Points of No Return: How the Ninth Circuit's New Voluntary Undertaking Doctrine Changes Return-to-Play in Sports

By SAM C. EHRLICH*

Introduction

THE NINTH CIRCUIT COURT OF APPEALS has had a monumental impact on the governance of sports over the past few years. In direct contrast to other circuits, the Ninth Circuit has stood apart by ruling in often very athlete-friendly ways in a variety of sport law subject matter areas. Recent decisions where the Ninth Circuit has surprised many by ruling in favor of athlete-plaintiffs can be found in the fields of intellectual property,[1] federal labor law,[2] and employment law.[3] Indeed, the Supreme Court recently affirmed the Ninth Circuit's athlete-friendly ruling in the antitrust case, *NCAA v. Alston*, siding with the Ninth Circuit's requirement that the National Collegiate Athletic Association ("NCAA") defend its amateurism restrictions through a full rule of reason analysis rather than giving the NCAA the broader

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1. *See, e.g.*, Keller v. Elec. Arts, Inc. (*In re* NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268 (9th Cir. 2013) (holding college athletes' right of publicity outweighs the First Amendment rights of a video game company that was using the athletes' likenesses to create the NCAA Football franchise).

2. Dent v. NFL, 902 F.3d 1109 (9th Cir. 2018) (finding that athletes' claims against the National Football League for allegedly failing to properly oversee the prescription of painkillers by clubs are not preempted by § 301 of the Labor Management Relations Act).

3. Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (affirming a district court holding that college athletes are not employees of the NCAA or its conference but narrowing the district court's much broader finding that college athletes cannot be found to be employees of their schools as well); Senne v. Kan. City Royals Baseball Corp., 934 F.3d 918 (9th Cir. 2019) (certifying three classes of minor league baseball players, allowing them to move forward with their class-action suit alleging federal minimum wage and overtime violations under the Fair Labor Standards Act).

threshold-level immunity from antitrust scrutiny that other circuits had granted in prior litigation.[4]

Beyond *Alston*, the Ninth Circuit has also done much to reshape the landscape of health-and-safety policymaking at all levels in sport in two recent cases: *Mayall v. USA Water Polo* (2018)[5] and *Dent v. National Football League* (2020).[6] *Mayall* and *Dent* each dealt with allegations of insufficient institutional controls by overseeing athletic organizations[7] in one particular area of sports health-and-safety: the oft-rushed return of athletes from injury. Both cases involved allegations that the overseeing athletic organization defendant's failure to promulgate adequate return-to-play policy harmed athletes who were improperly allowed back into game action, causing secondary harm.[8] In each case, the Ninth Circuit overturned district court opinions, finding no duty of care based on more conventional interpretations of the voluntary undertaking doctrine.[9] Instead, the court held that each of the overseeing athletic organizations in question did owe a duty to act to protect its players from injuries caused by premature return-to-play and attacked in damning language those organizations' seeming disinterest in doing so.[10]

4. 141 S. Ct. 2141 (2021); *see also* Petition for Writ of Certiorari at 19–23, *Alston*, 141 S. Ct. 2141 (No. 20-512); Brief for the Petitioner at 24–26, *Alston*, 141 S. Ct. 2141 (No. 20-512) (each contrasting the underlying Ninth Circuit decision with decisions made by the Third, Fifth, and Seventh Circuits).

5. 909 F.3d 1055 (9th Cir. 2018).

6. 968 F.3d 1126 (9th Cir. 2020).

7. This Article adopts the definition of "overseeing athletic organizations" from Sam C. Ehrlich, *Gratuitous Promises: Overseeing Athletic Organizations and the Duty to Care*, 25 JEFFREY S. MOORAD SPORTS L.J. 1, 16 (2018), with the added caveat that professional sports leagues may not be preempted out of the liability discussed in this Article under § 301 of the Labor Management Relations Act, as the early district court *Dent* decision referred to in the Ehrlich article was overturned on appeal. *See Dent*, 902 F.3d at 1109. However, the second *Dent* opinion noted that the question of whether the newly added voluntary undertaking claim—that is the subject of this Article—was not reviewed for § 301 preemption in that first *Dent* appellate decision, and thus sent the case back to the district court for a third time to decide that issue. *Dent*, 968 F.3d at 1135–36. *See infra* notes 89–92 and accompanying text.

8. *Mayall*, 909 F.3d at 1061–64; *Dent*, 968 F.3d at 1134–35.

9. *See generally Mayall*, 909 F.3d 1055; *Dent*, 968 F.3d 1126.

10. *Dent*, 968 F.3d at 1133 ("Players continued to face the heightened risks associated with playing through their injuries while receiving improperly handled and administered medications, and the NFL allegedly was aware of this from its audit results but nonetheless turned a blind eye to maximize its revenues."); *Mayall*, 909 F.3d at 1068 ("The [complaint] alleges that as early as 2011, parents and educators were raising concerns with USA Water Polo about the need for a concussion protocol. Rather than formulate and implement a protocol for its youth athletes, USA Water Polo did nothing.").

As argued in this Article, while those cases have (by comparison) flown more under the radar than a case like *Alston*, they could have a similar effect on overseeing athletic organization policymaking. As the Ninth Circuit itself noted, this newfound interpretation of the voluntary undertaking doctrine in the context of inadequate return-to-play policies "could establish a duty owed by [an overseeing athletic organization] to protect player safety after injury, breach of that duty by incentivizing premature return to play, and liability for resulting damages."[11] Indeed, the Ninth Circuit found in *Mayall* that the overseeing athletic organization's complete failure to enact and enforce a concussion return-to-play policy could even constitute *gross* negligence under California law.[12]

Part I of this Article will explore the Ninth Circuit's *Mayall* and *Dent* decisions, while seeking to tie them together to fully examine how application of the voluntary undertaking doctrine has shifted, both in comparison to the Ninth Circuit's pre-*Mayall* doctrine and interpretations of the voluntary undertaking doctrine by other courts. Part II highlights both the key shared takeaways from *Mayall* and *Dent*, and how the differences between these two cases affords a remarkably wide scope to this new interpretation of negligence liability for overseeing athletic organizations. Part III of this Article will then explore how *Mayall* and *Dent* require a shift in how overseeing athletic organizations approach health-and-safety policy in several key areas of policymaking efforts in sport.

I. The Shifting Landscape of the Voluntary Undertaking Doctrine

A. The Voluntary Undertaking Doctrine as Traditionally Applied to Sports

The voluntary undertaking doctrine refers to the legal theory collated as section 323 of the Restatement (Second) of Torts and provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or

11. *Dent*, 968 F.3d at 1128.
12. *Id.* at *passim.*

> (b) the harm is suffered because of the other's reliance upon the undertaking.[13]

As expressed by the California Supreme Court, the doctrine generally holds "that one who voluntarily undertakes to perform an action must do so with due care."[14] As such, the voluntary undertaking doctrine functions as an exception to the general nonfeasance rule, holding that those who voluntarily engage in an effort to protect another are responsible for an increase in harm to that other, even if the voluntary actor's mere failure to act is what actually causes the other's injuries.[15]

States have their own versions and interpretations of the voluntary undertaking doctrine that occasionally differ from section 323.[16] California's version of the voluntary undertaking doctrine, for example, differs slightly from section 323, holding that the plaintiff must make a showing that:

> (1) an actor undertook to render services to another;
> (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons;
> (3) the actor failed to exercise reasonable care in the performance of the undertaking;
> (4) the failure to exercise reasonable care resulted in physical harm to the third persons; and
> (5) either (a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.[17]

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13. RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965).

14. Coffee v. McDonnell-Douglas Corp., 503 P.2d 1366, 1370 (Cal. 1972).

15. *See, e.g.*, Alvarez v. Jacmar Pac. Pizza Corp., 122 Cal. Rptr. 2d 890, 907 (Cal. Ct. App. 2002) ("[T]here generally is no liability for nonfeasance but the voluntary assumption of an undertaking creates a duty to exercise due care."); Wakulich v. Mraz, 785 N.E.2d 843, 856 (Ill. 2003) ("Importantly, plaintiff's theory in this case is not that defendants failed to perform at all and are liable for their nonfeasance. Plaintiff's theory is that defendants negligently performed their voluntary undertaking and are liable for their misfeasance."); *see also* Sam C. Ehrlich, *Swimming Against the Current:* Mayall v. USA Water Polo *and Its Potential Impact on Overseeing Athletic Organizations*, 19 VA. SPORTS & ENT. L.J. 1, 22 n. 166 (2019).

16. *See, e.g.*, Chew v. Meyer, 527 A.2d 828, 832 (Md. Ct. Spec. App. 1987) (noting that the Maryland courts' "analytical approach" to determining voluntary undertakings is "totally inconsistent" with the position of § 323); Kerr-Morris v. Equitable Real Estate Inv. Mgmt., Inc., 736 N.E.2d 552, 555–56 (Ohio Ct. App. 1999) (Hildebrandt, J., dissenting) (dissenting from the majority on the basis that Ohio's version of the voluntary undertaking doctrine specifically requires, in all cases, reliance by the plaintiff on the defendants' undertaking).

17. *See* Mayall v. USA Water Polo, Inc., 909 F.3d 1055, 1066 (9th Cir. 2018) (citing Artiglio v. Corning Inc., 957 P.2d 1313, 1318 (Cal. 1998)).

A law review article written by this Author prior to the Ninth Circuit decisions discussed in this Article found only a narrow application of the voluntary undertaking doctrine to overseeing athletic organizations.[18] In reviewing six different court cases alleging a voluntary undertaking by an overseeing athletic organization, this article ultimately found that it is immensely difficult for plaintiffs to succeed in such a claim against overseeing athletic organizations that only indirectly create policy in sport operational apparatuses, while leaving more direct oversight to clubs and event managers.[19] At the time, only one of those six cases—*Hill v. Slippery Rock University*[20]—had been successful in convincing a court that an overseeing athletic organization owed a duty of care to the athletes within its oversight based on the failure to promulgate adequate policy to protect athletes from harm.[21] And *Hill* rested on a key differentiating factor than the others: the fact that the NCAA's failure to require Division II athletes to undergo testing for sickle cell trait prior to athletic practice and competition was made to look much worse by the fact that the NCAA *did* require such testing at the Division I level.[22]

One notable case reviewed in that article was *Lanni v. NCAA*,[23] a 2015 Indiana state court case where the plaintiff, a college fencer, alleged that the NCAA's failure to undertake a hazard and risk assessment and require certain operational safety precautions within the arena led to her being stabbed in the eye by a sabre while watching a teammate's match.[24] Comparing the case to two failed lawsuits against fraternities for failing to properly protect students against hazing activities, the Indiana Court of Appeals found that the NCAA owed no specific duty to the college athlete plaintiff because, while it was "commendable" for the NCAA "to actively engage its member institutions and student-athletes in how to avoid unsafe practices," those acts "do not rise to the level of assuring protection of the student-athletes from injuries that may occur at sporting events."[25] More generally, the court found that "[a]ctual oversight and control cannot be imputed

18. *See* Ehrlich, *supra* note 7.
19. *Id.*
20. 138 A.3d 673 (Pa. Super. Ct. 2016).
21. *See* Ehrlich, *supra* note 7, at 25–27 (summarizing *Hill*, 138 A.3d 673).
22. *See* Ehrlich, *supra* note 7, at 25; *Hill*, 138 A.3d at 679.
23. 42 N.E.3d 542 (Ind. Ct. App. 2015).
24. *Id.* at 545–47.
25. *Id.* at 553.

merely from the fact that the NCAA has promulgated rules and regulations and required compliance with those rules and regulations."[26]

Other states have had mixed interpretations of the legal duties and responsibilities of overseeing athletic organizations under the voluntary undertaking doctrine. In *McCants v. NCAA*,[27] a federal district court in North Carolina found that "[w]hile rules and regulations promulgated by the NCAA may be relevant to the issue of breach of the standard of care, they are irrelevant to the threshold issue of whether a legal duty exists in the first instance."[28] Such a duty by the NCAA cannot exist in the first place, the court found, as "regulating an activity is not the same as engaging in it, or even controlling it, under North Carolina law."[29] On the other hand, a state court in Ohio found in a concussion lawsuit against the NCAA that "the NCAA voluntarily oversees and promulgates the rules and regulations for college football for the purpose of providing a competitive environment that is safe and ensures fair play," and thus could be found to owe a duty to athletes within that competitive environment.[30]

There has been another frequent problem with using the voluntary undertaking doctrine against overseeing athletic organizations for a failure to promulgate policy: the doctrine's requirement that the plaintiff show either an increase in the risk of harm by the organizer's failure to act, or detrimental reliance by the athlete on the organization's voluntary undertaking.[31] In many ways, this requirement conflicts with the assumption of the risk defense as applied in the sports context, where there is no duty for sports event managers to act to prevent risks that are inherent in a sport.[32] In *Mehr v. Fédération Inter-*

26. *Id.*

27. 201 F. Supp. 3d 732 (M.D.N.C. 2016).

28. *Id.* at 745.

29. *Id.* (quoting Foster v. Nat'l Christian Couns. Ass'n, No. 03CV00296, 2004 WL 1497562, at *4 (M.D.N.C. June 1, 2004)).

30. Schmitz v. NCAA, 67 N.E.3d 852, 869 (Ohio Ct. App. 2016).

31. *See* RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965).

32. *See, e.g.*, Coomer v. Kan. City Royals Baseball Corp., 437 S.W.3d 184 (Mo. 2014) (deciding whether a regularly held mid-inning "hotdog toss" event at Kansas City Royals professional baseball games was an inherent risk to watching a Royals game, which would foreclose any negligence claim under the assumption of the risk doctrine). *Coomer* is contrasted with the bulk of case law implicating the so-called "baseball rule," which is a perfect demonstration of the general assumption of the risk rule in sports, as it holds that baseball spectators generally cannot recover for injuries suffered by objects (e.g., foul balls) flying into the stands, which is clearly an inherent risk of attending a baseball game. *See generally* Nathaniel Grow & Zachary Flagel, *The Faulty Law and Economics of the "Baseball Rule,"* 60 WM. & MARY L. REV. 59 (2018) (explaining and critiquing the baseball rule).

nationale de Football Ass'n,[33] for example, a federal court in California explained in a soccer concussion case that under California law "there is no duty to prevent risks that are inherent in a sport, but rather only a duty not to increase the risks to a participant over and above those inherent in the sport."[34]

In *Mayall v. USA Water Polo*,[35] the same California federal court found that allegations of an overseeing athletic organization's failure to promulgate policy to "*minimize* the risk of head injuries" did not support allegations that the organization "*increased* those risks."[36] Even pointing to return-to-play policies that allegedly increased the risks of harm created by successive head injuries was not enough to overcome that burden, according to the court, since for the sport in question in that case—water polo—"successive head injuries in a single game or tournament are common."[37]

However, that final case—*Mayall v. USA Water Polo*—would be appealed to the Ninth Circuit.[38] Surprisingly, the Ninth Circuit would not only reverse the district court's holdings, but do so in a way that would shift the application of the voluntary undertaking doctrine—at least in California—to eliminate both the increased risk and lack of duty problems inherent in most prior precedent governing the liability of overseeing athletic organizations in regard to health-and-safety policy.

B. *Mayall v. USA Water Polo* (9th Cir. 2018)

In *Mayall*, the mother of a youth water polo player (named H.C. in the original complaints but later revealed as "Hannah Carlson" after she turned 18)[39] sued USA Water Polo after her daughter was hit in the face with a ball during a tournament match.[40] The tournament was sanctioned by USA Water Polo, the governing body of water polo in the United States.[41] Carlson's coach, who, as noted in the complaint, "was 'lacking any concussion management training, qualifications, and education from USA Water Polo,'" allowed her to remain

33. 115 F. Supp. 3d 1035 (N.D. Cal. 2015).
34. *Id.* at 1062 (citing Knight v. Jewett, 834 P.2d 696 (Cal. 1992)).
35. 174 F. Supp. 3d 1220 (C.D. Cal. 2016).
36. *Id.* at 1228.
37. *Id.* at 1227.
38. 909 F.3d 1055 (9th Cir. 2018).
39. *See* Third Amended Complaint, *Mayall*, 909 F.3d 1055 (No. 16-56389).
40. *Mayall*, 909 F.3d at 1058.
41. *Id.*

in the match.[42] In fact, Carlson played in several additional matches that weekend, taking several additional shots to the head and face, thus "exacerbating her initial injury."[43] Carlson was never evaluated by a medical professional during the tournament.[44]

The effects of the concussion were swift, clear, and unfortunate: two days after the tournament, Carlson was suffering from "headaches, sleepiness, and fatigue so severe that she was unable to attend school."[45] She was forced to drop out of public school due to "a deficit in her ability to hold information in her mind or complete tasks, and was functioning in a low-average range in memory and controlled attention."[46]

According to the complaint against USA Water Polo, the governing body—despite being "the sanctioning authority for more than 500 Member Clubs and more than 400 tournaments" conducted each year—had almost nothing in terms of a post-concussion return-to-play policy for its youth tournaments.[47] In fact, USA Water Polo's entire concussion policy at the time was a one-sentence line item buried in its "sportsmanship" policy stating that coaches must "demonstrate good sportsmanship" by avoiding "[p]hysically or emotionally abusing" athletes, coaches, referees, or others.[48] The policy then defined "physical abuse," providing as an example of physical abuse: "encouraging or permitting an athlete to return to play pre-maturely following a serious injury (e.g., a concussion) and without the clearance of a medical professional."[49]

USA Water Polo's bare-bones concussion policy was, as noted by the Ninth Circuit, implemented and kept in place through Carlson's 2014 injury despite concerns raised by USA Water Polo's insurers in September 2010, and in emails from parents and educators starting in 2011.[50] Additionally, the governing body's scant and buried concussion policy for its youth tournaments stood in sharp contrast to its policy for its adult national teams, which was a separate and much more extensive return-to-play policy implemented in 2011.[51]

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 1058–59.
48. *Id.* at 1064.
49. *Id.* at 1064–65.
50. *Id.* at 1068.
51. *Id.* at 1059.

Despite these claims, Carlson's mother (representing her then-minor daughter until 2019) had her complaint dismissed twice by the District Court of the Central District of California. Mayall's claims were first dismissed without prejudice for two principle reasons: first, based on a failure to trace her daughter's injuries to USA Water Polo under standing principles; and second, based on a failure to show that USA Water Polo took any action to decrease the risk of suffering head injuries beyond those inherent in water polo, as required by the voluntary undertaking doctrine.[52] Despite amending her complaint to focus more on the secondary injuries caused by USA Water Polo's failure to promulgate policy to prevent the risk of harm of repeat concussions, Mayall's case was dismissed again a few months later, this time with prejudice.[53] This time, as noted above, the district court's decision was based in large part on a finding that the distinction between primary and secondary concussions "is untenable," as secondary post-concussive effects are still inherent to the sport and thus assumed as an inherent risk of the activity.[54]

The Ninth Circuit, however, decisively reversed, finding that the distinction between primary and secondary concussions was both material and sufficient to sustain a negligence claim against the governing body.[55] The Ninth Circuit treated the allegations against USA Water Polo quite harshly, writing that, if the allegations of the complaint were true, the governing body "was well-aware of the severe risk of repeat concussions and of the need to implement a policy to remove players from play after suffering a head injury," and that its "inaction in the face of substantial evidence of risk of harm[ ] constitutes 'an extreme departure from the ordinary standard of conduct'" that can even rise to the level of gross negligence.[56] In the end, the Ninth Circuit found that USA Water Polo both had and failed to fulfill its duty of care to Carlson, and that its failure to enact meaningful return-to-play policy sufficiently increased the risk of harm to establish a voluntary undertaking under California law.[57]

52. Mayall v. USA Water Polo, Inc., 174 F. Supp. 3d 1220, 1224–30 (C.D. Cal. 2016).

53. Mayall v. USA Water Polo, Inc., No. SACV 15–0171 AG (KESx), 2016 WL 7613224 (C.D. Cal. Aug. 26, 2016).

54. *Id.* at *2–3.

55. *Mayall*, 909 F.3d at *passim*.

56. *Id.* at 1068.

57. *Id.* at *passim*. The parties agreed to voluntarily dismiss the action in December 2020, likely due to a confidential settlement. *See* Joint Stipulation of Dismissal with Prejudice at 1, Mayall v. USA Water Polo, Inc., No. 15-cv-00171 (C.D. Cal. Dec. 11, 2020).

As this Author wrote in a prior article reviewing the ramifications of the *Mayall* opinion, there are three principal ways that the *Mayall* litigation changed the implementation of sport tort law within the Ninth Circuit's jurisdiction—or at least in how it applies California negligence law and interprets defenses to negligence, including exceptions to the general nonfeasance rule.[58]

First, the Ninth Circuit's distinction between primary injuries and secondary injuries—like, for example, the extra risk of harm resulting from repeat concussions—was a novel way to remove assumption of the risk as a viable defense for overseeing athletic organizations.[59] While the California Court of Appeals had previously found, in a similar sport tort case, that acute secondary injuries resulting from the increased risk of harm from a coach's failure to guard against primary injury complications could be actionable,[60] the Ninth Circuit's decision in *Mayall* arguably extended that doctrine to find that "claims concerning secondary injuries like repeat concussions that can be 'minimized or eliminated' through affirmative action by coaches or policymakers negate the assumption of the risk defense."[61] This interpretation "changed the application of the assumption of the risk doctrine by not requiring an acute, second injury to create an action."[62]

Second, *Mayall* changed the interpretation of the voluntary undertaking doctrine by finding that USA Water Polo's mere status as an overseeing athletic organization with the ability to promulgate health and safety rules did establish a voluntary undertaking and thus a duty of care.[63] This finding by the Ninth Circuit was a major shift in interpretation of the legal responsibility of athletic organizations with mere oversight responsibilities. Indeed, the earlier-discussed review of the application of the voluntary undertaking doctrine, which analyzed the *Mayall* district court decision (alongside five other sport negligence cases), synthesized a general rule that "organizations that merely take a 'broad responsibility' to promote safety in their sport cannot be held

58. *See* Ehrlich, *supra* note 15, at 18–27.

59. *Id.* at 18–20.

60. *See* Wattenbarger v. Cincinnati Reds, Inc., 33 Cal. Rptr. 2d 732, 735–37 (Cal. Ct. App. 1994) (finding that the assumption of the risk defense did not bar a pitcher from claiming a duty of care against a club for whom he had been trying out when he had been allowed to continue pitching despite reporting feeling his arm "pop" to an overseeing coach).

61. Ehrlich, *supra* note 15, at 20 (quoting *Mayall*, 909 F.3d at 1062).

62. Ehrlich, *supra* note 15, at 20.

63. *Id.*

as having 'specifically undertaken a duty' to keep players safe."[64] That perception of the law was shattered by the Ninth Circuit's holding, which found instead that allegations in the complaint "alleg[ing] that USA Water Polo failed to use its authority to provide routine and important safety measures, including a concussion-management and return-to-play protocol that protects players" were sufficient to show an increased risk of harm.[65]

Finally, this review of *Mayall* observed "a particularly powerful finding by the Ninth Circuit" that USA Water Polo's failure to implement a proper return-to-play protocol in light of the immense evidence of the risk of harm of secondary concussions could not only constitute negligence, but *gross* negligence as well.[66] This indictment of USA Water Polo's conduct raised the stakes of the *Mayall* litigation by not only making punitive damages available, but also making possible the idea that assumption of risk could be thrown out altogether in cases like *Mayall*, since prior precedent in California has found that one cannot assume the risk of gross negligence in the same way that one cannot assume the risk of recklessness or intentional torts.[67] This holding by the Ninth Circuit serves to put additional pressure on overseeing athletic organizations in enacting health-and-safety policy in the future.

Vitally, when discussing the shift in policy regarding the voluntary undertaking doctrine, this Author's review found that *Mayall*'s holdings in this regard had been extensively discussed in oral arguments in another pending case at the Ninth Circuit: *Dent v. National Football League*.[68] The article argued that the way the Ninth Circuit panel was citing *Mayall* in its discussions of *Dent*'s related legal issues "will signal clearly whether the Ninth Circuit itself sees *Mayall* as having expanded the scope of the voluntary undertaking doctrine in how it applies to the responsibilities of overseeing athletic organizations to promulgate effective policy."[69] Since then, *Dent* has been decided, and its holdings do in fact continue to signal expansion of the Ninth Circuit's interpretation of the voluntary undertaking doctrine in several material ways.

64. Ehrlich, *supra* note 7, at 34 (quoting Mehr v. Fédération Internationale de Football Ass'n, 115 F. Supp. 3d 1035, 1066 (N.D. Cal. 2015)).

65. *Mayall*, 909 F.3d at 1067.

66. Ehrlich, *supra* note 15, at 25–27.

67. *Id.*

68. *See id.* at 24–25 (discussing Oral Argument, Dent v. NFL, 968 F.3d 1126 (9th Cir. 2020) (No. 19-16017), https://www.youtube.com/watch?v=MFL9j6Dl-Y8 [https://perma.cc/46YR-RHSF]).

69. Ehrlich, *supra* note 15, at 25.

C. *Dent v. National Football League* (9th Cir. 2020)

In sharp contrast to *Mayall*'s plaintiff—a youth water polo player—*Dent* concerned a class action of former professional football players who played in the National Football League ("NFL") between 1969 and 2014.[70] Like *Mayall*, *Dent* concerned so-called "return-to-play" procedures, but, instead of alleging damages caused by secondary concussive effects, the *Dent* plaintiffs claimed that the NFL "negligently facilitated the hand-out of controlled substances to dull players' pain and return them to the game after injury in order to maximize revenues by keeping marquee players on the field."[71]

According to the complaint, the NFL and its member clubs encouraged players to take pain-masking medication instead of seeking rehabilitative treatment for their injuries, with team doctors handing players pills "in 'small manila envelopes that often had no directions or labeling'" and telling them "to take whatever was in the envelopes" without asking questions about their contents.[72] As a result, according to the plaintiffs, retired NFL players in the class "suffer from permanent orthopedic injuries, drug addictions, heart problems, nerve damage, and renal failure."[73]

The NFL's status as an overseeing athletic organization—as opposed to a direct overseer of the players—was of particular concern in the *Dent* litigation. The NFL's status as a collectively bargained professional sports league was also of concern. In fact, the *Dent* litigation was originally dismissed based on section 301 of the Labor Management Relations Act ("LMRA"), which holds that federal labor law has exclusive jurisdiction over labor disputes involving a collective bargaining agreement ("CBA").[74] As interpreted by the Supreme Court, section 301 holds that a state tort claim that is "inextricably intertwined with consideration of the terms of the labor contract" is preempted by the collective bargaining agreement, and that "[i]f the state tort law purports to define the meaning of the contract relationship, that law is preempted."[75]

On this question, the district court held that the plaintiffs' negligence claims would be preempted under this statute because "[i]n

70. Dent v. NFL (*Dent II*), 968 F.3d 1126, 1127–28 (9th Cir. 2020).

71. *Id.* at 1128.

72. Dent v. NFL (*Dent I*), 902 F.3d 1109, 1115 (9th Cir. 2018).

73. *Id.*

74. Dent v. NFL, No. C 14-02324 WHA, 2014 WL 7205048, at *2 (N.D. Cal. Dec 17, 2014); *see also* 29 U.S.C. § 195(a).

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

evaluating any possible negligence by the NFL as alleged in the operative pleading, it would be necessary to take into account what the NFL has affirmatively done to address the problem, not just what it has not done."[76] On appeal, however, the Ninth Circuit reversed, finding no preemption as "no examination of the CBAs is necessary to determine that distributing controlled substances is an activity that gives rise to a duty of care."[77] The Ninth Circuit positioned its holding on the premise that the NFL "has a duty to avoid creating unreasonable risks of harm when distributing controlled substances that is completely independent of the CBAs"—there is no need to examine the CBA to determine whether the NFL owed a duty not to negligently distribute controlled substances to players, therefore, as they always owe a duty not to do so.[78] And while the NFL argued that the CBAs placed medical disclosure operations on teams and their hired physicians, not the NFL, compliance with the Controlled Substances Act provision alleged to have been violated by the NFL in the plaintiffs' negligence *per se* claim cannot be bargained away, as "[t]he parties to a CBA cannot bargain for what is illegal."[79] As such, the Ninth Circuit allowed the parties to proceed on the merits of the negligence claims alleged by the plaintiffs.

By the time the parties reached the Ninth Circuit for a second time in *Dent II*, the plaintiffs had condensed their claims against the NFL to a single negligence claim based on three different theories: negligence *per se* (based on a violation of the Controlled Substances Act), a special relationship between the players and the NFL, and a voluntary undertaking by the NFL.[80] The district court rejected all three theories, finding generally that the plaintiffs' complaint failed because the plaintiffs "d[id] not allege that the NFL *itself* violated the relevant drug laws and regulations governing the medications at issue," instead claiming that the harm was more directly caused by club doctors and trainers.[81] As such, the district court found that the plaintiffs' claims, which ultimately amounted to "accus[ing] the NFL of doing nothing despite awareness of the alleged conduct by club doctors and trainers," were not sufficient to establish a duty of care, citing prior California litigation holding that "[a] defendant does not in-

76. *Dent*, 2014 WL 7205048, at *4.

77. *Dent I*, 902 F.3d at 1120.

78. *Id.*

79. *Id.* at 1120–21.

80. *Dent II*, 968 F.3d 1126, 1127–28 (9th Cir. 2020).

81. Dent v. NFL, 384 F. Supp. 3d 1022, 1029 (N.D. Cal. 2019).

crease the risk of harm by merely failing to eliminate a preexisting risk."[82]

The Ninth Circuit affirmed on the negligence *per se* and special relationship theories, agreeing with the district court that the plaintiffs did not allege statutory violations on the part of the NFL for the negligence *per se* theory,[83] and that the plaintiffs ultimately included nothing of substance in their complaint to claim a special relationship.[84]

On the voluntary undertaking claim, however, the court took a special interest in its new *Mayall* precedent. In fact, all three members of the Ninth Circuit panel spent quite a bit of time at oral arguments probing the NFL's counsel on how the court's prior decision in *Mayall* would affect the *Dent* claims.[85] Judge Bybee asked the NFL's counsel whether the allegations in the complaint of certain NFL employees who had engaged in policies, conducted studies, and made recommendations for the clubs "could be characterized as a voluntary undertaking by the NFL that was inadequate within the meaning of our decision in *Mayall*."[86] When the NFL's counsel argued that this theory was estopped in prior litigation, Judge Bybee reasoned that the plaintiffs "had an opportunity to file an amended complaint" as they "may have had second thoughts" about the voluntary undertaking claim after seeing the *Mayall* opinion.[87] And when faced with NFL arguments that *Mayall* required a showing of an increase in harm to trigger liability—whereas the NFL "proactively doing audits and compliance methods, even if they were insufficient, as they allege, and didn't solve the problem" did not increase the harm—Judge Bybee responded that this determination "ought to be a jury question" or "at least [saved] for summary judgment" instead of being dismissible by a judge before discovery.[88]

These *Mayall*-focused thoughts by the Ninth Circuit panel were clearly reflected in the resulting opinion, which reversed the district court's dismissal of the negligence claim based on the voluntary undertaking theory—largely through citation, reliance, and application

82. *Id.* at 1031–33 (quoting Univ. of S. Cal. v. Superior Ct., 241 Cal. Rptr. 3d 616, 631 (Cal. Ct. App. 2018)).

83. *Dent II*, 968 F.3d at 1131.

84. *Id.* at 1135.

85. Oral Argument, Dent v. NFL, 968 F.3d 1126 (9th Cir. 2020) (No. 19-16017), https://www.youtube.com/watch?v=MFL9j6Dl-Y8 [https://perma.cc/46YR-RHSF]).

86. *Id.* at 44:00–44:50.

87. *Id.* at 44:50–45:36.

88. *Id.* at 49:00–50:30.

on *Mayall*. Indeed, Judge Tallman's statement of the voluntary undertaking doctrine in the introduction of the opinion clearly showed the court's sharp focus on *Mayall*, as he wrote that "[i]f proven, a voluntary undertaking theory could establish a duty owed by the NFL to protect player safety after injury, breach of that duty by incentivizing premature return to play, and liability for resulting damages."[89]

This statement—essentially a summary of *Mayall*'s holding on the voluntary undertaking claim applied to the NFL—would be reflected throughout the court's analysis of the plaintiffs' claims in the *Dent II* opinion, as would its expansive view of the *Mayall* precedent. Summarizing the findings in *Mayall*, Judge Tallman wrote that the *Mayall* court:

> [C]oncluded that a negligence claim based on voluntary undertaking should survive 12(b)(6) dismissal where a putative class of youth water polo players alleged that, "by failing to establish a concussion-management and return-to-play protocol for its youth water polo league, USA Water Polo failed to exercise reasonable care in the performance of its undertaking—ensuring a healthy and safe environment for its players."[90]

Similarly, the court found that the *Dent* plaintiffs' pleading that the NFL "'voluntarily undertook a duty' to 'ensure the proper record-keeping, administration and distribution of Medications,' but ultimately failed to protect players due to its 'business culture in which everyone's financial interest depends on supplying Medications to keep players in the game'" was sufficient to sustain a voluntary undertaking claim.[91]

The opinion also noted that the policy promulgated by the NFL purported to provide guidelines for the prescription and utilization of prescription drugs provided by club personnel to players, but the league failed to change the policy even after a 2010 investigation of the NFL's clubs by the Drug Enforcement Agency.[92] In noting this particular allegation, Judge Tallman clearly had in mind the one-sentence concussion return-to-play policy much derided by his Ninth Circuit colleagues in *Mayall*.[93]

To show a breach of that duty, Judge Tallman pointed back to *Mayall*, noting that the alleged "physical harm that resulted from their premature return to play after suffering otherwise debilitating injuries

89. *Dent II*, 968 F.3d at 1128.
90. *Id.* at 1132.
91. *Id.*
92. *Id.* at 1133.
93. Mayall v. USA Water Polo, Inc., 909 F.3d 1055, 1064–65 (9th Cir. 2018).

masked by over-prescription of pain-relieving medications" does "resemble[ ] the alleged failure on the part of USA Water Polo to 'use its authority to provide routine and important safety measures' regarding return-to-play methods after an injury has been sustained."[94] Rejecting the idea that the clubs, not the NFL, should be held ultimately responsible due to their more direct oversight, Judge Tallman found that "[d]espite the NFL's one-step-removed relationship to the players, it was within the NFL's control to promulgate rules or guidelines that could improve safety for players across the league," while comparing its role to USA Water Polo's role as "the 'rule making authority'" in *Mayall*.[95]

Addressing the concerns raised by NFL's counsel at oral argument regarding a potential failure to show an increase in harm as required by the elements of the voluntary undertaking doctrine, Judge Tallman wrote that the complaint's allegations that the NFL's "carelessness increased the risk of [physical] harm" were certainly sufficient to prove that element.[96] Judge Tallman highlighted written testimony by players who were told by doctors seen after their careers concluded that "some of their ailments might be the result of the amount of Medications they took during their NFL careers."[97] That, according to the court, would be enough to reflect a sufficient negligence pleading under all elements of the voluntary undertaking doctrine.[98]

Importantly, Judge Tallman did note that the voluntary undertaking claim at issue had not been raised in the complaint read for the prior preemption discussion in *Dent I*.[99] As noted above, this fact was highlighted by the NFL, which claimed the plaintiffs were now judicially estopped from adding the voluntary undertaking claim into a new complaint.[100] The panel disagreed, finding that the plaintiffs' late decision to pursue the voluntary undertaking claim while still relying on their negligence *per se* claim as the "primary duty at issue" did not "rise to the level of a 'clearly inconsistent' position."[101] However, the panel did find that the district court (and the *Dent I* Ninth Circuit panel) did not consider the issue of whether the voluntary undertak-

94. *Dent II*, 968 F.3d at 1134.
95. *Id.* (quoting *Mayall*, 909 F.3d at 1068).
96. *Dent II*, 968 F.3d at 1134–35.
97. *Id.* at 1135.
98. *Id.*
99. *Id.*
100. *Id.* at 1132 n.3.
101. *Id.* (quoting New Hampshire v. Maine, 532 U.S. 742, 750 (2001)).

ing doctrine is preempted by section 301 of the LMRA.[102] As such, the panel remanded the case back to the district court to decide that question, potentially setting up a *Dent III* in the near future.[103]

II. Tying Together *Mayall* and *Dent*

To be clear, *Mayall* and *Dent* are strictly Ninth Circuit jurisprudence made under the terms of California's voluntary undertaking doctrine. But *Mayall* and *Dent* may represent a larger trend by the courts to hold overseeing athletic organizations more accountable for failed efforts to enact effective health-and-safety policy to protect the athletes under their care. Given the fact that the two organizations implicated in each case—the NFL and USA Water Polo—are broad-based, national sports management organizations being held to this new standard in the largest state in the country by population, the impact of *Mayall* and *Dent* on these two organizations will be strongly felt regardless of jurisdiction. Furthermore, the Ninth Circuit covers a huge portion of the country—forty percent of the nation's land mass and twenty percent of its population, according to the Cato Institute.[104] This means that sports leagues and overseeing athletic organizations have often had to adjust to Ninth Circuit rulings on a nationwide-scale—even if the jurisdictional or doctrinal foundation of these rulings are confined to one geographic area or the laws of one particular state.[105]

102. *Dent II*, 968 F.3d at 1135.

103. *Id.* at 1136. A potential "*Dent III*" decision at the Ninth Circuit will be substantially delayed, however, in February 2021 the district court on remand rejected the NFL's effort to dismiss the voluntary undertaking claim on preemption grounds, allowing the case to proceed to discovery and potential trial. Dent v. NFL, No. C 14-02324 WHA, 2021 WL 662173, at *6–7 (N.D. Cal. Feb. 19, 2021). Still, Judge Alsup of the Northern District of California expressed doubts about the plaintiffs' ability to move past preemption after discovery, writing that "if the [voluntary undertaking] theory is that the audits showed rampant misuse of painkillers by the clubs and that the NFL's failure to intervene constituted negligence," then CBA analysis will be necessary, thus requiring dismissal under § 301. *Id.* at *7. Indeed, Judge Alsup's decision seemed in large part based on a strong desire to avoid, for as long as possible, a third appeal to the Ninth Circuit—and, potentially, a third reversal—as he ended his opinion by stating: "Rather than a third dismissal and overindulgence in judicial notice, the Court believes the record for the court of appeals will be more complete and true to history if we proceed to trial and/or summary judgment." *Id.*

104. Mark Brnovich & Ilya Shapiro, *Split up the Ninth Circuit–but Not Because It's Liberal*, CATO INSTITUTE (Jan. 11, 2018), https://www.cato.org/commentary/split-ninth-circuit-not-because-its-liberal [https://perma.cc/B5J2-HZVA].

105. *See, e.g.*, Vincent Tumminello III, *The Changing Face of College Athletics:* O'Bannon *and Cost of Attendance*, MARTINDALE (Feb. 13, 2018), https://www.martindale.com/legal-news/article_taylor-porter-brooks-phillips-llp_2505989.htm [https://perma.cc/R9XT-THQD] (exploring the cause-and-effect nature that O'Bannon v. NCAA, 802 F.3d 1049

What is perhaps most striking about these two cases, however, is the simple fact that the defendants represent two ends of a number of different spectrums. As the NFL itself argued in attempting to distinguish *Mayall* in *Dent II* oral arguments, the NFL oversees professional football, which involves older, more sophisticated adult athletes, while the USA Water Polo league at issue in *Mayall* was a youth league.[106] Additionally, the NFL argued that *Mayall* was distinguished due to the fact that the athlete allegedly harmed in *Mayall* by the governing body's conduct was a minor both at the time of the injury and throughout most of the litigation.[107] One can certainly understand an instinct to interpret the law to better protect youth athletes than professional athletes, but the extension of that protection to adult, professional athletes was a particularly notable twist in the *Dent II* decision. One struggles to think of a wider gulf in talent, expertise, and general understanding of the risks of sport than the gap between youth water polo and the NFL. But as the Ninth Circuit pointed out in rejecting the NFL's argument to that effect, "[n]othing in *Mayall* suggests that the logic or holding of the case should be cabined" to just apply to youth athletes, and the focus of *Mayall* "is instead on the harm that results from prematurely returning athletes to play after they have already suffered an injury."[108]

A second key distinction between *Mayall* and *Dent* that was seemingly irrelevant to the Ninth Circuit was the existing level of involvement by the overseeing athletic organization defendants in attempting to control the alleged risk of harm. The Ninth Circuit repeatedly cited rather damning allegations against USA Water Polo in *Mayall*, noting that, if the allegations of the complaint were true, the governing body had "repeatedly ignored the known risk of secondary injuries, and repeatedly ignored requests that it implement a concussion-management and return-to-play protocol."[109] As such, the Ninth Circuit sharply criticized USA Water Polo, writing that the organization's "inaction in the face of substantial evidence of risk of harm,

(9th Cir. 2015), had on NCAA changes to cost-of-attendance stipend rules); Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1013, 1015 (2019) (noting that Major League Baseball spent significant time and effort lobbying for a statutory exemption from the Fair Labor Standards Act ("FLSA") in response to an FLSA suit brought by minor league baseball players).

106. Oral Argument at 45:20–51:40, Dent v. NFL, 968 F.3d 1126 (9th Cir. 2020) (No. 19-16017), https://www.youtube.com/watch?v=MFL9j6Dl-Y8 [https://perma.cc/46YR-RHSF]).

107. *Id.*

108. *Dent II*, 968 F.3d at 1133 n.4.

109. Mayall v. USA Water Polo, Inc., 909 F.3d 1055, 1068 (9th Cir. 2018).

constitutes 'an extreme departure from the ordinary standard of conduct.'"[110] These barbs were inarguably well-deserved, as USA Water Polo's entire return-to-play policy for its youth programs was limited to a one-sentence, hortatory throwaway line in a "sportsmanship" policy that was so vague it could not have even purported to be enforceable.[111] And what made matters even worse for the Ninth Circuit was the fact that USA Water Polo demonstrated its knowledge of the need for stalwart return-to-play by enacting such a policy for its Olympic teams—a comparison that the Ninth Circuit noted repeatedly throughout its opinion to excoriate USA Water Polo's lack of similar engagement for its youth programs.[112]

In *Dent II*, by contrast, there was no lack of policy, just a lack of enforcement. As the Ninth Circuit noted, the NFL player plaintiffs alleged in their complaint that the NFL had created a drug oversight program as early as 1973, and had begun auditing clubs' compliance with federal drug laws in the early 1990s.[113] But in analogizing *Mayall*, the Ninth Circuit pointed to similar *inaction*, noting the plaintiffs' allegations that they "continued to face the heightened risks associated with playing through their injuries while receiving improperly handled and administered medications and the NFL allegedly was aware of this from its audit results but nonetheless turned a blind eye to maximize its revenues."[114] The allegations of inaction in the face of mounting evidence here is the same, but the nature of the undertaking is different: USA Water Polo allegedly failed to *enact* policy while the NFL allegedly failed to *enforce* its existing policy, and both flavors of inaction were of the nature that the Ninth Circuit found distasteful.[115]

110. *Id.*

111. *Id.* at 1064–65.

112. *See, e.g.*, *id.* at 1065 ("Given its policy for the national team, USA Water Polo can hardly contend that a comparably detailed concussion-management policy and return-to-play protocol for its youth-league players would fundamentally alter the nature of water polo."); *id.* at 1067 ("USA Water Polo thereby increased the risk of secondary concussions to players who improperly returned to play, a risk that USA Water Polo could eliminate through the implementation of concussion-management protocols already used by its national team.").

113. *Dent II*, 968 F.3d at 1132–33.

114. *Id.*

115. At the same time, the Ninth Circuit also condemned the NFL for its inability to create better policy. The opinion later argued that, like in *Mayall*, "[d]espite the NFL's one-step-removed relationship to the players, it was within the NFL's control to promulgate rules or guidelines that could improve safety for players across the league" and allegations that the NFL "has already demonstrated its ability to create better policies . . . but has failed to enforce them" were similarly persuasive as the allegations in *Mayall*. *Id.* at 1134.

These variances in application of the voluntary undertaking doctrine lead to a clear new rule at the Ninth Circuit: when there is a failure to enact proper policy governing the return-to-play after an injury, in the face of mounting evidence of the risk of harm created by putting players back in the game too quickly, such inaction constitutes an increase in the risk of harm as required by the doctrine. Indeed, the Ninth Circuit said as much itself when summarizing the question before it in *Dent II*, writing that "[i]f proven, a voluntary undertaking theory could establish a duty owed by the NFL to protect player safety after injury, breach of that duty by incentivizing premature return to play, and liability for resulting damages."[116] When written more generally, this statement can be extrapolated to hold that, if proven, the voluntary undertaking doctrine can hold those who would normally be found to have broad oversight powers to promote health and safety liable for not properly protecting player safety by encouraging return-to-play before the player should return from injury.

III. Applying *Mayall* and *Dent*'s New Doctrine

A. The Risk of Harm of Inconsistent or Nonexistent Return-to-Play Policy

On January 17, 2021, Kansas City Chiefs' star quarterback, Patrick Mahomes, took a hard hit to the head and neck area during the Chiefs' divisional round matchup against the Cleveland Browns, slamming his head on the ground as he was tackled to the turf.[117] As shown on the Columbia Broadcasting System ("CBS") Sports television cameras, Mahomes got up from the turf noticeably woozy, dizzy, and disoriented.[118] While it was obvious that Mahomes was suffering from concussion symptoms, and that his team was rightfully replacing him for backup Chad Henne, the decision of when Mahomes should return to the field, or whether Mahomes should return to the game at all represented, as NFL Hall of Fame quarterback Brett Favre later remarked, a significant "test" for the NFL.[119] An opinion piece published later in the *Chicago Tribune* remarked that the relative caution

116. *Id.* at 1128.

117. Michael Shapiro, *Patrick Mahomes Exits in Third Quarter vs. Browns After Suffering Concussion*, SPORTS ILLUSTRATED (Jan. 17, 2021), https://www.si.com/nfl/2021/01/17/chiefs-patrick-mahomes-injury-concussion-browns [https://perma.cc/R5N9-R72P].

118. *Id.*; Highlight Heaven, *Patrick Mahomes DIZZY After Big Hit (OUT FOR GAME w/ Concussion)*, YOUTUBE (Jan. 17, 2021), https://www.youtube.com/watch?v=6mrsM9y8OTA [https://perma.cc/496L-WTKN].

119. Mike Florio, *Brett Favre on Patrick Mahomes Concussion: "This is a Test for the NFL,"* PRO FOOTBALL TALK (Jan. 19, 2021, 10:07 AM), https://profootballtalk.nbcsports.com/

exhibited by the Chiefs and the NFL in keeping Mahomes out of the closer-than-expected playoff game against the upstart Browns and continuing to play it safe with him in the following week leading up to the conference championship game represented significant progress for the NFL, given the league's history with concussions and return-to-play decisions more generally.[120]

For as long as sports has existed, athletes have been glorified as 'professionals' or 'gutsy' for fighting back from injury to help their team win. In a particularly famous counterexample to the Mahomes story, Boston Red Sox pitcher Curt Schilling was given an experimental procedure during the 2004 American League Championship Series to suture a torn tendon in his ankle to his skin, allowing him to continue pitching throughout the Red Sox' playoff run despite suffering a serious injury to that ankle during an earlier playoff series.[121] Schilling's suture broke during the game, leaving a bloody stain on his sock that was captured by television and reporters' cameras, leading to an iconic image representing a historic moment in baseball history.[122] Now, fifteen years later as Schilling faces eligibility for the Baseball Hall of Fame, no discussion of Schilling's candidacy is complete without a discussion of the legendary "Bloody Sock," which represents Schilling's overall heroics in leading his Red Sox to their first World Series title in nearly 100 years.[123]

The aftereffects of such 'gutsy' efforts, however, are all-too-often ignored. Along these lines, Schilling himself struggled immensely dur-

2021/01/19/brett-favre-on-patrick-mahomes-concussion-this-is-a-test-for-the-nfl/ [https://perma.cc/W7HH-73BU].

120. Reid Forgrave, *Op-ed: Super Bowl-Bound Patrick Mahomes and the NFL's Progress on Concussions*, CHI. TRIBUNE (Feb. 1, 2021, 4:19 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-nfl-patrick-mahomes-super-bowl-concussion-20210201-u46u36j2vbdxlpurazsafzkb5m-story.html [https://perma.cc/H4DL-K5EB].

121. Aaron Halford, *Biggest Comebacks: Curt Schilling Overcomes Ankle Injury to Dominate Yankees in 2004 ALCS*, WEEI (Oct. 26, 2018, 7:51 AM), https://www.radio.com/weei/blogs/aaron-halford/biggest-comebacks-curt-schilling-overcomes-ankle-injury-to-dominate-yankees-in [https://perma.cc/UZ3T-V8QT].

122. *Id.*

123. *See, e.g.*, Jay Jaffe, *JAWS and the 2021 Hall of Fame Ballot: Curt Schilling*, FANGRAPHS (May 21, 2021, 11:17 AM), https://blogs.fangraphs.com/jaws-and-the-2021-hall-of-fame-ballot-curt-schilling/ [https://perma.cc/D23M-9YGF]; Joe Posnanski, *Outspoken Schilling Warrants Hall Call*, MLB.COM (Jan. 9, 2018), https://www.mlb.com/news/curt-schilling-worthy-of-hall-of-fame-c264447012 [https://perma.cc/79SD-ZSE3]. Schilling has yet to reach the Hall of Fame, but his failure to earn election to the Hall of Fame is, of course, for reasons entirely unrelated to the "bloody sock" incident—or to his playing career at all. *See, e.g.*, Greg Cote, *Why Curt Schilling Has Only Himself to Blame for Falling Short of Baseball's Hall of Fame*, MIA. HERALD (Jan. 27, 2021, 4:13 PM), https://www.miamiherald.com/sports/spt-columns-blogs/greg-cote/article248795295.html [https://perma.cc/YPX8-EADH].

ing the following season in large part due to never getting that right ankle back to full strength.[124] Without a doubt, Schilling—a veteran professional athlete who made twelve million dollars to pitch for the Red Sox in 2004[125]—was certainly entitled to choose to receive the surgery and return to play prematurely, and his conscious choice to do so makes it difficult to blame anyone for the resulting harm aside for himself (based on what is publicly known). But the iconic and historic nature of the example that he set both demonstrates and contributes to the pressure placed on athletes to come back from injury sooner than they probably should.

All too often, the athlete in question does not have complete autonomy in making the choice to return to play, either because they are pressured into coming back prematurely and/or they simply do not know any better, relying in near totality on the expected expert opinions of coaches. Such a fact pattern was demonstrated in *Mayall*, where the young water polo player looked to her coach for guidance as to whether she should continue, and her coach—due to his own failings, improper training, and insufficient protocol from the top—allowed her to exacerbate her injuries by keeping her in the game instead of keeping her safe.[126] Similarly, in *Wattenbarger*—the California state court case relied upon by the Ninth Circuit in both *Mayall* and *Dent*—the plaintiff was a hopeful young pitching prospect who was in the midst of what was possibly a once-in-a-lifetime shot to try out for a major league baseball club.[127] The plaintiff in that case would have done anything to stay on the field to preserve his chance at big league stardom—including pitching through a 'pop' in his arm after hearing no instructions to stop, suffering a torn triceps as a result.[128]

While this usually applies to younger athletes, that is not always the case. An emphasis on the aftereffects of premature return-to-play was, in large part, the focus of *Dent*, as the plaintiffs' allegations largely centered around a culture of clubs doing everything they can to get

124. Howard Ulman, *Schilling Says He's Healthy Again*, Associated Press (Feb. 18, 2016). Schilling spent 56 days on the injured list during the 2005 season and made only 11 starts with a 5.69 earned run average—by far the worst season in his storied career. *Id.*; *Curt Schilling*, Baseball Reference, https://www.baseball-reference.com/players/s/schilcu01.shtml [https://perma.cc/Q2C8-YPTD].

125. Ulman, *supra* note 124.

126. Mayall v. USA Water Polo, Inc., 909 F.3d 1055, 1058 (9th Cir. 2018).

127. Wattenbarger v. Cincinnati Reds, Inc., 33 Cal. Rptr. 2d 732, 735 (Cal. Ct. App. 1994).

128. *Id.*

players back on the field, regardless of what might happen to those athletes later. Getting players back on the field as quickly as possible was the reason why, as the plaintiffs argued—and as the Ninth Circuit focused on in their *Dent II* decision—the players "continued to face the heightened risks associated with playing through their injuries while receiving improperly handled and administered medications."[129] The desire to get the players back on the field, the Ninth Circuit noted, led to the NFL "turn[ing] a blind eye" to audit results pointing to this improper administration of dangerous painkillers in order to "maximize its revenues."[130]

Allegations of leagues and clubs turning a blind eye to the risk of player injuries is not new. Ironically, perhaps the most famous scandal of this sort combines the manner of injury from *Mayall* and the defendant from *Dent*: the NFL's well-documented history of denying and covering up the risk of harm of concussions in professional football.[131] But as *Mayall* and *Dent* collectively demonstrate, such issues are not limited to concussions, and they are certainly not limited to professional sports.

An illustrative example comes from a 2016 article in the *Journal of the Canadian Chiropractic Association* that painstakingly details the issues in giving a nineteen-year-old Ontario Junior Hockey League ("OJHL") player sufficient rest from a left clavicle fracture.[132] While the player was given an estimated eight-to-twelve week timeframe from his physician for a return to contact sport, this timeframe overlapped with the team's playoff run, resulting in pressure on the team therapist, from both management and the player himself, to clear the player to return to play.[133] As such, the therapist cleared the player to return in the second round of the playoffs—just five-and-a-half weeks post-trauma.[134] Unsurprisingly, the player was hit into the boards from behind during his third game back and injured his left clavicle to an even greater degree.[135] An eight-to-twelve week recovery period was

129. *Dent II*, 968 F.3d 1126, 1133 (9th Cir. 2020).

130. *Id.*

131. *See, e.g.*, MARK FAINARU-WADA & STEVE FAINARU, LEAGUE OF DENIAL: THE NFL, CONCUSSIONS, AND THE BATTLE FOR TRUTH (Three Rivers Press, 2013); Kirstie Brenson, Note, *Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation*, 2017 U. CHI. LEGAL F. 595 (2018).

132. Roger Menta & Kevin D'Angelo, *Challenges Surrounding Return-to-Play (RTP) for the Sports Clinician: A Case Highlighting the Need for a Thorough Three-Step RTP Model*, 60 J. CANADIAN CHIROPRACTIC ASS'N 311 (2016).

133. *Id.* at 315.

134. *Id.*

135. *Id.*

turned into a three-month recovery period with additional surgeries needed to ensure that the player's clavicle could be stabilized enough to allow him to return to hockey at all.[136]

Mayall, *Dent*, *Wattenbarger*, and this OJHL example collectively demonstrate the need for the overseeing athletic organizations themselves to step in and mandate consistent and binding regulation to ensure that players are given enough time to recover before they are cleared to return to play. Club management, coaches, and especially the players themselves are often far too conflicted in these situations, as they all have too much money and/or hopes of glory and victory on the line to make an objective decision about whether to allow for sufficient recovery time before returning to play. While having club doctors bound by the Hippocratic Oath on the sidelines to make this call certainly helps matters, *Dent* and the OJHL example show that these doctors too often face tremendous pressure to take more aggressive measures to get players back on the field.

Instead, the responsibility for ensuring the safety of players in such a situation should be placed not only on the coaches and clubs directly overseeing the activity, but also on the overseeing athletic organizations that know better, have a more objective view of the situation, and place it upon themselves to ensure the health and safety of those who participate in their sport. Granted, the leagues themselves are not entirely immune from such conflicts of interest—as demonstrated clearly by *Dent*'s allegations of the league itself "turn[ing] a blind eye" to its own audit results showing reckless prescription of painkillers by clubs in order to "maximize its [own] revenues" as well as the revenues of the clubs.[137] The NFL certainly does not want Patrick Mahomes to be out with concussion symptoms one second of game-time more than he has to be.

But this is why the trend by the Ninth Circuit to finally place legal responsibility and negligence-based duties of care on these overseeing bodies is so important, as the leagues—so long as proper pressure is applied on them by the courts—have the most power to step in and force clubs, coaches, and even players themselves to do everything they can to avoid further injury and complications to the already-prevalent risk of harm caused by injuries inherent to each particular sport. All too often, overseeing athletic organizations—including most

136. *Id.*

137. *Dent II*, 968 F.3d 1126, 1128, 1133 (9th Cir. 2020).

damningly, the NCAA—have refused legal responsibility for failing to take proper steps to protect players from the risk of injuries.[138]

To be clear, many leagues have already taken significant steps to ensure that clubs and players are following proper return-to-play protocol. Such actions include, for example, requiring referees to force coaches to take players out of games at the risk of forfeit,[139] and having third-party physicians on the sidelines with the power to overrule coach and club physician decisions about returning a player with concussion symptoms back on the field.[140] However, the former is suspect as referees in even the highest level of sport are generally not trained in a diagnostic capacity and thus often inaccurately assess player injuries,[141] and the latter is generally reserved for one particular injury: concussions. Regardless, the handling of player injuries outside of the in-game context is still largely left up to individual teams and schools.[142]

Additionally, while the often-hyper-focused nature of return-to-play guidelines on concussions is understandable, given the importance of protecting against secondary concussions, the difficulty in their diagnosis and treatment, and the controversy surrounding prior

138. *See, e.g.*, Dan Bernstein, *NCAA's Role in Protecting Student-Athletes Could be Clouded by Legal Liability, Among Other Factors*, SPORTING NEWS (Mar. 14, 2019), https://www.sportingnews.com/us/ncaa-football/news/ncaa-role-protecting-student-athletes-could-be-clouded-by-legal-liability-other-barriers/75o4pjwi4tyj1hy90jwnof012 [https://perma.cc/6N4H-BKRG]; *see also* Tezira Abe, Note, *The NCAA's Special Relationship with Student-Athletes as a Theory of Liability for Concussion-Related Injuries*, 118 MICH. L. REV. 877 (2020).

139. *See, e.g.*, Gerrod Bede, *Liability for Youth Sports Injuries*, ARNOLD & CLIFFORD LLP, https://www.arnlaw.com/liability-for-youth-sports-injuries/ [https://perma.cc/SY4A-35LP]. As that article notes, Ohio law requires youth sports referees (along with coaches) to "remove a player from the field of play who 'exhibits signs, symptoms, or behaviors consistent with having sustained a concussion or head injury while participating in the practice or competition[.]'" *Id.* (alterations in original) (quoting OHIO REV. CODE ANN. § 3313.539(D) (West 2014)).

140. *See, e.g.*, *NFL Return-To-Participation Protocol*, NFL PLAYER HEALTH & SAFETY (June 20, 2017), https://www.nfl.com/playerhealthandsafety/resources/fact-sheets/nfl-return-to-participation-protocol [https://perma.cc/3WL8-HTCK] ("All return to full participation decisions are to be confirmed by the Independent Neurological Consultant (INC).").

141. *See* C.W. Fuller, A. Junge & Jiri Dvorak, *An Assessment of Football Referees' Decisions in Incidents Leading to Player Injuries*, 32 AM. J. SPORTS MED. 17 (2004) (finding that Fédération Internationale de Football Association (FIFA) referees' ability to identify both general and head injuries as fouls was unreliably low).

142. Michael Burke & Sam Fortier, *Tracking and Handling Concussions in College Football is Left to Schools. Doctors Think That Should Change.*, DAILY ORANGE (Aug. 28, 2017, 11:08 AM), http://dailyorange.com/2017/08/tracking-and-handling-concussions-in-college-football-is-left-to-schools-doctors-think-that-should-change/ [https://perma.cc/5NM5-TXU6].

handling of that unique risk of harm, *Dent* and the OJHL example discussed above show that such difficulties are certainly not limited to that one specific risk of harm. In fact, recent events have shown that the overwhelming desire to get players on the field at all costs has by no means been solved or even mitigated. The COVID-19 pandemic and its unique challenges with both return-to-play and getting players on the field in the first place have at times shone an ugly light on sports and the overseeing athletic organizations that run them, as these entities have done all that they can to get athletes back on the field at all costs.

B. *Mayall*, *Dent*, and COVID-19

The Ninth Circuit's newfound broad interpretation of the voluntary undertaking doctrine as applied to overseeing athletic organizations is particularly noteworthy when one considers the challenges that such organizations have faced while attempting to manage the COVID-19 pandemic. Across all levels of sports, overseeing athletic organizations have been criticized for allowing players to play sports during the pandemic.[143] But sports has largely continued at most levels even despite this criticism and a multitude of positive tests.[144] Three particular cases at the high school level identified by *USA Today* opinion columnist Jon Solomon stand out as demonstrative examples of the degree to which both athletes and overseeing athletic organizations have worked to continue and restart play:[145] (1) the Illinois High

143. *See, e.g.*, Nathan Kalman-Lamb, Derek Silva & Johanna Mellis, *College Basketball Needs to Shut Down During the COVID-19 Pandemic*, TIME (Dec. 21, 2020, 7:00 AM), https://time.com/5922163/college-basketbal-covid-19/ [https://perma.cc/K2FE-WEAJ]; Editorial, *Keep High School Sports Shut Down During COVID-19 Pandemic*, THE MERCURY NEWS (Nov. 13, 2020, 5:15 PM), https://www.mercurynews.com/2020/11/13/editorial-keep-high-school-sports-shut-down-during-covid-19-pandemic/ [https://perma.cc/7MA7-TCQU]; Michael Beaven, *Summit County Public Health Encourages Schools to Stop Playing Sports Amid Ongoing COVID-19 Pandemic; Twinsburg Extends Athletic Pause*, AKRON BEACON J. (Dec. 7, 2020, 6:37 PM), https://www.beaconjournal.com/story/sports/high-school/2020/12/07/scph-tells-schools-stop-playing-sports-amid-covid-19-pandemic-twinsburg-extends-pause/6478428002/ [https://perma.cc/X2YK-XZE8].

144. *See, e.g.*, Dan Levin, *Despite Covid Outbreaks, Youth Sports Played On*, N.Y. TIMES (Mar. 13, 2021), https://www.nytimes.com/2021/03/13/us/covid-youth-sports.html [https://perma.cc/JB2H-R46A]; Greg Johnson, *Planning for Fall Championships Continues Despite COVID-19*, NCAA (May 22, 2020, 7:30 PM), https://www.ncaa.org/about/resources/media-center/news/planning-fall-championships-continues-despite-covid-19 [https://perma.cc/PK45-4XJX].

145. Jon Solomon, *Youth Sports' Response to COVID-19 has Failed. Here's What We Need to Do Now.*, USA TODAY (Jan. 6, 2021, 11:35 AM), https://www.usatoday.com/story/opinion/2020/12/08/youth-sports-covid-19-precautions-have-failed-heres-what-we-need-column/3855400001/ [https://perma.cc/776B-3NY9].

School Association allowing boys' and girls' basketball teams to play in defiance of the conflicting orders of the Illinois governor;[146] (2) the hiding of COVID-19 cases and symptoms by Minnesota high school athletes;[147] and (3) the so-called "Black Ops stuff" engaged in by athletes to practice and train in violation of local guidelines in Oregon, as described by a father.[148]

Many sports have continued relatively unabated at the professional and intercollegiate levels. But while professional sports have allowed athletes and organizing bodies to come together to agree to mutual terms of adjusted pay and mitigation guidelines through collective bargaining,[149] the implementation of COVID-19 protocols in college sports—which does not have collective bargaining between players and schools—has been more problematic. The NCAA conferences' unilateral implementation of COVID-19 protocols in advance of the Fall 2020 season nearly caused a player boycott, including a written list of demands by players in the Pac-12 and Big Ten Confer-

146. *See* Cate Cauguiran & Diane Pathieu, *IHSA to Allow Girls, Boys Basketball This Winter, Defying Pritzker's Guidance*, ABC7 (Oct. 29, 2020), https://abc7chicago.com/llinois-high-school-sports-ihsa-basketball-pritzker-illinois/7427844/ [https://perma.cc/XR5H-E43C]. The organization reversed course and delayed the season after insurance companies refused to insure the schools. Michael O'Brien, *IHSA Still Plans to Play Every Sport in 2020-21 School Year*, Chi. Sun-Times (Dec. 14, 2020, 3:13 PM), https://chicago.suntimes.com/high-school-sports/2020/12/14/22174365/high-school-sports-ihsa-covid-19 [https://perma.cc/J96R-QU93].

147. Erin Golden, *Surge in COVID-19 Cases Means Fewer Minnesota Schools Meet In-Person Rules*, Star Tribune (Oct. 16, 2020, 9:05 AM), https://www.startribune.com/covid-surge-means-fewer-minnesota-schools-meet-in-person-rules/572755471/ [https://perma.cc/5ZNS-HTFL].

148. Tom Goldman, *While Pro and College Athletes Fight Through a Pandemic, Kids Have a Tougher Path*, NPR (Nov. 16, 2020, 7:00 AM), https://www.npr.org/2020/11/16/935235682/while-pro-and-college-athletes-fight-through-a-pandemic-kids-have-a-tougher-path [https://perma.cc/6V5U-HBMX].

149. In some cases, collectively bargaining these policy adjustments came easily. *See, e.g.*, Jabari Young, *NBA's Strong Relationship with Its Players Could Prevent Collective Bargaining Issues*, CNBC (Aug. 29, 2020, 10:15 AM), https://www.cnbc.com/2020/08/29/nbas-strong-relationship-with-its-players-could-prevent-collective-bargaining-issues.html [https://perma.cc/ZD9L-7V6P]. In other cases, collectively bargaining these policy adjustments was not so easy. *See, e.g.*, Derick Hutchinson, *Why is MLB Season in Jeopardy? Breaking Down All That's Happened Between Players and Owners*, Click On Detroit (June 17, 2020, 2:12 PM), https://www.clickondetroit.com/sports/2020/06/17/why-is-mlb-season-in-jeopardy-breaking-down-all-thats-happened-between-players-and-owners/ [https://perma.cc/9Z4E-F55U]. In Major League Soccer (MLS), on the other hand, COVID-19 temporarily caused collective bargaining negotiations to completely break down. *See* Jeff Carlisle, *MLS Players' Association Won't Strike, But Dispute Commissioner's CBA Claims*, ESPN (Jan. 13, 2021), https://www.espn.com/soccer/major-league-soccer/story/4287464/mls-players-association-wont-strikebut-dispute-commissioners-cba-claims/ [https://perma.cc/M5P2-ECQ9].

ences.[150] These demands led to the Pac-12 and Big Ten Conferences canceling their seasons a few days later, though both conferences would eventually restart play midway through the fall semester.[151]

When college sports did begin play—either on schedule or delayed—COVID-19 cases piled up quickly.[152] A late-December 2020 report by the *New York Times* reported over 6,600 positive COVID-19 tests among college athletes, coaches, and staff members, with the potential for many more as the *Times* was only able to gather complete data for just 78 of the 130 colleges and universities in the NCAA Football Bowl Subdivision.[153]

The NCAA has largely left COVID-19 policy to its individual member schools and conferences, though it did release a list of guidelines for these schools and conferences to follow.[154] These guidelines largely focused on big-picture policies like allowing athletes to opt out of participation without having their scholarship revoked.[155] The guidelines do require member schools to "employ and adhere to the protocols set forth" in a second "Resocialization of Collegiate Sport" document that contains more specific policies regarding return-to-

150. *#WeAreUnited*, The Players' Tribune (Aug. 2, 2020), https://www.theplayerstribune.com/articles/pac-12-players-covid-19-statement-football-season [https://perma.cc/YXH9-3BZ2]; *#BigTenUnited*, The Players' Tribune (Aug. 5, 2020), https://www.theplayerstribune.com/articles/big-ten-covid-19-football-season [https://perma.cc/6E68-CEZC]; *see also* Kaelen Jones, *"We Know We've Opened the Door,"* The Ringer (Aug. 18, 2020, 9:04 AM), https://www.theringer.com/2020/8/18/21372897/college-football-players-unity-ncaa-pac-12-big-ten [https://perma.cc/Y27T-DTKP] (describing and analyzing the various player movements—and counter-movements—surrounding the planning of the Fall 2020 college sports season).

151. Pat Forde & Ross Dellenger, *First Power 5 Dominoes Fall as Big Ten, Pac-12 Pull Plug on Fall Season*, Sports Illustrated (Aug. 11, 2020), https://www.si.com/college/2020/08/11/ncaa-football-season-big-ten-pac-12-canceled [https://perma.cc/D8TL-NMUE].

152. Alan Blinder, Lauryn Higgins & Benjamin Guggenheim, *College Sports Has Reported at Least 6,629 Virus Cases. There Are Many More*, N.Y. Times (Dec. 20, 2020), https://www.nytimes.com/2020/12/11/sports/coronavirus-college-sports-football.html [https://perma.cc/MGE8-2E45].

153. *Id.*

154. *Board Directs Each Division to Safeguard Student-Athlete Well-Being, Scholarships and Eligibility*, NCAA (Aug. 5, 2020, 11:44 AM), https://www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility [https://perma.cc/G69A-5Q8M]; *see also* Jane Coaston, *College Football's Coronavirus Crisis, Explained*, Vox (Aug. 11, 2020, 7:07 PM), https://www.vox.com/2020/8/10/21355857/college-football-coronavirus-explained [https://perma.cc/244N-A5LN].

155. *Board Directs Each Division to Safeguard Student-Athlete Well-Being, Scholarships and Eligibility*, *supra* note 154*; see also NCAA Board of Governors Decision on Fall Sports Championships During 2020-21 and Requirements for Each Division Related to the Conduct of Fall Sports and Championships.*, NCAA (Aug. 5, 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/2020-21BOG_RequirementsFallChampionships.pdf [https://perma.cc/FDC3-7TCG].

play after a positive COVID-19 test, including specific time periods for when both symptomatic and asymptomatic athletes should be held out of play.[156] But these policies are largely couched in language including "should" and "can" rather than stipulating firm instructions.[157] Indeed, the document contains no enforcement mechanism or prescribed penalties, and states that, for both symptomatic and asymptomatic athletes, "[a]ny decision to discontinue isolation of infected individuals should be made in the context of local circumstances."[158]

There has been some enforcement of COVID-19 protocol at the conference level, however. In October 2020, the Southeastern Conference ("SEC") fined the University of Mississippi ("Ole Miss"), the University of Tennessee, and Texas A&M University $100,000 each for failing to adhere to the conference's gameday mask-wearing policy.[159] Around that time, SEC commissioner Greg Sankey revealed to ESPN that penalties assessed to schools for breaking the conference's mask-wearing policies can reach up to a cumulative one million dollars for four separate offenses.[160]

Mask wearing is different than return-to-play, however, and one can even argue that such fines are merely assessed in a performative way, to make it seem like the organization is being vigilant on COVID-19 protocols. In fact, the Big Ten Conference did not even bother fining coaches who did not wear masks during games, preferring instead to leave decisions on mask enforcement to individual universities.[161] On return-to-play—the much more effective way to prevent infection between teams and schools—there has been no evidence of any punishment for member schools coming back after quarantine

156. *Resocialization of Collegiate Sport: Developing Standards for Practice and Competition*, NCAA (Aug. 14, 2020), https://www.ncaa.org/sport-science-institute/resocialization-collegiate-sport-developing-standards-practice-and-competition [https://perma.cc/JCQ9-JS52].

157. *Id.*

158. *Id.*

159. Bryan Matamoros, *SEC Fines Three Schools for Breaking COVID-19 Protocols*, WRUF (Oct. 20, 2020), https://www.wruf.com/headlines/2020/10/20/sec-fines-three-schools-for-breaking-covid-19-protocols/ [https://perma.cc/XMU6-7XFH].

160. Heather Dinich, *SEC Schools That Break COVID-19 Protocols Can Be Fined up to $1 Million*, ESPN (Oct. 16, 2020), https://www.espn.com/college-football/story/_/id/30126714/sec-schools-break-covid-19-protocols-fined-1-million [https://perma.cc/CXE7-8JT5].

161. Timothy Rapp, *Ohio State AD Says Big Ten Won't Fine Football Coaches for Not Wearing Masks*, Bleacher Rep. (Oct. 19, 2020), https://bleacherreport.com/articles/2914173-ohio-state-ad-says-big-ten-wont-fine-football-coaches-for-not-wearing-masks [https://perma.cc/R5YV-9S5J].

too quickly or for simply not postponing games where they clearly should have.

Of course, in order to properly apply the *Mayall/Dent* voluntary undertaking doctrine, there must be some mounting evidence of a risk of harm created by putting players back in the game too quickly. A negligence case for simply contracting COVID-19 during play or practice would almost certainly result in dismissal, likely under the assumption of the risk defense since most athletes—especially sophisticated professional, collegiate, and potentially even high school athletes—would know, understand, and appreciate the risks of contracting COVID-19 during athletic events.[162] Even if such a risk is not normally inherent to playing sports, a strong case can be made that such a risk would absolutely be found to be an inherent risk of playing sports during the well-publicized COVID-19 pandemic period.[163]

But with COVID-19, there is a risk of harm specific to premature return-to-play: the risks presented by myocarditis.[164] Myocarditis is an inflammation of the heart muscle that in some cases can lead to enlargement of the heart, weakening it, and causing it to fail.[165] This causes shortness of breath, fatigue, low blood pressure, and heart palpitations.[166] For athletes, this can be particularly problematic as it is one of the leading causes of sudden cardiac death in athletes.[167]

A December 2020 study in the *European Heart Journal* found that even though athletes are generally not in the risk group for severe COVID-19 infections and thus significantly more likely to only develop

162. *See, e.g.*, Joel Gerson, Polsinelli, *Contact Sports in the Era of COVID-19: How Schools and Amateur Sports Leagues May Face New Liability*, JD SUPRA (May 31, 2020), https://www.jdsupra.com/legalnews/contact-sports-in-the-era-of-covid-19-81583/ [https://perma.cc/7AXW-JFQV]. As Gerson notes, there are other factors that could also lead to dismissal, including other elements of the implied assumption defense and the signing of liability waivers. *Id.*

163. *Id.*

164. *See, e.g.*, Bhurint Siripanthong et al., *Recognizing COVID-19–Related Myocarditis: The Possible Pathophysiology and Proposed Guideline for Diagnosis and Management*, 17 HEART RHYTHM 1463 (2020) (discussing findings and diagnosis of myocarditis in COVID-19 cases); Christian Eichhorn et al., *Myocarditis in Athletes is a Challenge*, 13 J. AM. COLL. CARDIOLOGY 495 (2020) (discussing the challenges in diagnosis and treatment of myocarditis in athletes); Benjamin Hurwitz & Omar Issa, *Management and Treatment of Myocarditis in Athletes*, 22 CURRENT TREATMENT OPTIONS IN CARDIOVASCULAR MED. 65, 65 (2020) (noting that "[m]yocarditis is an underlying cause of sudden cardiac death in young athletes").

165. Sandy Bauers, *Penn Cardiologist Explains How COVID-19 Can Affect the Heart*, THE PHILA. INQUIRER (Feb. 4, 2021), https://www.inquirer.com/health/covid-effect-heart-disease-penn-medicine-20210204.html [https://perma.cc/XCH3-2NCE].

166. *Id.*

167. Eichhorn et al., *supra* note 164, at 65; Hurwitz & Issa, *supra* note 164, at 495.

mild or asymptomatic COVID-19 cases, "a potential risk of a myocardial involvement cannot be excluded even in asymptomatic athletes."[168] This has already been shown in a few, especially notable cases. Boston Red Sox pitcher Eduardo Rodriguez was forced to miss the entire 2020 season when it was revealed that he had developed myocarditis as a result of a COVID-19 infection.[169] Additionally, a September 2020 statement by Pennsylvania State University ("Penn State") Director of Athletic Medicine Wayne Sebastianelli stating that thirty to thirty-five percent of Big Ten athletes who tested positive for COVID-19 had myocarditis symptoms sent shockwaves across the sports world, and it was cited as a primary reason why the Big Ten Conference delayed the start of its football season.[170] While that large number was eventually walked back to a more conservative figure of about fifteen percent of COVID-19-positive athletes with myocarditis,[171] the probability of the heart condition leading to fatal results—particularly when paired with strenuous athletic practice and conditioning—creates a major risk for athletes if they return too soon from even an asymptomatic infection.[172]

Dr. Sebastianelli's statement stands out, as it makes clear that even prior to the Fall of 2020 it was well known that myocarditis was a risk factor in having athletes return to play too early. While there had not been the years of buildup of research and stakeholder pressure like there has been with the risks of repeat concussions in *Mayall* or the evidence of ignored audits in *Dent*, the international attention given to every scrap of information about COVID-19 throughout the summer months was somewhat analogous and certainly within the reach and attention of those running sporting events that fall. As

168. Philipp Schellhorn, Karin Klingel & Christof Burgstahler, *Return to Sports After COVID-19 Infection*, 41 EUR. HEART J. 4382, 4382 (2020).

169. Alex Speier, *With Myocarditis Behind Him, Red Sox Lefty Eduardo Rodriguez Confidently Looks Ahead*, BOS. GLOBE (Nov. 19, 2020, 8:11 PM), https://www.bostonglobe.com/2020/11/19/sports/with-myocarditis-behind-him-red-sox-lefty-eduardo-rodriguez-confidently-looks-ahead/ [https://perma.cc/44P5-6J38].

170. Paul Myerberg, *Penn State Doctor Says 30-35% of Big Ten Athletes Positive for COVID-19 had Myocarditis Symptoms*, USA TODAY (Sept. 3, 2020, 2:55 PM), https://www.usatoday.com/story/sports/ncaaf/bigten/2020/09/03/big-ten-athletes-covid-had-myocarditis-symptoms-one-third-cases/5704234002/ [https://perma.cc/H86A-DMZJ].

171. Cindy Boren, *Penn State Clarifies Remark by Doctor About Myocarditis and Covid-19 Positive Big Ten Athletes*, WASH. POST (Sept. 3, 2020, 4:04 PM), https://www.washingtonpost.com/sports/2020/09/03/big-ten-coronavirus-myocarditis/ [https://perma.cc/9KKB-CNW2].

172. *See* Crystal Phend, *The Real Reason Post-COVID Myocarditis Is a Worry*, MEDPAGE TODAY (Sept. 8, 2020), https://www.medpagetoday.com/infectiousdisease/covid19/88487 [https://perma.cc/U39W-Z6BX].

such, a strong comparison can be drawn between *Mayall*, *Dent*, and any situation where an athlete was put back into action sooner than they should have been. Given that the December 2020 study cited above recommended "a strict ban on sport for a period of at least 3-6 months"—a time period that would effectively end a season for athletes at most levels—such a situation is certainly conceivable.[173]

As of this writing, no noteworthy cases of injury specifically caused by a premature return-to-play after a COVID-19 diagnosis can be found. But it is not hard to believe that such a case could come to light in the near future, especially since we have already had one well-publicized incident to this effect. In December 2020, University of Florida star forward Keyontae Johnson collapsed on the court in the middle of a game against archrival Florida State.[174] After spending some time in a medically-induced coma, Johnson spent ten total days in two hospitals, having been diagnosed with acute myocarditis.[175] Johnson had tested positive for COVID-19 during the summer (along with several teammates), and it was suspected that there was a link between the two diagnoses.[176]

While it was eventually discovered by Johnson's physicians that his case of myocarditis was not related to his earlier COVID-19 diagnosis,[177] it does show the dangers of myocarditis in athletes and how any cases caused by COVID-19 could shake out in the near future. Indeed, if major college basketball programs, like the University of Florida, were not looking for signs of myocarditis among its athletes testing positive for COVID-19, it is difficult to imagine that smaller colleges, high schools, and youth programs will be.[178] Given the prevailing attitude of prioritizing playing games over ensuring safety, cases like *Mayall* and *Dent* involving COVID-19 and myocarditis may unfortunately be not too far in the future.

173. Schellhorn, Klingel & Burgstahler, *supra* note 168, at 4384.

174. *Florida's Johnson Hospitalized After Collapsing on Court*, Associated Press (Dec. 12, 2020), https://apnews.com/article/tallahassee-florida-gators-mens-basketball-florida-mike-white-keyontae-johnson-92955cac3a11402172df366384b89ff3 [https://perma.cc/BS3H-H9B3].

175. Zach Abolverdi, *Florida's Keyontae Johnson Diagnosed with Heart Inflammation Following Collapse at Game*, Gainesville Sun (Dec. 23, 2020, 12:33 PM), https://www.gatorsports.com/story/basketball/2020/12/22/florida-gators-keyontae-johnson-has-season-ending-heart-issue/4006117001/ [https://perma.cc/E6WD-3ZKQ].

176. *Id.*

177. Matt Baker, *Keyontae Johnson's Family: Collapse Wasn't Coronavirus-Related*, Tampa Bay Times (Feb. 3, 2021), https://www.tampabay.com/sports/gators/2021/02/03/keyontae-johnsons-family-collapse-wasnt-coronavirus-related/ [https://perma.cc/D8F7-NKPV].

178. *See* Jonathan H. Kim et al., *Coronavirus Disease 2019 and the Athletic Heart: Emerging Perspectives on Pathology, Risks, and Return to Play*, 6 JAMA Cardiology 219 (2020).

Conclusion

In *Mayall* and *Dent*, the Ninth Circuit hit on a major problem within sport policymaking, and it took bold steps in holding overseeing athletic organizations accountable for inaction in the face of potential harm faced by athletes who are prematurely returned to play. At least within the Ninth Circuit's jurisdiction, it is no longer good enough—and no longer legally viable—to merely delegate authority down to lower levels of the sport governance apparatus, including individual teams, coaches, or players themselves.

It remains to be seen how wide of an impact *Mayall* and *Dent* will have on the national sports scene. As noted, *Mayall* and *Dent* are, for now, strictly Ninth Circuit precedent limited to the application of California law. But the novel application of the voluntary undertaking doctrine espoused and developed in these two decisions could, by their very nature, have a wide impact on overseeing athletic organizational policymaking into the future as they demonstrate an emerging trend towards requiring more accountability for organizations that operate and profit on athletes risking their bodies and livelihoods in sporting competition.

Should the application of the voluntary undertaking doctrine advanced by the Ninth Circuit in *Mayall* and *Dent* spread, there will be increased accountability and responsibility for organizations who hold themselves out as "committed to creating a healthy and safe environment."[179] Based on *Mayall* and *Dent*, organizations who claim such a responsibility on websites and marketing materials right up until the point of litigation can no longer hide behind the shield of differentiating promulgation of broad policies against "[a]ctual oversight and control" over particular athletic events.[180] Organizations who voluntarily take on responsibilities "to create and then enforce league-wide rules regarding player safety,"[181] and other athlete health issues, will be held to that duty when they improperly balance player health and safety against profits and the desire to play games against the protection of athletes under their care or through simple "inaction in the face of substantial evidence of risk of harm."[182]

As demonstrated by the remarkably parallel discussions between return-to-play and the COVID-19 pandemic more generally, discus-

179. Mayall v. USA Water Polo, Inc., 909 F.3d 1055, 1058–59 (9th Cir. 2018).
180. Lanni v. NCAA, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015).
181. *Dent II*, 968 F.3d 1126, 1134 (9th Cir. 2020).
182. *Mayall*, 909 F.3d at 1068.

sions for when, how, and if athletes should play under increased risk circumstances are everlasting and ever-present even as organizations slowly but surely get better at enacting effective and enforceable health and safety policy, including in the more well-publicized risks like secondary concussions and painkiller abuse, and the return-to-play issues that arise in those areas. And as shown from findings of myocarditis among athletes following COVID-19 exposure, return-to-play issues will continue to arise as new health and safety issues develop and take shape throughout all levels of athletic competition.

As such, it is likely that new versions of *Mayall*, *Dent*, and the Ninth Circuit's newfound application of the voluntary undertaking doctrine to return-to-play policies will pop up as well. Assuming that the Ninth Circuit continues its athlete-friendly jurisprudence in these cases, these new decisions will likely continue pushing responsibility onto overseeing athletic organizations and continue shaping sport governance on a broad scale, even beyond the geographic limitations of the Ninth Circuit's jurisdiction. In this regard, the Ninth Circuit will continue developing its reputation as arguably being the most important circuit in various areas of sport law among all levels of the sport governance apparatus.