alleging that league failed to warn players about dangers of repeated brain trauma caused by concussive and subconcussive impacts sustained by players during their professional careers, and seeking medical monitoring relief. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[18] Damages

Medical treatment and care of person injured

Medical monitoring claims seek to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure.

Cases that cite this headnote

[19] Damages

Medical treatment and care of person injured

Medical monitoring claims are considered a non-traditional tort.

Cases that cite this headnote

[20] Damages

Medical treatment and care of person injured

Under Massachusetts law, plaintiff seeking future damages for medical monitoring must establish: (1) the defendant's negligence; (2) caused; (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury; (4) for which an effective medical test for reliable early detection exists; (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury; and (6) such diagnostic medical examinations are reasonably and periodically necessary, in conformance with the standard of care; and (7) the present value of the reasonable cost of such tests and care as of the date of the filing of the complaint.

Cases that cite this headnote

[21] Damages

Expenses

Under California law, cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable.

Cases that cite this headnote

[22] Damages

Medical treatment and care of person injured

To establish reasonableness and necessity of medical monitoring award under California law, plaintiff must establish: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to the plaintiff's chances of developing the disease had he or she not been exposed and the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis.

Cases that cite this headnote

[23] Damages

Medical treatment and care of person injured

Under Florida law, medical monitoring is independent cause of action that does not require proof of present injury or cellular or subcellular harm.

Cases that cite this headnote

[24] Damages

Medical treatment and care of person injured

To establish equitable claim for medical monitoring in Florida plaintiff must establish: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that

makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Cases that cite this headnote

[25] Damages

Medical treatment and care of person injured

In Arizona, plaintiffs may recover medical monitoring where the plaintiff is at risk of developing an injury in the future.

Cases that cite this headnote

[26] Courts

Nature of judicial determination

"Substantive law" is that part of law which creates, defines, and regulates rights, as opposed to "adjective or remedial law," which prescribes a method of enforcing the rights or obtaining redress for their invasion.

Cases that cite this headnote

[27] Damages

Medical treatment and care of person injured

Under Minnesota law, entitlement to medical monitoring relief requires substantive proof; it is not merely a procedural or remedial issue.

Cases that cite this headnote

[28] Federal Civil Procedure

Employees

Individualized legal issues substantially predominated over common legal issues precluding certification of class of living retired professional hockey players in action against professional hockey league, seeking medical monitoring relief; under Minnesota's choice-of-law principles, law of states in which former professional hockey players were domiciled, or where they played hockey, rather than hockey league's state, applied, medical monitoring law varied widely across United States and Canada, and thus, depending upon playing history and domicile of each class member, district court would be forced to apply a wide range of legal standards for the recovery of medical monitoring. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[29] Federal Civil Procedure

Employees

Certification of issue class related to whether professional hockey league owed duty of care to professional hockey players under negligence standards, whether league breached those duties by failing to warn, whether head impacts experienced by players substantially contributed to development of Neurological Disease, Disorder, or Conditions (NDDCs) and whether retired players were at increased risk of developing those conditions was not warranted, in former professional hockey players' class action against professional hockey league; each class member would still require an individualized choice-of-law determination, resulting in application of widely varying legal standards for their claims. Fed. R. Civ. P. 23(b)(3), 23(c)(4).

Cases that cite this headnote

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MEMORANDUM OPINION AND ORDER

SUSAN RICHARD NELSON, United States District Judge

I. INTRODUCTION

***1** This matter is before the Court on Plaintiffs' Motion for Class Certification and for Appointment of Class Representatives and Class Counsel. (Doc. No. 638.) The Court held a hearing on this motion on March 16, 2018. (*See* Doc. Nos. 969, 973.) For the reasons set forth herein, Plaintiffs' Motion for Class Certification is denied.

II. BACKGROUND

A. Plaintiff's Allegations

This action, brought on behalf of a proposed class of former National Hockey League ("NHL") players, arises from what Plaintiffs describe as the "pathological and debilitating effects of brain injuries caused by concussive

and subconcussive impacts sustained by former NHL players during their professional careers." (Doc. No. 615, Second Am. Class Action Compl. ("SAC") ¶ 2.) The NHL, according to Plaintiffs, knew or should have known of the growing body of scientific evidence linking repetitive concussive events to long-term neurological problems, such as dementia, Alzheimer's, and Chronic Traumatic Encephalopathy ("CTE"). (*Id.* ¶¶ 4–5.) The NHL did not, however, warn Plaintiffs or any other member of the proposed class about the dangers of repeated brain trauma. (*Id.* ¶ 6.)

1. Promotion of Violence

Plaintiffs assert that the NHL has permitted, and even promoted, violence in its sport since the League was formed in 1917. (*See* SAC ¶¶ 274–90.) For "nearly a century," the NHL has "developed and promoted a culture of gratuitous violence within NHL hockey." (*Id.* ¶ 303.) Part of the NHL's strategy, Plaintiffs allege, has been to promote brutality and violence by glorifying the violent aspects of the game, including, but not limited to, the brutal and ferocious head-snapping checks and the vicious bare-knuckle fights that occur on the ice. (*Id.* ¶ 304.) The "continued growth" of violence through the NHL's history is best-exemplified by the "enforcers" or "goons" of the 1970s, 1980s, and 1990s—"players known for using intimidating force to protect marquee teammates and respond aggressively to physical or foul play." (*Id.* ¶ 278.) The NHL continues to promote violence, Plaintiffs allege, by featuring violent hits and fights in commercials for the game, producing a weekly program segment called "Top 10 Hits of the Week" on the NHL Network, and sponsoring video games that include fighting and vicious body checking. (*Id.* ¶¶ 315, 320, 323.)

The growth of violence drew attention from outside observers. (*Id.* ¶ 280.) In 1974, the Ontario Cabinet appointed Canadian lawyer William McMurtry to issue a report on violence in amateur hockey. (*Id.*) McMurtry interviewed numerous NHL players as part of his research. (*Id.*) His report stated:

> In talking to numerous players in the NHL and WHA, they all feel that most advertising and selling of the game is over-emphasizing the fighting and brawling at the expense of educating the crowds about the skill and finesse. This past season the advertising for the NBC Game of the Week, showed a film clip of a hockey fight. Can you conceive of any other sport promoting itself in this fashion?

***2** (*Id.*) In the report, then NHL President Clarence Campbell was quoted as saying: "it is the business of conducting the sport in a manner that will induce or be conducive to the support of it at the box office .... Show business, we are in the entertainment business and that can never be ignored. We must put on a spectacle that will attract people." (*Id.* ¶ 307.)

In 1988, then NHL President John Ziegler was quoted in *The Miami Herald* as stating, "Violence will always be with us in hockey .... Anytime you get a situation of high anxiety and frustration in any walk of life, you get violence." (*Id.* ¶ 309.) A year later in the Wall Street Journal, Ziegler stated that he would not rid the NHL of fighting because if "you did that, you wouldn't be commissioner for long ... The view of the 21 people who own the teams, and employ me, is that fighting is an acceptable outlet for the emotions that build up during play. Until they agree otherwise, it's here to stay ... The main question about fighting is, 'Does the customer accept it?' The answer, at present, seems to be yes." (*Id.* ¶ 310.)

Current NHL Commissioner Gary Bettman holds a similar view. In a 2007 press conference, Bettman explained that the NHL is "not looking to have a debate on whether fighting is good or bad or should be part of the game," and continued, "fighting has always had a role in the game." (*Id.* ¶ 311.) In 2011, Bettman highlighted fan support as a reason not to ban fighting: "Our fans tell us that they like the level of physicality in our game, and for some people it's an issue but it's not as big an issue in terms of fans and people in the game to the extent that other people suggest it is." (*Id.* ¶ 312.) Bettman later called fighting a "thermostat" that helps cool things down when tensions run high. (*Id.* ¶ 313.)

In contrast to the NHL, other elite and professional ice hockey leagues successfully promote a completely different style of play, including Olympic and European ice hockey, in which finesse, speed and skill, and power without violence dominate, and fighting is almost nonexistent. (*Id.* ¶ 290.) For example, fighting is

prohibited by the International Ice Hockey Federation ("IIHF"), which governs Olympic hockey and most international leagues. (*Id.* ¶ 291.) IIHF Rule 141 penalizes any player who "punches an opponent during game action, after a whistle, or any time during the regular course of a game during a prolonged player confrontation." (*Id.*) Instigators of fights are penalized with immediate ejection from the game, and IIHF authorities are given discretion to issue further suspensions. (*Id.*) Amateur hockey leagues such as the National Collegiate Athletic Association ("NCAA") similarly punish fighting much more harshly than the NHL. (*Id.* ¶ 292.) The National Basketball Association ("NBA") and the National Football League ("NFL") also prohibit fighting. (*Id.* ¶¶ 295–97.)

2. Knowledge and Failure to Warn

Despite "mounting evidence" establishing the "link between brain injuries and subconcussive impacts suffered by, among others, hockey players," Plaintiffs allege that "for decades" the NHL "either took no steps to protect and educate its players or took insufficient steps to make players aware of the real risks of playing in the NHL, which would have protected players from unnecessary long term effects of brain trauma." (SAC ¶¶ 7–9.)

In 1928, for example, pathologist Harrison Martland published a study of boxers[1] that was the first to link subconcussive impacts and "mild concussions" to degenerative brain disease. (*Id.* ¶¶ 178–79.) Another study of boxers in 1973 outlined the neuropathological characteristics of "Dementia Pugilistica," including loss of brain cells, cerebral atrophy, and neurofibrillary tangles. (*Id.* ¶ 190.)[2] Between 1952 and 1994, numerous additional studies were published in medical journals including the *Journal of the American Medical Association, Neurology*, the *New England Journal of Medicine*, and *Lancet* warning of the dangers of single concussions, multiple concussions, and sports-related head trauma from multiple concussions. (*Id.* ¶ 196.) In 1982, the *Canadian Medical Association Journal* published an article titled "Return to athletic competition following concussion," which concluded that "return to training and competition should be deferred until all associated symptoms such as headaches have completely resolved. The decision to return must take into account the nature of the sport, the athlete's level of participation and the cumulative effect of previous concussions. Some athletes will have to avoid any further participation in their sport." (*Id.* ¶ 193.) In 1986, the *Physician and Sportsmedicine* Journal published an article by Dr. Robert Cantu[3] titled "Guidelines for return to contact sports after cerebral concussion." (*Id.* ¶ 194.) Dr. Cantu established a system to grade the severity of concussions based on clear and obvious symptoms and corresponding guidelines for when players should return to play. (*Id.*) Dr. Cantu added to the concussion grading scale in 2001. (*Id.*)

***3** Plaintiffs allege that in the last decade, numerous published peer-reviewed scientific studies have demonstrated that playing professional sports is associated with significant risk for numerous negative long-term effects, including depression, cognitive disorders, and brain injuries such as dementia, Alzheimer's and CTE. (*Id.* ¶ 200.) This includes multiple published studies regarding the negative long-term effects of head impacts on current and former football players. (*Id.*) Plaintiffs assert that NHL players are five times more likely to suffer a concussion than NFL players, which according to Plaintiffs is not surprising since NFL players play on average four pre-season games, a sixteen-game regular season, and engage in only 11-15 minutes of actual playing time per game, while NHL players on average play six pre-season games and an 82-game season, and except for fourth-liners and spare defensemen, play an average of 18-25 minutes per game. (*Id.* ¶ 214.) Head injuries can also occur in practice and in the training camps leading up to the regular season. (*Id.* ¶¶ 270–73.)

Rather than take immediate measures to protect its players from these known dangers, Plaintiffs allege that the NHL for decades failed to disclose to its players relevant and highly material health information it possessed regarding the significant risks associated with concussions. (*Id.* ¶ 237.) At the same time, the NHL promoted and encouraged violent blows to the head as a routine part of the game. (*Id.*)

3. Medical Monitoring Relief

Plaintiffs assert that by virtue of playing in the NHL, all retired players have sustained concussive or subconcussive impacts, resulting in cellular and subcellular neurological injury. (SAC ¶ 388.) The unresolved accumulation of such cellular and subcellular injuries places players at an

increased risk of developing neurodegenerative diseases and conditions that occur earlier, and with greater severity, than they otherwise would occur. (*Id.*) This cellular and subcellular damage often does not result in any concurrent symptoms. (*Id.* ¶ 389.) Thus, some players had no reason to suspect or investigate their cellular and subcellular injury until very recently, when news about the root causes of neurodegenerative diseases and conditions in professional athletes became widespread. (*Id.*)

Plaintiffs therefore seek medical monitoring relief on behalf of a class of all living retired NHL players. (*See* SAC ¶ 1; Doc. No. 665, 1/19/17 Ltr. from C. Zimmerman to Hon. S. Nelson ("Zimmerman Ltr.") 1.) Plaintiffs claim that medical monitoring would provide "immense relief to retired players" because "[e]ven when neurodegenerative diseases and conditions are timely diagnosed and the patient is fortunate enough to be in a supportive environment, the diseases have a profound impact on patients and their families." (SAC ¶ 391.) If left undiagnosed, neurodegenerative diseases and conditions "can lead to severe consequences, including debilitating depression, the breakdown of family and employment relationships, and suicide, not to mention the devastating physical impact of the diseases." (*Id.*) Plaintiffs request medical monitoring of present cellular and subcellular injuries allegedly caused by the NHL's negligence, fraudulent concealment, fraud by omission, and failure to warn of the enhanced, long-term risk of contracting a Neurological Disease, Disorder, or Condition ("NDDC"),[4] or the symptoms thereof, from concussive and subconcussive impacts that occurred when they played in the NHL. (*Id.* ¶ 1.) Plaintiffs allege that "[s]erial testing of cognitive functioning for early signs or symptoms of neurologic dysfunction and serial brain imaging for signs of injury or disease is medically necessary to assure early diagnosis and effective treatment of brain disease," and that "[m]onitoring procedures exist that comport with contemporary scientific principles and make possible early detection of the neurodegenerative diseases and conditions that Plaintiffs and members of the Class are at increased risks of developing or have developed." (*Id.* ¶¶ 420–21.)

B. NHL's Response to Class Action Allegations

***4** The NHL disputes the assertion of Plaintiffs and their experts and argues that there is no definitive causal link between players sustaining concussions and later developing NDDCs such as CTE. (Doc. No. 787, Def.'s Mem. 6–20.) The NHL also explains that it and the NHLPA "have always had a strong commitment to player safety within the context of a physical, contact sport," and "their approaches to improving player safety with respect to head injuries have changed over time as information regarding the potential risks of head hits has evolved." (Def.'s Mem. 20.) To support its opposition to class certification, the NHL offered twenty-three expert opinions on a variety of topics. (*See* Doc. No. 732, Declaration of John Beisner ("Beisner Decl."), Attached Exhibits; *see also* Doc. Nos. 733–49.)

The NHL asserts that the scientific community's understanding of CTE is still in its "infancy." (Def.'s Mem. 6 (citing Doc. No. 789-1, Stern R. et al., *Long-term Consequences of Repetitive Brain Trauma: Chronic Traumatic Encephalopathy*, Physical Medicine and Rehabilitation Journal (2011).) As stated by one of the NHL's experts, there is "much more to learn about the potential cause and effect relationships of repetitive head impact exposure, concussions, and long-term brain health .... More research on the long-term sequelae is needed to better understand the incidence and prevalence of CTE or other neurodegenerative conditions among former athletes." (Doc. No. 732-7, Declaration of Paul McCrory ("McCrory Decl.") ¶ 96.) Plaintiffs' expert Dr. Cantu testified at his deposition that " 'a cause-and-effect relationship has not as yet been demonstrated between CTE and concussions or exposure to contact sports.' " (Doc. No. 773, Cantu Dep. 335:8–16 (citation omitted).) Thus, the NHL strongly disputes Plaintiffs' theory that "there has been a clear association ... between repeated blows to the head in sports" and CTE since 1928. (Doc. No. 787, Def.'s Mem. 7 (quoting Doc. No. 644, Casper Decl. ¶ 19; *see also* Doc. No. 646, Cantu Decl. ¶ 95; Doc. No. 642, Comstock Decl. ¶ 119; SAC ¶¶ 178–79).)[5]

The NHL also contests the relationship between mild Traumatic Brain Injury ("mTBI")[6] and other NDDCs, such as ALS, Alzheimers, and Parkinson's. (Def.'s Mem. 16.) "While the scientific research related to these diseases has similarly progressed over distinct timeliness, there is no consensus in the medical literature that mTBI increases the risk of any of the NDDCs specified by plaintiffs, and research concerning any relationship between mTBI and some of these diseases is nonexistent." (*Id.* (citing Doc. No. 749, Declaration of Kristine Yaffe ("Yaffe Decl.") ¶¶ 14, 42–61).) NHL expert Dr. Yaffe explains that

the diseases identified by Plaintiffs have numerous risk factors, including age, education level, family history of neurodegenerative disease, cardiovascular disease, stroke, diabetes, high blood pressure, obesity, substance abuse, depression and sleep conditions. (Yaffe Decl. ¶ 39.) The potential causes of "cognitive, mood, or behavioral conditions," they argue, are even more varied. Depression, for example, is associated with alcoholism, drug abuse, traumatic or stressful life events, negligent/traumatic childhood, and financial and psychological stressors. (Doc. No. 736, Supplemental Declaration of Jennifer Finkel ("Finkel Suppl. Decl.") ¶ 17.) Dr. Finkel, another NHL expert, performed a comprehensive psychiatric evaluation and medical record review of three of the named Plaintiffs and determined that "the psychological symptoms experienced by these individuals are likely attributable to other psychosocial causes" unrelated to head injuries. (Finkel Suppl. Decl. ¶ 18.)

***5** Finally, the NHL maintains that there is "no consensus in the medical or scientific community about the definition of 'subconcussive' blows, impacts, or injuries." (Doc. No. 732-5, Declaration of Grant Iverson ("Iverson Decl.") ¶ 151.) The few studies that have been conducted, they argue, are inconclusive regarding the clinical effects of such impacts in humans. (*See* Doc. No. 732-4, Declaration of Kevin Guskiewicz ("Guskiewicz Decl.") ¶ 66 ("to date, there is not a published paper that can answer the question about the association between subconcussive impacts and [long term neurodegenerative diseases], let alone a cause and effect explanation.").)

C. Proposed Class Representatives

Dan LaCouture played forward for the Edmonton Oilers from 1998–2001, the Pittsburgh Penguins from 2001–03, the New York Rangers from 2003–04, the Boston Bruins from 2005–06, the New Jersey Devils from 2006–07, and the Carolina Hurricanes in 2008. (SAC ¶ 28.) LaCouture alleges that he suffered close to twenty concussions while playing in the NHL, and numerous subconcussive injuries and hits to the head. (*Id.* ¶ 29.) He alleges to suffer on a daily basis from headaches, irritability, sensitivity to light, change of personality, sleeping problems, and severe depression. (*Id.* ¶ 38.) LaCouture additionally reports problems that include impulsivity, issues with self-regulation, and worsening self-esteem. (Doc. No. 732, Declaration of John H. Beisner ("Beisner Decl."), Ex. E; Doc. No. 737 at 57.) According to LaCouture, his family has expressed "a great deal of concern" about his anger and irritability. (*Id.* at 58.) LaCouture is a resident and citizen of Massachusetts. (SAC ¶ 27.)

Gary Leeman played defense and then forward for the Toronto Maple Leafs from 1983–1992, the Calgary Flames from 1992–93, the Montreal Canadians from 1993–94, the Vancouver Canucks from 1994–95, and the St. Louis Blues in 1996. (SAC ¶ 40.) Leeman alleges that during his career, he suffered a fractured skull with an accompanying severe concussion, as well as numerous other concussions and subconcussive hits to the head. (*Id.* ¶ 42.) On an ongoing basis, Plaintiff alleges that he experiences headaches, memory loss, inability to concentrate, irritability, balance problems, sensitivity to light, mood swings, anxiety, dizziness, problems managing stress, fainting sensations, blurred vision, ringing in his ears, change of personality, sleeping problems, and moderately severe depression. (*Id.* ¶ 44.) At his deposition, Leeman testified that he previously experienced occasional panic attacks brought on by his anxiety, but that it has "been awhile" since his last panic attack. (Doc. No. 641, Declaration of Charles S. Zimmerman ("Zimmerman Decl."), Ex. 147 at 115.) He primarily complains of increased irritability, in addition to a propensity for distractibility and impulsivity. (Doc. No. 737 at 177.) Leeman identifies memory impairment as the "most frightening" of his symptoms. (*Id.* at 178.) Leeman is a resident and citizen of Ontario, Canada. (SAC ¶ 39.)

Bernie Nicholls played center for the Los Angeles Kings from 1982–1990, the New York Rangers from 1991–92, the Edmonton Oilers in 1993, the New Jersey Devils from 1993–94, the Chicago Blackhawks from 1994–95, and the San Jose Sharks from 199699. (SAC ¶ 46.) Nicholls alleges that he suffered a broken jaw while playing for the Kings and a concussion playing for the Sharks in 1997. (*Id.* ¶¶ 48–49.) On October 29, 1998, he took a violent hit to the head when a stick hit him in the eye, leaving him disoriented and necessitating twenty-five stitches. (*Id.* ¶ 50.) Nicholls alleges that he suffers on a daily basis from dizziness, disorientation, memory loss, tinnitus, post-traumatic headaches, concentration difficulties, sleep disorder, and cognitive deficit. (*Id.* ¶ 51.) At his deposition, Nicholls testified that he also suffers from periodic depression and bouts of irrational anger. (Zimmerman Decl., Ex. 144 at 19–20.) Nicholls also indicates that both he and his family have noticed increasing problems with his memory over the last few years. (Doc. No. 737 at 109.) Nicholls states that his

primary mood symptom is intermittent irritability. (*Id.* at 110.) Nicholls is a resident and citizen of Ontario, Canada. (SAC ¶ 45.)

***6** David Christian played forward for the Winnipeg Jets from 1979–83, the Washington Capitols from 1983–90, the Boston Bruins from 1990–91, the St. Louis Blues from 1991–92, and the Chicago Blackhawks from 1992–94. (SAC ¶ 53.) Christian alleges that during his career, he suffered numerous undiagnosed concussions and subconcussive hits to the head that were not properly treated. (*Id.* ¶ 55.) In one incident while playing for the Winnipeg Jets, Christian was struck in the head and knocked unconscious. (*Id.* ¶ 56.) In another incident while playing for the Washington Capitals, Christian was struck so hard in the head that he immediately saw flashing lights and stars and fell to the ice. (*Id.* ¶ 57.) Christian is a resident and citizen of Minnesota. (*Id.* ¶ 52.) [7]

Reed Larson played defense for the Detroit Red Wings from 1977–87, the Boston Bruins from 1987–89, the Edmonton Oilers, New York Islanders, and Minnesota North Stars from 1988–89, and in 1989 for the Buffalo Sabres. (SAC ¶ 60.) Larson alleges that he suffered numerous undiagnosed concussions and subconcussive hits to the head that were not properly treated during his career. (*Id.* ¶ 62.) In one incident while playing for the Detroit Red Wings in 1977, Larson was involved in a fight on the ice resulting in numerous blows to the head and a broken nasal cavity. (*Id.* ¶ 63.) In another incident while playing for the New York Islanders, Larson was struck in the head by a slap shot during practice. (*Id.* ¶ 66.) The blow was so severe that it required fifty stitches and plastic surgery to correct the damage to Larson's face. (*Id.*) Larson suffers from depression, irritability, short-term memory loss, fatigue, sleep disorder, and occasional dizziness upon standing. (*See* Zimmerman Decl., Ex. 143; Doc. No. 737 at 15–20.) He denies that his memory or somatic complaints are noticeable, but admits that people "notice other things" about him, such as his impatience and irritability. (Doc. No. 737 at 16.) According to Larson, his irritability negatively affects his relationships, and he admits to having had six behavioral outbursts since retiring from hockey. (*Id.* at 17.) Larson is a resident and citizen of Minnesota. (SAC ¶ 59.)

Lawrence Zeidel, who passed away in 2014, played defense for the Detroit Red Wings from 1951–53, the Chicago Blackhawks from 1953–54, and the Philadelphia Flyers from 1967–69. (SAC ¶¶ 70, 72.) Zeidel's representative George M. Bradley alleges that Zeidel suffered numerous undiagnosed concussions and subconcussive hits to the head that were not properly treated, including head injuries from stick fights and being speared in the head with sticks. (*Id.* ¶¶ 74, 77.) After Zeidel's death, an expert panel of neurologists, neuropsychologists, and researchers examined Zeidel's case and concluded Zeidel suffered from CTE. (*Id.* ¶ 79; Zimmerman Decl., Ex. 149.) Zeidel was characterized as having a longstanding history of an extremely violent and explosive temper. (Zimmerman Decl, Ex. 149.) In his forties, he began having difficulty managing his financial affairs, displayed "seemingly manic behavior," and was involved in several altercations with co-workers. (*Id.*) In his fifties and sixties, Zeidel experienced cognitive deterioration resulting in unusual behavior and difficulty caring for himself and living independently. (*Id.*) He was diagnosed with dementia in his eighties and passed away due to multiple organ failure. (*Id.*) Zeidel's representative is a resident and citizen of Pennsylvania. (SAC ¶ 70.)

D. Plaintiffs' Proposed Classes

1. Class 1: All Living Retired NHL Hockey Players

***7** Plaintiffs Christian and Larson move for Rule 23(b)(2) certification and for appointment as representatives of a class of all living retired NHL hockey players. (Pls.' Mem. 29; Zimmerman Ltr. 1.) Plaintiffs assert that under Minnesota choice-of-law rules, the Court should apply New York law to the issue of liability (duty and breach), and Minnesota law to the issue of the remedy sought (medical monitoring). (Pls.' Mem. 29; Zimmerman Ltr. 2.) Alternatively, Plaintiffs Christian, Larson, Nicholls, and LaCouture move for certification under a grouping of state laws. (Pls.' Mem. 30 (requesting certification under a "state-law grouping theory because very few conflicts of substantive law are relevant to the claims and common evidence"); Zimmerman Ltr. 3 ("[I]f the Court determines that it would be improper to apply the law of a single state for the predicate tort duties, and the elements of medical monitoring relief of a single state (the choice-of-law approach), the medical monitoring and general negligence duties of all states are still sufficiently similar for the court to certify class 1.").)

2. Class 2: All Retired NHL Hockey Players (or representative claimants if they are deceased) who have been clinically diagnosed with a NDDC

Plaintiffs Leeman and the Ziedel Estate move for certification of a class of all retired NHL hockey players (or representative claimants if they are deceased) who have been clinically diagnosed with a NDDC as to the legal issues of duty of care and breach of duty, including the failure to warn, and factual issues relevant to whether the head impacts that class members experienced can cause latently-developed NDDCs. (Pls.' Mem. 29; Zimmerman Ltr. 4.)

III. DISCUSSION

A. Rule 23 Requirements for Class Certification

[1] **[2]** Class actions are governed by Federal Rule of Civil Procedure 23. They are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). In *Dukes*, the Supreme Court emphasized that the standard for obtaining class certification is an onerous one. The Court explained that Rule 23 "does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 350, 131 S.Ct. 2541 (emphasis in original). Class certification is proper only if the Court is satisfied, after a "rigorous analysis," that the prerequisites of the Rule have been satisfied. *Id.* at 350–51, 131 S.Ct. 2541. It might be necessary for a court to look beyond the pleadings before deciding the certification question. *Dukes*, 564 U.S. at 351, 131 S.Ct. 2541 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. 'The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' ") (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

To be certified as a class, Plaintiffs "must meet all of the Rule 23(a) requirements and must satisfy one of the three subsections of Rule 23(b)." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005) ("*St. Jude I* "). It is not necessary to discuss the Rule 23(a) requirements —numerosity, commonality, typicality, and adequacy— because Plaintiffs' Motion for Class Certification can be resolved on the requirements set forth in Rule 23(b). *See In re Prempro*, 230 F.R.D. 555, 573 (E.D. Ark. 2005) ("[A] full analysis of FRCP 23(a) is unnecessary since Plaintiffs failed to meet any of the FRCP 23(b) requirements, which precludes certification."). The "rigorous analysis" described in *Dukes* applies to Rule 23(b). *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (explaining that the "same analytical principles" established by *Dukes* "govern Rule 23(b)").

Plaintiffs argue for certification under Rule 23(b)(2), which provides for certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). (*See* Doc. No. 964, Pls.' Reply 7–10.) The NHL argues that Plaintiffs' motion should be addressed under Rule 23(b)(3), which allows for certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). (*See* Def.'s Mem. 28–31.)

***8** **[3]** **[4]** **[5]** **[6]** Rule 23(b)(3)'s requirement that common questions predominate over individual questions "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). The predominance requirement "is not satisfied if individual questions ... overwhelm the questions common to the class." *Ebert v. General Mills, Inc.*, 823 F.3d 472, 478–79 (8th Cir. 2016). Rule 23(b)(2), on the other hand, "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360, 131 S.Ct. 2541. A (b)(2) class need not meet (b)(3)'s predominance requirement, but at the same time, " 'the class claims must be cohesive.' " *Ebert*, 823 F.3d at 480 (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)). Rule 23(b)(2)'s cohesiveness requirement is "more stringent than the predominance and superiority requirements for maintaining a class action under Rule 23(b)(3)." *Id.*; *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010); *St. Jude I*, 425 F.3d at 1121–22. This is because a (b)(2) class is

mandatory and does not include an opt-out provision. *See Ebert*, 823 F.3d at 480 ("Because a (b)(2) class is mandatory, the rule provides no opportunity for (b)(2) class members to opt out, and does not oblige the district court to afford them notice of the action, both of which are prescribed for (b)(3) classes.").

The Court will analyze Plaintiffs' motion under Rule 23(b)(3) because the relief that they seek—medical monitoring—is predominantly monetary in nature, not declaratory or injunctive. *See Dukes*, 564 U.S. at 360, 131 S.Ct. 2541 (holding that claims for monetary relief cannot be certified under Rule 23(b)(2) where "the monetary relief is not incidental to the injunctive or declaratory relief"); *see also Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1196 (9th Cir. 2001) (reasoning that plaintiffs "seek the establishment of a reserve fund for past and future damages, compensation for future medical treatment, plus other compensatory and punitive damages. Although the complaint also seeks 'full and proper research into alternative methodologies for remedying the condition of each patient/class member,' this injunctive relief is merely incidental to the primary claim for money damages"); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995) (affirming rejection of medical monitoring class under Rule 23(b)(2) because "the relief sought was primarily money damages"); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 611 (W.D. Wash. 2001) ("Although the plaintiff now characterizes the relief as a program rather than a fund, the bottom line is money."). As stated below, Plaintiffs cannot meet the predominance requirement set forth in Rule 23(b)(3) because of the significant variance in legal standards governing medical monitoring claims. Even if Plaintiffs are correct that their motion should be analyzed under Rule 23(b)(2), certification would be denied for the same reasons. *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011) ("[A] (b)(2) class may require more cohesiveness than a (b)(3) class."); *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 607 (D. Minn. 2005) ("[T]he issues that defeat the predominance and superiority requirements of Rule 23(b)(3) also preclude certification under Rule 23(b)(2).").

Plaintiffs also move for certification as to particular issues. *See* Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). The Eighth Circuit has recognized that "there is a conflict in authority on whether [an issue] may be certified under Rule 23." *In re St. Jude Medical, Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) ("*St. Jude II*"). While not rejecting the possibility of issue certification, the court stressed that "[e]ven courts that have approved 'issue certification' have declined to certify such classes when the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation." *Id.*; *see also Ebert*, 823 F.3d at 479 (holding that the "deliberate limiting of issues" may be "problematic"). The predominance of individual legal issues also precludes issue certification in this case.

B. Rule 23(b)(3)

***9** As noted above, Rule 23(b)(3) allows for certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The "matters pertinent to these findings" include "the class members' interests in individually controlling the prosecution or defense of separate actions;" "the extent and nature of any litigation concerning the controversy already begun by or against class members;" "the desirability or undesirability of concentrating the litigation of the claims in a particular forum;" and "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D).

[7] **[8]** **[9]** District courts "must perform a rigorous analysis before determining that issues common to the class predominate over issues that differ among the individual class members." *Ebert*, 823 F.3d at 478. The predominance requirement " 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' " *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 377 (8th Cir. 2013) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). This inquiry is more demanding than the otherwise rather similar commonality requirement under Rule 23(a) in that, " '[w]hen determining whether common questions predominate, a court must conduct a limited preliminary inquiry, looking behind the pleadings, but that inquiry should be limited to determining whether, if the plaintiffs' general allegations are true, common evidence could suffice to make out a prima facie case for the class.' " *Id.* (quoting *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 618 (8th Cir. 2011)); *see also Behrend*, 569 U.S. at 34, 133 S.Ct. 1426 ("If

anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a). Rule 23(b)(3), as an 'adventuresome innovation,' is designed for situations 'in which class-action treatment is not as clearly called for.' ") (quoting *Dukes*, 564 U.S. at 362, 131 S.Ct. 2541). Where the resolution of a common issue "breaks down into an unmanageable variety of individual legal and factual issues," the predominance requirement is not satisfied. *Nobles v. State Farm Mut. Auto. Ins. Co.*, No. 10-04175-CV-C-NKL, 2013 WL 12153517, at *2 (W.D. Mo. June 5, 2013) (citing *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996)).

C. Choice-of-Law Principles

The Court first considers whether common legal issues predominate. Plaintiffs argue that they do because choice-of-law principles dictate that New York law applies on a classwide basis to the issues of duty and breach, and Minnesota law applies on a classwide basis to the issue of medical monitoring. (Pls.' Mem. 41–52.) In the alternative, Plaintiffs argue that the Court may certify a class including states with laws similar to Minnesota. (*Id.* at 52–56.) The NHL strenuously disagrees, arguing that different states' laws will govern the proposed class members' claims depending on where the class member lived and played during most of his career. (Def.'s Mem. 31–39.)

[10] **[11]** To decide the applicable law, the Court must conduct a choice-of-law analysis for each proposed class member. *See St. Jude I*, 425 F.3d at 1120 ("The Supreme Court has held an individualized choice-of-law analysis must be applied to each plaintiff's claim in a class action.") (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822–23, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985)). "A district court sitting in diversity must apply the conflict of law rules for the state in which it sits." *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001). Minnesota uses a three-step choice of law analysis. The first two steps "inquire whether differing state laws present an outcome-determinative conflict and whether each law constitutionally may be applied to the case at hand." *Blake Marine Grp. v. CarVal Investors LLC*, 829 F.3d 592, 595 (8th Cir. 2016). At the third step, the Court decides whether the rule of law at issue is substantive or procedural. *Glover v. Merck & Co., Inc.*, 345 F.Supp.2d 994, 998 (D. Minn. 2004) (citing *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 5 (Minn. Ct. App. 2003)). If the issue is substantive, the Court applies a " 'multi-step choice-of-law analysis, which includes application of five choice-influencing considerations, to determine which state's law applies.' " *Id.* at 998 (quoting *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994)). However, if the issue is procedural, then Minnesota applies its own law. *Id.* (citing *Jepson*, 513 N.W.2d at 469); *see also Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 596 (8th Cir. 2007) ("Minnesota courts apply Minnesota law regarding matters of procedure and remedies.").

1. Application of New York Tort Law

***10** **[12]** Plaintiffs argue that the Court should apply New York tort law on a classwide basis because that is where the NHL is currently headquartered and incorporated. (Pls.' Mem. 45, 50.) Outcome-determinative conflicts exist between the laws of New York and the other forty-nine states, the District of Columbia, and the Canadian provinces with respect to negligence and negligent misrepresentation.[8] (*See* Doc. No. 789-39, Def.'s Ex. 58, Survey of Variations in State Laws With Respect to Negligence); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (stating that "[t]he law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause" differs among the states in "important" ways). Therefore, the Court must apply the choice-influencing factors to determine the applicable law. Those factors are: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law. *Blake Marine Grp.*, 829 F.3d at 595.

[13] The first factor (predictability of results) is used to " 'fulfill the parties' justified expectations.' " *Dryer v. NFL*, Civil No. 09-2182 (PAM/AJB), 2013 WL 5888231, at *6 (D. Minn. Nov. 1, 2013) (quoting *Jepson*, 513 N.W.2d at 470). This factor is typically not relevant in tort cases because "the parties in such cases are not alleged to have acted in reliance on any state's laws." *Whitney v. Guys, Inc.*, 700 F.3d 1118, 1125 (8th Cir. 2012); *see also In re Baycol Prods. Litig.*, 218 F.R.D. 197, 207 (D. Minn. 2003). Even so, Plaintiffs argue that the NHL's control over the style of play and its decisions to withhold information from players occurred in New York, indicating that New York law would apply more predictably. (Pls.' Reply 13.) In *Dryer*, however, a class action brought by former NFL players for violation of common-law and statutory

publicity rights, the court explained that where plaintiffs "played in various locations, for teams located throughout the United States, it is likely that they would have expected that the vindication of their ... rights would be subject to the law where their team was located or where they themselves lived." 2013 WL 5888231, at *6. To the extent that this factor may be considered relevant to the Court's choice-of-law analysis, it finds favor in applying the law where each member of the proposed class played during his career or currently lives.

[14] The second factor (maintenance of interstate order) "weighs in favor of the state which has the most significant contacts with the facts relevant to the litigation." *In re Baycol Prods. Litig.*, 218 F.R.D. at 207 (citing *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 621 (8th Cir. 2001)). At times, this factor "favors the application of the law of states closely connected to Plaintiffs, such as the home state of their team(s) or their own homes." *Dryer*, 2013 WL 5888231, at *6. The NHL's home state also has significant contacts with the facts at issue, however, so this factor either favors the state of the player's team or is neutral.

The third factor (simplification of judicial task), while normally neutral, highlights the "unmanageability of the class action apparatus" where, as here, "it is possible that the law of many different states may apply to Plaintiffs' claims." *Id.*

[15] **[16]** Applying the fourth factor (advancements of the forum's governmental interest), courts must "determine which state's law to apply based on 'the relative policy interests of the two states.' " *Blake Marine Grp.*, 829 F.3d at 596. Once again, this factor points to the state where the former player currently resides, [9] not where the NHL is incorporated. "Our court has ... explained ... that a state's 'interest in protecting nonresidents from tortious acts committed within the state ... is only slight and does not support application of its law to the litigation.' " *Id.* (quoting *Hughes*, 250 F.3d at 621). By contrast, " '[c]ompensation of an injured plaintiff is primarily a concern of the state in which [the] plaintiff is domiciled.' " *Id.* (quoting *Kenna v. So-Fro Fabrics, Inc.*, 18 F.3d 623, 627 (8th Cir. 1994)); *see also In re Baycol Prods. Litig.*, 218 F.R.D. at 207 ("The Eighth Circuit ... has not given the [domicile] of the corporate defendant much weight in tort cases."). [10]

***11** **[17]** Application of the choice-influencing factors therefore favors the place where each class member lived and played during most of his career, or, for players whose career was not focused on a particular team, where they now live in retirement. [11] As a result, this Court finds that New York tort law cannot be applied on a classwide basis, and therefore, that the application of widely varying tort laws precludes a finding that common legal issues predominate.

2. Medical Monitoring Law Varies Widely Across the U.S. and Canada

[18] **[19]** Medical monitoring claims seek to " 'recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure.' " *Foster*, 229 F.R.D. at 602 (quoting *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424, 429 (1999)). These types of claims evolved from the realization that "widely recognized tort law concepts premised upon a present physical injury are ill-equipped to deal with cases involving latent injury." *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007). Medical monitoring claims are considered a " 'non-traditional tort.' " *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 552 (D. Minn. 1999) (quoting *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849 (3d Cir. 1990)).

Plaintiffs argue that Minnesota law governs their request for medical monitoring. Minnesota courts have allowed the recovery of medical monitoring expenses where the elements of a tort claim are proven and evidence of a present injury is established. *See Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 721 (Minn. Ct. App. 1998) (finding genuine fact issues concerning "emotional distress damages and medical monitoring expenses" due to "alleged chromosome damage"); *see also Werlein v. United States*, 746 F.Supp. 887, 904 (D. Minn. 1990) ("Assuming that a given plaintiff can prove that he has present injuries that increases his risk of future harm, medically appropriate monitoring is simply a future medical cost, which is certainly recoverable"), *vacated on other grounds*, 793 F.Supp. 898 (D. Minn. 1992).

Medical monitoring law in other jurisdictions, however, is greatly varied, resulting in significant outcome-determinative conflicts between Minnesota law and the other forty-nine states, the District of Columbia, and the

Canadian provinces. *See Myers*, 225 N.W.2d at 241 ("[I]t first must be determined that a conflict exists, i.e., will the choice of one law as compared to another determine the outcome?").

Several states, for example, recognize medical monitoring only if the plaintiff has a manifest physical injury. [12] One state has held that plaintiffs can recover medical monitoring upon a showing that the plaintiff has suffered a subcellular or subclinical injury. [13] Five states allow medical monitoring awards as a form of damages for certain potentially harmful exposures without proof of present injury or cellular or subcellular harm. [14] Four states recognize medical monitoring as an independent cause of action that does not require proof of present injury or cellular or subcellular harm. [15] Another state has held that plaintiffs can recover medical monitoring without a showing of manifest physical injury, but it is unclear whether medical monitoring is an independent claim or a form of damages. [16] In most of the remaining states and the District of Columbia, the courts have either not addressed the issue or the state of the law is unclear. [17]

***12** In the first category of states, the Michigan Supreme Court has rejected any independent claim for medical monitoring. *See Henry*, 701 N.W.2d at 686. The plaintiffs in that case did not claim to have "suffered any present physical harm because of defendant's allegedly negligent contamination." *Id.* at 689. The court emphasized that determining eligibility for participation in a medical monitoring program "involves the consideration of a number of practical questions and the balancing of a host of competing interests – a task more appropriate for the legislative branch than the judiciary." *Id.* at 698. The New York Court of Appeals also rejected medical monitoring as an independent cause of action absent proof of present physical injury. *See Caronia*, 982 N.Y.S.2d 40, 5 N.E.3d at 18 (N.Y. 2013) ("We conclude that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence."). [18]

[20] In Massachusetts, plaintiffs may recover the costs of medical monitoring as a form of future medical expense damages, upon a showing of subcellular injuries. *See Donovan*, 914 N.E.2d at 901–02. Such a claim includes seven elements: (1) the defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, in conformance with the standard of care, and (7) the present value of the reasonable cost of such tests and care as of the date of the filing of the complaint must be established. *Id.* at 902.

[21] **[22]** Five other states allow medical monitoring awards as damages without proof of present injury or cellular or subcellular harm, such as California, where "the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable." *Potter*, 25 Cal.Rptr.2d 550, 863 P.2d at 824. The following factors are relevant in determining the reasonableness and necessity of monitoring there: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to the plaintiff's chances of developing the disease had he or she not been exposed and the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. *Id.*, 25 Cal.Rptr.2d 550, 863 P.2d at 824–25.

***13** **[23]** **[24]** Some states, such as Florida, recognize medical monitoring as an independent cause of action that does not require proof of present injury or cellular or subcellular harm. *See Petito*, 750 So.2d at 105–07. In *Petito*, the court explained that an "action for medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm, whereas an enhanced risk claim seeks compensation for the anticipated harm,

proportionately reduced to reflect the chance that it will not occur ....” *Id.* at 105–06. The following elements must be proven to establish an equitable claim for medical monitoring in Florida: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. *Id.* at 106–07.

[25] In Arizona, plaintiffs may recover medical monitoring where the plaintiff is at risk of developing an injury in the future. *Burns*, 752 P.2d at 33–34. The court concluded that medical surveillance costs are a “compensable item of damages” despite “the absence of physical manifestation of any asbestos-related diseases.” *Id.* at 33. Subsequent decisions make it unclear as to whether medical monitoring is a form of damages or a stand-alone cause of action in Arizona. *Compare Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 481 (E.D. Pa. 1997) (stating that “[i]n *Burns*, the court described medical monitoring as a compensable item of damages,” not a distinct cause of action), *with In re St. Jude*, No. MDL 01-1396 JRT/FLN, 2004 WL 45504, at *7 (D. Minn. Jan. 5, 2004) (stating that Arizona is a jurisdiction that “recognize[es] a stand alone claim for medical monitoring”); *Quiroz v. ALCOA Inc.*, 240 Ariz. 517, 382 P.3d 75, 79 (App. 2016) (discussing the “claim” of medical monitoring).

Some of the remaining states, such as Alaska, Idaho, and Hawaii, do not have any court decisions that clearly address the issues related to medical monitoring. In other states, courts have addressed the issue, but there is no definitive guidance on whether such a claim is viable. *See, e.g., Mehr v. Federation Internationale de Football Ass'n*, 115 F.Supp.3d 1035, 1070 (N.D. Cal. 2015) (“Lower courts in Illinois have suggested that the Illinois Supreme Court might recognize an independent claim for medical monitoring even in cases where there is no present physical injury. However, to date, it does not appear that the Illinois Supreme Court has done so.”).

Plaintiffs argue that the conflicts between these states are not outcome-determinative because all NHL players present evidence of cellular damage or injury. (Pls.' Reply 17; 3/16/18 Hr'g Tr. 32.) Cellular damage, however, is not enough to allow recovery in states that require a present physical injury. As the Eleventh Circuit explained in a case applying Georgia law:

> Plaintiffs rest their personal injury claims on the contention that their allegations of subclinical and cellular damage are sufficient to allege a current physical injury under Georgia law; because we reject this argument, Plaintiffs' claims for personal injury and emotional distress must fail. And because Plaintiffs' allegations of subclinical damage are insufficient to state a current physical injury, Plaintiffs are not entitled to recover the ‘quantifiable costs of periodic medical examinations’ as future medical expenses. Plaintiffs have failed to point us to any Georgia authority that allows recovery of medical monitoring costs in the absence of a current physical injury.

Parker v. Wellman, 230 F. App'x 878, 882–83 (11th Cir. 2007); *see also Parker v. Brush Wellman, Inc.*, 377 F.Supp.2d 1290, 1296 (N.D. Ga. 2005) (explaining that an “overarching issue in this litigation is whether Plaintiffs who have endured only ‘sub-clinical, cellular, and sub-cellular’ damages from alleged beryllium exposure may rely on such effects as a physical ‘injury’ sustaining tort recovery”).[19] Thus, the conflicts between states that require physical injury and those that do not are outcome-determinative and cannot be ignored in a choice-of-law analysis. *Compare Williams*, 961 So.2d at 811 (Ala.) (“A person exposed to a known hazardous substance but not claiming a present physical injury or illness as a result may not recover as damages the costs of medical monitoring.”), *and Wood*, 82 S.W.3d at 859 (Ky.) (“[H]aving weighed the few potential benefits against the many almost-certain problems of medical monitoring, we are convinced that this Court has little reason to allow such a remedy without a showing of present physical injury.”), *with Meyer*, 220 S.W.3d at 717 (Mo.) (“[A] present physical injury requirement is inconsistent with th[is] theory of recovery.”), *and Sadler*, 340 P.3d at 1270 (Nev.) (“[A] plaintiff may state a cause of action for negligence with medical monitoring without asserting that he or she has suffered a present *physical* injury.”) (emphasis in original).[20]

***14** Other conflicts in state law are also apparent. Missouri, for example, requires a " 'significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.' " *Meyer*, 220 S.W.3d at 718 (quoting *Bower*, 522 S.E.2d at 433 (W. Va.)). Utah, on the other hand, requires only an increased risk. *See Hansen*, 858 P.2d at 979. Also in Utah, unlike in some other states, a plaintiff must show that a treatment exists that can alter the course of the illness. *Compare id., with Redland Soccer Club*, 696 A.2d at 145–46 (Penn.), *and Bower*, 522 S.E.2d at 432–33 (W. Va.). And some states require a plaintiff to prove the existence of a procedure that can result in early detection, but others do not. *Compare Petito*, 750 So.2d at 106–07 (Fla.), *and Donovan*, 914 N.E.2d at 902 (Mass.), *with Meyer*, 220 S.W.3d at 717–18 (Mo.), *and Burns*, 752 P.2d at 33–34 (Ariz.).

Plaintiffs maintain that a number of states can be grouped together based on the way they treat medical monitoring claims. (Pls. Mem. 35; Doc. No. 641-12, Ex. 141.) For example, Plaintiffs identify twenty-eight jurisdictions that permit medical monitoring relief where there is "a showing of exposure plus increased probability" of developing a future disease.[21] As discussed above, the laws of many of those jurisdictions are varied and complex. Plaintiffs' grouping theory cannot be used to sidestep the widespread divergence among the states in the requirements for medical monitoring. *Compare Donovan*, 914 N.E.2d at 901–02 (holding that plaintiffs in Massachusetts may recover the costs of medical monitoring as a form of future medical expense damages in cases involving subcellular injuries), *with Potter*, 25 Cal.Rptr.2d 550, 863 P.2d at 824 (allowing medical monitoring awards in California without proof of present injury or cellular or subcellular harm). Thus, there are significant outcome-determinative conflicts between the states' legal requirements for medical monitoring relief.

Plaintiffs maintain, however, that Minnesota law on medical monitoring can still be applied on a classwide basis because medical monitoring is procedural or remedial under Minnesota law. (Pls.' Mem. 47–48; Pls.' Reply 11–13.) The NHL counters that the issue is substantive, not procedural. (Def.'s Mem. 39–42.)

[26] " '[S]ubstantive law is that part of law which creates, defines, and regulates rights, as opposed to 'adjective or remedial' law, which prescribes [a] method of enforcing the rights or obtaining redress for their invasion.' " *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (quoting *Meagher v. Kavli*, 251 Minn. 477, 88 N.W.2d 871, 879–80 (1958)). Plaintiffs argue nonetheless that "Exposure + Causation of Cell Damage + Increased Risk" are "Remedial Elements" that should be controlled by Minnesota law. (Zimmerman Ltr. 2.)

[27] To succeed on their medical monitoring claim under Minnesota law, Plaintiffs must prove that they incurred cell damage (injury) as a result of being exposed to the hazard of playing hockey in the NHL (causation), and the consequent increased risk of developing NDDCs (increased risk). Exposure, causation and increased risks, however, are essential elements of tort liability, not damages and hence are not remedial. Entitlement to medical monitoring requires substantive proof; it is not merely a procedural or remedial issue.

***15** The cases cited by Plaintiffs are not to the contrary. (Pls.' Reply 11 (citing *Bryson*, 573 N.W.2d at 721; *Palmer v. 3M Co.*, No. C2-04-6309, 2005 WL 5891911 (Minn. Dist. Ct. Apr. 6, 2005); *Thompson*, 189 F.R.D. at 552; *Werlein*, 746 F.Supp. at 904). In *Werlein*, the court found that plaintiffs could be "entitled to recover the costs of future medical monitoring as tort damages under the common law" because if "a given plaintiff can prove that he has present injuries that increases his risk of future harm, medically appropriate monitoring is simply a future medical cost, which is certainly recoverable." 746 F.Supp. at 904. Despite the description of medical monitoring as "simply a future medical cost," *Werlein* supports the characterization of medical monitoring as substantive, not procedural, because the court's reasoning presumes that plaintiffs would not be entitled to medical monitoring as a "future medical cost" in the absence of "present injuries that increase[ ] ... risk of future harm." *Id.*

Then in *Bryson*, the Minnesota Court of Appeals followed the reasoning in *Werlein* and held that it "could not 'rule as a matter of law that plaintiffs' alleged injuries are not 'real' simply because they are subcellular. The effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to determine whether plaintiffs have suffered present harm.' " 573 N.W.2d at 721 (quoting *Werlein*, 746 F.Supp. at 901). The court therefore held, as in *Werlein*, that the plaintiff could recover "medical monitoring expenses *because of her alleged*

chromosome damage." *Id.* (citing *Werlein*, 746 F.Supp. at 901, 905) (emphasis added). *Bryson* therefore considered the existence of a subcellular injury (chromosome damage) to be a prerequisite to the recovery of medical monitoring costs, suggesting as in *Werlein* that medical monitoring should be characterized as substantive, not procedural. [22]

Ultimately, and perhaps most importantly, none of the cases cited by Plaintiffs discuss whether medical monitoring is substantive or procedural under the applicable standard set forth by the Minnesota Supreme Court. Plaintiffs do not cite a single case from Minnesota or any other jurisdiction holding that entitlement to medical monitoring is a procedural issue controlled by the law of the forum for choice-of-law purposes. To the contrary, courts have treated medical monitoring as substantive, not procedural or remedial.

In the *St. Jude* cases, for example, the Eighth Circuit considered certification of a medical monitoring class in a products liability suit involving prosthetic heart valves. *See St. Jude I*, 425 F.3d at 1121–23; *St. Jude II*, 522 F.3d at 840–42. After "reviewing the laws of different states with regard to medical monitoring, the [district] court observed it would apply the medical monitoring law of different states, conditionally certifying the class only as to 'those plaintiffs whose valves were implanted in states that recognize a stand-alone cause of action for medical monitoring, absent proof of injury.' " *St. Jude I*, 425 F.3d at 1118. The Eighth Circuit reversed because "diverse legal and factual issues preclude class certification." *Id.* at 1121. The court reasoned that "[p]roposed medical monitoring classes suffer from cohesion difficulties, and numerous courts across the country have denied certification of such classes." *Id.* at 1122. According to the court, there were "individual variations" among the class members because "exposure-only plaintiffs" would " 'incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.' " *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Moreover, "[d]ifferences in state laws on medical monitoring further compound these disparities." *Id.* As the court then explained, "states recognizing medical monitoring claims as a separate cause of action have *different elements triggering culpability.*" *Id.* (emphasis added). Thus, the Eighth Circuit in *St. Jude I* recognized that medical monitoring is a substantive issue requiring a choice-of-law analysis for each class member, [23] not a procedural or remedial issue that can be applied uniformly to an entire class. [24] *See also Foster*, 229 F.R.D. at 605–06 ("[C]laims for medical monitoring are not treated uniformly among the states, and this divergence creates a 'myriad of individual legal issues that defeat the predominance requirement' and makes certification 'totally unmanageable and inefficient.' Many states have not recognized medical monitoring claims, and those which have done so have adopted widely varying criteria for recovery."); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 212 (D. Minn. 2003) (rejecting argument that "the differences in state law governing medical monitoring claims ... should not preclude class certification").

***16** **[28]** Since, as discussed above, the choice-influencing factors point to several different states, depending upon the playing history and domicile of each class member, the Court would be forced to apply a wide range of legal standards for the recovery of medical monitoring. Someone who played for the New York Rangers or Islanders (such as Plaintiff LaCouture) could not state a claim for medical monitoring without a showing of present injury. A former player for the St. Louis Blues (such as Plaintiff Leeman) could receive medical monitoring as an element of damages without proof of present injury. Someone who played for the Florida Panthers or Tampa Bay Lightning or retired to Florida could be entitled to medical monitoring as an independent cause of action without proof of present injury. A former player for the Minnesota North Stars or the Minnesota Wild or someone who currently lives in Minnesota (such as Plaintiffs Christian and Larson) could receive medical monitoring as a form of damages if he has proof of cellular or subcellular injury. *See Bryson*, 573 N.W.2d at 721 (stating that proof of subcellular damage may suffice to prove the required present injury in a medical monitoring case and is a question of fact for the jury to decide). For a player who retired to Hawaii, the court would be acting on a blank slate with no clear guidance from any court as to whether, and under what circumstances, medical monitoring is a viable claim or an element of damages. As one court explained in denying certification of a medical monitoring class,

> Many states never have recognized a claim for medical monitoring, a circumstance that would force this Court into the undesirable position of attempting to predict how their

> courts of last resort would resolve that issue. Those states that have done so have adopted widely varying criteria for recovery. There simply is no justification for embarking on so complex a path.

In re Rezulin Products Liab. Litig., 210 F.R.D. 61, 74 (S.D.N.Y. 2002); *see also In re Prempro*, 230 F.R.D. at 563 (denying certification because differing state laws "cannot reasonably be grouped in a comprehensive manner that does not seriously impinge on the integrity of the law of each state").

For all of these reasons, individualized legal issues will substantially predominate over common legal issues in this litigation. *See St. Jude I*, 425 F.3d at 1122; *see also Zehel-Miller v. Astrazenaca Pharm., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) ("The fact that medical monitoring is not treated uniformly throughout the United States creates a myriad of individual legal issues that defeat the predominance requirement of Rule 23(b)(3)."); *In re Baycol Prods. Litig.*, 218 F.R.D. at 208 ("Differences in state law, no matter how slight" may "swamp any common issues and defeat predominance"). Accordingly, class certification cannot be granted under Rule 23(b)(3). [25]

D. Rule 23(c)(4), Issue Class

[29] Plaintiffs Leeman and the Ziedel Estate move for Rule 23(c)(4) certification and for their appointment as representatives of Class 2 as to certain issues only—the legal issues of duty of care and breach of duty, including the failure to warn, and factual issues relevant to whether the head impacts that class members experienced can cause latently-developed NDDCs. More specifically, Plaintiffs seek class certification as to "whether the NHL owed duties of care under negligence standards;" "whether the NHL breached those duties, including by failing to warn;" "whether head impacts experienced in NHL-style play substantially contribute to the development of [NDDCs] as described in the Complaint;" and "whether retired players are at an increased risk of developing" these conditions. (Zimmerman Ltr. 4.)

Limiting issues in this manner, however, cannot be used to evade the predominance and cohesiveness requirements. In *Ebert*, for example, the Eighth Circuit reversed the certification of a class limited to particular issues related to General Mills' liability to property owners for the release of a toxic substance. The court explained that the district court

> abused its discretion in determining that the individualized issues in this case 'do not predominate over the common issues for those questions for which certification is sought.' Indeed, it is the deliberate limiting of issues by this district court in this case that is problematic. Stated earlier, all actions can be articulated so that there are common questions. Here, by bifurcating the case and narrowing the question for which certification was sought, the district court limited the issues and essentially manufactured a case that would satisfy the Rule 23(b)(3) predominance inquiry. Concluding 'that questions on individualized exposure will not be addressed as part of [the] questions for which the Court will agree to certify the class' complicates the litigation of the elements necessary to resolve the plaintiffs' claims. The district court's narrowing and separating of the issues ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial.

***17** 823 F.3d at 479. Similarly here, Plaintiffs' proposal to resolve certain issues on a classwide basis would not result in a more efficient resolution of the class members' claims. Each class member would still require an individualized choice-of-law determination, resulting in the application of widely varying legal standards for their claims, particularly with respect to medical monitoring. *See, e.g., Harding v. Tambrands Inc.*, 165 F.R.D. 623, 632 (D. Kan. 1996) (denying class certification because "instructing the jury in a manner that is both legally sound and understandable to a jury of laypersons would be a herculean task" and "the verdict form necessary to submit the case to the jury would read more like a bar exam"). Since this "limited class certification would do little to increase the efficiency of the litigation," *St. Jude II*, 522 F.3d at 841, certification must be denied.

IV. CONCLUSION

The Court is sympathetic to the significant cost and the likelihood of duplicative proof in trying this case many times, for each individual player. This result, however, is mandated by the Supreme Court's guidance in *Dukes* and the Eighth Circuit's rulings in *St. Jude* and *Ebert*. In particular, the "rigorous analysis" required by *Dukes* demonstrates that there are widespread differences in

applicable state laws governing medical monitoring. 564 U.S. at 350–51, 131 S.Ct. 2541. Given those differences, the Court finds that resolving these claims in a single class action would present significant case management difficulties. *See* Fed. R. Civ. P. 23(b)(3)(D). The Court therefore declines to certify either of Plaintiffs' proposed classes under Rule 23.

ORDER

THEREFORE, IT IS HEREBY ORDERED THAT:

Plaintiffs' Motion for Class Certification and for Appointment of Class Representatives and Class Counsel (Doc. No. 638) is **DENIED**.

All Citations

--- F.R.D. ----, 2018 WL 3421343

Footnotes

1 Martland, H., *Punch Drunk*, Journal of American Medicine (1928). (*See* Doc. No. 789-3.)

2 Corsellis, J.A. et al., *The Aftermath of Boxing*, Psychol Med (1973) (*See* Doc. No. 789-7.)

3 Dr. Cantu is one of Plaintiffs' experts in this case. (*See* Doc. No. 646.) The NHL moved to exclude the testimony of Dr. Cantu and Plaintiffs' other four experts—D'Arcy Jenish, Dr. Stephen T. Casper, Dr. R. Dawn Comstock, and Dr. Thomas Blaine Hoshizaki. (*See* Doc. Nos. 755, 761, 767, 772, 781.) None of these motions are addressed in this Order.

4 As used by Plaintiffs, "NDDC" includes ALS, Alzheimer's, Parkinson's, CTE, Frontotemporal Dementia, Lewy Body Dementia, Parkinson's Dementia, and other neurodegenerative diseases or conditions, as well as any cognitive, mood, or behavioral conditions where such conditions arose after retirement from the NHL. (Doc. No. 640, Pls.' Mem. 1 n.2; SAC ¶ 399.)

5 For example, the NHL argues that the boxer study findings should not apply to other sports. (Def.'s Mem. 8; *see also* Doc. No. 732-1, Declaration of Lisa Brenner ("Brenner Decl.") ¶ 50 (because the blows sustained by boxers in the Martland study were " 'severe' " and, in some cases, resulting in a loss of " 'consciousness ... for a considerable period of time[,]" its "[i]mplications for milder and less frequent trauma that might be associated with contact sports are not evidence"); Doc. No. 789-12, Critchley, M., *Medical Aspects of Boxing, Particularly from a Neurological Standpoint*, Br Med J (1957) ("One important distinction ... distinguishes boxing from most other forms of athleticism. Injuries are coincidental in other sports, but in boxing the aim and object ... is to render the opponent *hors de combat.*").)

6 The term mTBI is used interchangeably with concussion. (SAC ¶ 160; Cantu Decl. ¶ 23.)

7 Christian does not allege that he is currently suffering from any concussion-related symptoms. (SAC ¶¶ 52–58.) At his deposition, Christian answered "no" when asked if he suffers from or has depression, forgetfulness, balance problems, difficulty concentrating, light sensitivity, mood swings, anxiety, problems managing stress, dizziness, fainting sensations or light-headedness, blurred vision, or ringing in his ears. (Zimmerman Decl., Ex. 145 at 100–01.) Christian also denied that his personality has changed in the last ten years. (*Id.* at 101.)

8 *See* Zimmerman Ltr. 1 (explaining that Plaintiffs seek class treatment for negligence and negligent misrepresentation claims).)

9 In a significant number of cases, this will be the same state where the player spent the majority of his career.

10 It is not necessary to discuss the fifth factor (better rule of law) because it "applies only if the first four factors do not resolve the choice-of-law question." *Dryer*, 2013 WL 5888231, at *6 (citing *Myers v. Gov't Empl. Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238, 244 (Minn. 1974)).

11 Even if the NHL's location pointed towards the applicable law, the NHL was headquartered in Montreal before moving to New York in 1977. As a result, Plaintiffs' own theory would not result in the uniform application of a single body of law to the entire class. At oral argument, counsel for the NHL explained that 1,000 retired, living players in Proposed Class 1 played part of their career when the NHL was headquartered in Montreal, and 600 retired, living players played their entire career when the NHL was headquartered in Montreal. (Doc. No. 973, 3/16/18 Hr'g Tr. 37.) Plaintiffs attempt to rectify this oversight by offering to "limit the Class definition to those who played from 1977 onward." (Pls.' Reply 14.) This proposal would raise adequacy issues with respect to the Estate of Zeidel, whose playing career ended in 1969.

12 *See Hous. Cty. Health Care Auth. v. Williams*, 961 So.2d 795, 811 (Ala. 2007); *Wood v. Wyeth-Ayerst Lab., Div. of Am. Home Products*, 82 S.W.3d 849, 859 (Ky. 2002); La. Civ. Code Ann. Art. 2315(B); *Henry v. Dow Chem. Co.*, 473 Mich. 63, 701 N.W.2d 684, 686 (2005); *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1, 3 (Miss. 2007); *Caronia*

v. Philip Morris USA, Inc., 22 N.Y.3d 439, 982 N.Y.S.2d 40, 5 N.E.3d 11, 18 (2013); *Curl v. Am. Multimedia, Inc.*, 187 N.C.App. 649, 654 S.E.2d 76, 81 (2007); *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403, 183 P.3d 181, 183 (2008); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (applying Virginia law); *Alsteen v. Wauleco, Inc.*, 335 Wis.2d 473, 802 N.W.2d 212, 218–19 (App. 2011).

13 *See Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 914 N.E.2d 891, 901–02 (2009).

14 *See Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795, 823–24 (1993); *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 71 A.3d 30, 75–76 (2013); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007); *Sadler v. PacifiCare of Nev., Inc.*, 340 P.3d 1264, 1270 (Nev. 2014); *Ayers v. Twp. of Jackson*, 106 N.J. 557, 525 A.2d 287, 298 (1987).

15 *See Petito v. A.H. Robins Co.*, 750 So.2d 103, 105–07 (Fla. Dist. Ct. Ap. 2000); *Redland Soccer Club, Inc. v. Dep't of the Army*, 548 Pa. 178, 696 A.2d 137, 145–46 (1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993); *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424, 432 (1999).

16 *See Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28, 33–34 (App. 1987).

17 No Canadian court has recognized the validity of medical monitoring claims, and a number of those courts have expressed skepticism of such claims due to Canada's publicly-funded healthcare system. (*See* Doc. No. 789-37, Def.'s Ex. 56, Decl. of John B. Laskin ("Laskin Decl.") ¶¶ 12–33; Doc. No. 789-38, Def.'s Ex. 57, Decl. of Sylvie Rodrigue ("Rodrigue Decl.") ¶¶ 8–9.) One third of the proposed class members live in Canada. (3/16/18 Hr'g Tr. 41.) Five of the six Proposed Class Representatives played for a Canadian team at some point in their career, and Plaintiffs Leeman and Nicholls are Canadian residents.

18 Plaintiffs argue that New York law does not restrict medical monitoring to those manifesting physical symptoms of a disease. (Pls.' Reply 18 (citing *Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F.Supp.3d 233 (N.D.N.Y. 2017).) The court in *Baker* interpreted *Caronia* to allow medical monitoring where the underlying injury is the accumulation of a toxic substance within the plaintiff's body. 232 F.Supp.3d at 250. *Baker* also allowed an interlocutory appeal and suggested that the Second Circuit should "certify these issues to the New York Court of Appeals," which could "assist the lower courts by clarifying *Caronia*." *Id.* at 254. Even if *Baker*'s interpretation of *Caronia* is correct, the Court's conclusion that there are outcome-determinative conflicts between the various states' laws on medical monitoring would not be altered.

19 The status of medical monitoring claims in Georgia can be characterized as unclear due to the lack of state court authority on the topic. *See Parker*, 377 F.Supp.2d at 1302 ("[I]t is not the function of a federal court to expand state court doctrine in novel directions absent clear state authority suggesting the propriety of such an extension.").

20 Even if proof of cellular damage was sufficient to establish a basis for liability on a classwide basis, the presence of cellular damage would need to be established in each player and that the cellular damage was caused by exposure to the hazard of playing hockey in the NHL (as opposed to playing hockey somewhere else or as a result of another cause). Thus, causation in this context would require individualized proof.

21 The jurisdictions identified by Plaintiffs are: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington. (*See* Doc. No. 641-12, Pls.' Ex. 141, Chart A.)

22 The other two cases cited by Plaintiffs do not support their argument. In *Thompson*, the court was "not inclined" to find that the tort of medical monitoring exists under Minnesota law given its "novelty ... and that the Minnesota Supreme Court has yet to recognize it as an independent theory of recovery." 189 F.R.D. at 552. Even if the claim did exist under Minnesota law, the court found that the issue "would not be proper for determination on a class-wide basis." *Id.* In *Palmer*, the court dismissed a claim for medical monitoring because it is "not recognized as an independent cause of action by Minnesota courts." 2005 WL 5891911 (citing *Thompson*, 189 F.R.D. at 552). The court also noted that "Minnesota courts allow *recovery* for the cost of medical monitoring as tort *damages only if the elements for future damages are met.*" *Id.* (citing *Bryson*, 573 N.W.2d at 721) (emphasis in original).

23 Plaintiffs argue that *St. Jude I* does not stand for the proposition that medical monitoring is substantive because the court did not "pause to consider" whether the issue is substantive or remedial. (3/16/18 Hr'g Tr. 27; Pls.' Reply 12.) In support, Plaintiffs cite *In re Levaquin Prods. Liab. Litig.*, MDL No. 08-1943 (JRT), 2010 WL 7852346 (D. Minn. Nov. 9, 2010), which held that Minnesota's punitive damages law is remedial, not substantive. *Id.* at *6–10. In conducting its choice-of-law analysis, the court noted that the defendants did not cite "a single case in which a court has characterized Minnesota's punitive damages statute as substantive. Instead, they have cited cases in which courts engaged in a conflict of law analysis regarding conflicts between states' punitive damages statutes without *pausing to consider* whether such

statutes are substantive or procedural." *Id.* at *8 (emphasis added) (internal citations omitted). While it is true that the Eighth Circuit did not explicitly analyze whether medical monitoring is substantive or procedural, this Court must follow the Eighth Circuit's clear directive in *St. Jude I* that legal variations between states' medical monitoring laws precludes class certification.

24 On remand, the district court determined that Minnesota law should apply to all claims in the nationwide class, and recertified the class pursuant to Rule 23(b)(3). *St. Jude II*, 522 F.3d at 838. In *St. Jude II*, the Eighth Circuit reversed because "the need for detailed and individual factual inquiries concerning the appropriate remedy for any violation still weighs strongly against class certification." *Id.* at 840. While the court noted that the district court "eliminated the diversity of legal issues by applying Minnesota law to all claims," *id.*, the court did not endorse or affirm this approach. *Id.* at 841 ("We recognize that plaintiffs may present certain issues that are common to all of their claims, *assuming it is proper under Minnesota choice of law principles and the Constitution to apply Minnesota law to every claim.*") (emphasis added).

25 Because the legal issues in this putative class are too highly individualized, it is not necessary for the Court to consider whether the factual issues are too highly individualized to support class treatment.

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