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FAIR OR FOUL PLAY?: A PROPOSAL TO LIMIT THE SCOPE OF INDEMNITY CLAUSES BETWEEN SPORTS ORGANIZATIONS AND CONCESSIONAIRES FOR ALCOHOL-FUELED THIRD PARTY INJURIES

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ABSTRACT

Enjoying an ice-cold beer and attending a live sporting event go hand-in-hand. To cater to all fans, sports organizations often contract with third-party concessionaires to provide food and beverage services at their venues. Sports organizations understand alcohol distribution and consumption is integral to many fans' gameday experiences. Therefore, sports organizations employ concessionaires to sell alcohol. Alcohol and sports, however, have proven to be a volatile mix. Overserved and intoxicated fans have injured other fans and third parties at sporting venues. Consequently, an injured party may seek damages from the concessionaire who overserved the injurer, as well as the sports organization responsible for the entire event. The contracts between concessionaires and sports organizations, however, regularly contain indemnification clauses exculpating the sports organization from liability. Indemnification clauses leave concessionaires fully exposed for an incident to which the sports organization likely contributed. Sports organizations should not be allowed to contract away their liability, as the result proves unjust. Instead of adhering strictly to an indemnification clause's terms as between these parties, courts should distribute fault equitably. This Note proposes courts apply the partial indemnification doctrine in the sports organization and concessionaire contracting context. Further, state legislatures should work to codify the doctrine's principles to ensure the law's uniform application in alcohol-related injury scenarios. Partial

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indemnification provides a just resolution by compensating injured victims, and incentivizing concessionaires and sports organizations to closely monitor alcohol consumption at live sporting events.

INTRODUCTION

Brian Stow has become a well-known San Francisco Giants fan over the past decade, but not just for his love of baseball. On Major League Baseball (MLB) Opening Day in 2011, Stow was nearly beaten to death by two Los Angeles Dodgers fans in the Dodgers Stadium parking lot.[1] Excessive alcohol consumption at the game is one factor alleged to have caused the attack.[2]

In 1999, a New York Giants fan left the stadium with a blood-alcohol content level nearly triple the legal limit. The fan crashed into the Verni family, leaving their two-year-old daughter paralyzed.[3] A $110 million judgment was entered against Aramark, the New York Giant's concessionaire responsible for alcohol distribution at the stadium.[4] The Giants, on the other hand, settled with the Verni family for only $700,000.[5]

Although these sports organizations garnered large profits from the assailants' alcohol consumption, both families received limited compensation from the organizations.[6] Inadequate compensation was the by-product of indemnification clauses between the sports organizations and their concessionaires.

Many sports organizations contract with independent concessionaires to provide alcohol at their venues.[7] Distributing and consuming alcohol on-site is risky, so sports organizations

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[1] Lee Jenkins, *The Day that Damned the Dodgers*, SPORTS ILLUSTRATED, Aug. 29, 2011, at 50, 53.

[2] *See generally* Plaintiffs' Complaint for Damages, Stow v. L.A. Dodgers, LLC, No. BC462127, 2011 WL 1998679, ¶ 12 (Cal. Super. Ct. May 24, 2011).

[3] Jane Allande-Hession, *N.F.L. Is Sued over a Crash that Left a Child Paralyzed*, N.Y. TIMES, Oct. 11, 2003, at B5.

[4] Verni v. Stevens, 903 A.2d 475, 484 (N.J. Super. Ct. App. Div. 2006).

[5] *Id.* at 502.

[6] *See supra* text accompanying notes 2—5.

[7] *See* Mike Sunnucks, *Driven to Serve*, SPORTS & BUS. J. (May 14, 2018), https://www.sportsbusinessdaily.com/Journal/Issues/2018/05/14/In-Depth/Concessionaires.aspx.

often include indemnification provisions in their contracts with third parties.[8] Indemnification provisions insulate a sports organization from liability if an alcohol-related injury occurs, while simultaneously shifting all fault to the concessionaire asked to serve alcohol.[9] These clauses allow sports organizations to 'contract away' their duty of care to protect fans and third parties from foreseeable harm at sporting events.[10] Therefore, a plaintiff's recovery is limited against a team who made a large profit from the alcohol sales that led to their injury. Sadly, many fans attend games "with their guard down," assuming a team's venue will be reasonably safe.[11] Allowing sports organizations to use indemnification provisions as a shield from liability permits culpable parties to escape responsibility for negligently contributing to an injury. Thus, indemnification provisions are both unjust and unfair for all parties involved.

In response to this issue, some state courts adopted the doctrine of partial indemnity.[12] Partial indemnity allocates damages among multiple tortfeasors based on a party's comparative fault in causing the third-party injury.[13] Courts adhering to this doctrine recognize full indemnity may be appropriate under some circumstances. However, fairness principles urge courts to move away from the all-or-nothing approach of express indemnification clauses, and move towards equitable distribution of damages based on the parties' relative culpability.[14] These principles can be applied to alcohol-related injury claims to appropriately apportion fault among parties.

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[8] *See* John M. Sadler, *Liquor Liability Insurance for Sports/Recreation Organizations*, SADLER SPORTS & RECREATION INS. BLOG (last visited Oct. 12, 2020) https://www.sadlersports.com/blog/liquor-liability-insurance-sports-recreation-organizations/.

[9] *Id.*

[10] *See* Sample v. Eaton, 302 P.2d 431, 434 (Cal. Dist. Ct. App. 1956) (quoting Winn v. Holmes, 299 P.2d 994, 996 (Cal. Dist. Ct. App. 1956)).

[11] Benjamin Trachman, *Going to Bat for the "Baseball Rule": Atlanta National League Baseball Club, Inc. v. F.F. et. al*., 7 HARVARD J. OF SPORTS & ENT. L. 205, 216 (2016).

[12] Michael A. Hummers, *A Criticism of Judicially Adopted Comparative Partial Indemnity as a Means of Circumventing Pro Rata Contribution Statutes*, 47 J. OF AIR L. & COM 117, 118 (1981).

[13] Dole v. Dow Chem. Co., 282 N.E.2d 288, 290 (N.Y. 1972).

[14] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 910 (Cal. 1978).

This Note proposes a statutory solution to remedy the all-or-nothing approach of express indemnification clauses. The Stow and Verni cases demonstrate teams should be held liable when their patrons have suffered serious or deadly injuries at the hands of highly intoxicated sports fans. This Note first analyzes case law and other incidents highlighting when a plaintiff's recovery has been limited against a sports organization because of an indemnification clause with a concessionaire. Second, it provides an overview of the concessions contracting process and indemnity law. Third, it explores the partial indemnity doctrine as an equitable solution to apportioning fault between teams and concessionaires for alcohol-related injuries. Finally, this Note urges state courts to recognize the partial indemnity doctrine and calls upon state legislatures to codify its legal principles. Adopting a partial indemnity statute in the sports organization and concessionaire context will yield consistent judicial decisions, and will adequately serve public policy goals like victim compensation and injury prevention.

I. INEBRIATION, INJURIES, AND INDEMNIFICATION

Consuming alcohol is integral to the live sports atmosphere and professional sports organizations understand alcohol can enhance the fan experience.[15] Seventy-six percent of more than 2,000 senior level professional and collegiate sports executives said concessions are "a critical element of the fan experience."[16] Sports venues and teams regularly consult with independent concessionaires to operate their food and beverage services.[17] Through contract, the independent concessionaire is responsible for overseeing all concession operations at a venue.[18] This responsibility commonly includes alcoholic beverage

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[15] Paul Steinbach, *Sporting Events and Booze a Volatile Mix*, ATHLETIC BUSINESS. (Aug. 2004), https://www.athleticbusiness.com/drugs-alcohol/drinking-games.html.

[16] Sunnucks, *supra* note 7.

[17] Mike Sunnucks, *Concessions snapshots*, SPORTS BUS. J. (May 13, 2013), https://www.sportsbusinessdaily.com/Journal/Issues/2013/05/13/In-Depth/Company-profiles.aspx.

[18] Paul Steinbach, *The Benefits of Outsourcing Concessions*, ATHLETIC BUSINESS (Mar. 2000), https://www.athleticbusiness.com/Marketing/the-benefits-of-outsourcing-concessions.html.

distribution.[19] By allowing concessionaires to sell alcohol at games, sports organizations can increase their sales revenue and improve the fan experience.

While selling and consuming alcohol can be beneficial for both fans and sports organizations, it presents significant liability. Journalist Paul Steinbach notes, "[a]s long as you put a whole bunch of people who are enthusiastic about what they are doing in a big building for four hours and give them the opportunity to consume alcohol, there's a risk that you have to manage—regardless of the sport."[20] According to a Harvard University study analyzing alcohol consumption at sporting events, fans who drink heavily are more likely to experience problems including trouble with the police and risk of injury.[21] Harvard's findings are supported by two decades of third-party injuries resulting from fans being overserved at venues.

A. FAN VS. FAN VIOLENCE LAWSUITS

Brian Stow's near-fatal attack at Dodger Stadium is one of the most prominent sports fan violence incidents. In 2011, Stow attended MLB Opening Day to see the San Francisco Giants take on the rival Los Angeles Dodgers at Dodgers Stadium.[22] Stow attended the game with friends and sat in an outfield section notoriously known for rowdy fans.[23] Other than minor "trash talk," neither Stow nor his friends were involved in altercations inside the ballpark.[24]

After the game, Stow and his friends exited the stadium and walked through the parking lot.[25] Dodgers fans, excited about their 2-1 victory over the Giants, continued to heckle Stow and his entourage.[26] Moments later, the harassment turned into a near-deadly assault as Louie Sanchez, a Dodgers fan, struck Stow from

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[19] *See id.*

[20] Steinbach, *supra* note 15.

[21] *See* Toben F. Nelson, Henry Wechsler, *School Spirits: Alcohol and Collegiate Sports Fans*, 28 ADDICTIVE BEHAVIORS 1, 6 (2003).

[22] Jenkins, *supra* note 1 at 52.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 53.

[26] *Id.*

behind in the side of the head.[27] Witnesses said Stow was unconscious before he hit the ground; his head bounced off the concrete from impact.[28] Stow was repeatedly kicked in the head and torso while on the ground as Marvin Norwood, another Dodgers fan, stood over him exclaiming, "who else wants to fight?"[29] Stow was treated for a fractured skull and internal bleeding.[30] Stow now suffers from permanent brain damage.[31]

Stow's family filed a civil suit against the Dodgers and their owner, Frank McCourt, to recover for Stow's severe injuries and medical costs.[32] The complaint alleged the Dodgers failed to take reasonable action in deterring Stow's aggressive attackers.[33] The complaint further contended the Dodgers "promotion of excessive alcohol consumption" at the stadium and "lack of uniformed security, both inside the stadium and in the parking lot" were among other "unacceptable failures" leading to this incident.[34]

In 2016, while at a Chicago Blackhawk's playoff game against the Anaheim Ducks, John Cooke alleged a fan "consumed large quantities of alcohol…was loud, boisterous and unruly."[35] The fan lost his balance during a goal celebration and fell onto Cooke who was seated in front of him.[36] Cooke suffered personal, life-altering injuries.[37]

Cooke filed a complaint against Levy Restaurants, the concessionaire responsible for distributing food and beverages at the Blackhawks United Center arena.[38] The complaint sought over

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See id.* at 58.

[32] *See generally* Plaintiffs' Complaint for Damages, Stow v. L.A. Dodgers, LLC, No. BC462127 2011 WL 1998679, ¶ 12 (Cal. Super. Ct. May 24, 2011).

[33] *Id.*

[34] *Id.*

[35] Scott A. Andresen, *Imbibing Fan Becomes Pain in the Neck at Blackhawks Game*, SPORTSLITIGATIONALERT.COM (Apr. 29, 2016) http://www.sportslitigationalert.com/archive/002757.php; Complaint, Cooke v. Chicago Blackhawks, No. 2016-L-003550, 2016, ¶11 (Ill. Cir. Ct. Apr. 7, 2016).

[36] Andresen, *supra* note 35; Complaint, *supra* note 35, ¶ 16.

[37] Complaint, *supra* note 35, ¶ 16.

[38] *Id.*

$100,000 from Levy Restaurants for overserving the allegedly intoxicated fan.[39] The complaint also noted security officers ignored grievances about the fan, and the Blackhawks knew, or should have known, the fan was impaired and a posed a danger to spectators seated below him.[40] Levy Restaurants' primary responsibility for Cooke's injuries was likely because of an indemnification clause within the concessions agreement between the Blackhawks and the United Center.

1. *UNRECORDED FAN VS. FAN VIOLENCE INCIDENTS*

Fan violence persists well beyond incidents recorded in court. More often, the mass media captures and recounts alcohol-fueled incidents. On June 4, 1974, the Indians offered beers to fans in attendance for only ten cents each.[41] Over 25,000 fans flocked to Cleveland Municipal Park to witness this game against the Texas Rangers, and more importantly partake in the beverage promotion.[42] During the game, misbehaving fans ran naked onto the field, threw hotdogs at Rangers players, and yelled obscenities from the upper-deck.[43] The situation worsened in the ninth inning when an intoxicated fan tried to grab a Rangers player's hat, resulting in a stadium-clearing riot.[44] Fans poured onto the field from the stands, pelting players and other spectators with cups, rocks, and folding chairs.[45] Radio commentators noted the lack of police protection during the incident.[46] The game eventually ended in a forfeit in the Rangers' favor.[47] Nine individuals were arrested because of the intoxicated frenzy with "no question that

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[39] *Id.*

[40] Complaint, *supra* note 35 at ¶ 17.

[41] *Cleveland Indians' Ten Cent Beer Night: The Worst Idea Ever*, BLEACHERREPORT.COM (Mar. 21, 2009), https://bleacherreport.com/articles/142952-ten-cent-beer-night-the-worst-idea-ever.

[42] Joe Noga, *Fans Riot on 10-cent Beer Night: On this Day in Cleveland Indians History*, CLEVELAND.COM (June 4, 2020), https://www.cleveland.com/tribe/2020/06/fans-riot-on-10-cent-beer-night-on-this-day-in-cleveland-indians-history.html.

[43] *Id.*; *Cleveland Indians' Ten Cent Beer Night: The Worst Idea Ever*, *supra* note 41.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

beer played a part in the riot."[48] The incident is one of the worst decisions ever made by stadium management.[49]

In 1990, the Los Angeles Times reported Paul Albrecht's assault at the Los Angeles Coliseum.[50] Albrecht wore a Steelers t-shirt and was hit by ice and other items as he walked through boisterous Raiders fans to get to his seat.[51] Moments later, Albrecht was beaten and kicked in the head by a Raiders fan.[52] Albrecht was knocked unconscious, and the assailant was arrested and booked on suspicion of assault with a deadly weapon with great bodily injury.[53] Most notably, the official police report mentioned Albrecht's assailant was "very HBD—police shorthand for had been drinking."[54] Bystanders said Albrecht did not react to the fans harassment; he was just wearing a Steelers t-shirt.[55] Albrecht regained consciousness after he was transported to the University of Southern California Medical Center Intensive Care Unit, but remained in critical condition.[56] Steelers spokesman Don Edwards said, "occasionally there are scuffles in the stands…but something like this, the way it was described…that's a scary sight to see."[57]

B. FAN VS. THIRD PARTY VIOLENCE LAWSUITS

An intoxicated fan presents dangers to both fans within and beyond the stadium limits. For example, on October 24, 1999, Daniel Lanzaro attended a New York Giants football game with his friend, Michael Holder, at Giants Stadium.[58] Lanzaro and

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[48] *Id*.

[49] Geremy Graham, *The Top 20 Drunken Fan Incidents Ever (With Video),* BLEACHERREPORT.COM (Aug. 9, 2010), https://bleacherreport.com/articles/432367-the-top-20-drunken-fan-incidents-ever-with-video.

[50] Patt Morrison, *Steeler Fan Beaten at Coliseum Shows Some Improvement*, L.A. TIMES (Sept. 25, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-09-25-me-1247-story.html.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] Verni *ex rel.* Burstein v. Harry M. Stevens, Inc., 903 A.2d 475, 484 (N.J. Super. Ct. App. Div. 2006).

Holder tailgated before entering the game.[59] Lanzaro claimed he was drunk before the first quarter ended.[60] Yet the men continued to buy more beer from the concessionaires inside the stadium despite being highly intoxicated.[61] Lanzaro testified he "tipped the server an extra ten dollars to bypass the stadium's two-beer limit."[62] The two men left the game during the third quarter and proceeded to drive to two more local bars.[63]

At approximately 5:47 P.M., Lanzaro swerved across lanes and collided with a car driven by Robert Verni.[64] Verni's wife, Fazila, and two-year-old daughter, Antonia, were both in the back seat of the car.[65] Fazila was found "wedged behind the driver" while Antonia laid unconscious.[66] Lanzaro had a 0.266 blood-alcohol content, which nearly tripled the legal limit.[67]

Fazila and Antonia Verni sued, seeking compensatory and punitive damages against Lanzaro, the Giants, Aramark, and other named defendants.[68] Aramark was the concessionaire who distributed alcohol at Giants Stadium.[69] After a lengthy trial, the court concluded Lanzaro had been served beer while visibly intoxicated at Giants Stadium.[70] The jury found "Lanzaro and the Aramark defendants were equally responsible for the injuries caused by the collision."[71] The court entered a $110 million judgment against Aramark.[72] The Giants settled with the Verni family for only $700,000.[73] Aramark appealed the verdict and later settled with the Verni family for $25 million.[74] Though

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[59] *Id.*
[60] *Id.* at 485.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 486.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 484.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 503.
[74] Henry Gottlieb, *Stadium Beer Vendor Liability Suit Settled for $25 Million*, LAW.COM, (Dec. 5, 2008, 12:00 AM),

Aramark shouldered the legal liability for the tragic injuries, the trial court noted both the National Football League (NFL) and the Giants "had a duty to the Verni's to exercise reasonable care in regulating alcoholic beverages and consumption at Giants Stadium."[75]

The *Verni* case illustrates the "culture of intoxication" at live sporting events and its grave effects.[76] Both Aramark and the Giants breached their duty of care owed to the Verni family, yet the Giants were only responsible for 2.8% of Aramark's total damages.[77] This near-complete shift in liability among these joint tortfeasors is largely because of indemnification. This outcome undermines the notion that liability is borne in direct proportion to a party's fault.[78]

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https://www.law.com/almID/1202426492772/?slreturn=20191010163540.

[75] Richard M. Southall & Linda A. Sharp, T*he National Football League and Its 'Culture of Intoxication:' A Negligent Marketing Analysis of Verni v. Lanzaro*, 16 J. LEGAL ASPECTS SPORT 121, 124 (2006).

[76] Dave Anderson, *'Culture of Intoxication' and a Victim*, N.Y. TIMES (Mar. 23, 2007), https://www.nytimes.com/2007/03/23/sports/football/23anderson.html.

[77] The Giants 2.8% damage liability was calculated by dividing the Giant's settlement amount with the Verni family ($700,000) by Aramark's settlement amount with the Verni family ($25,000,000).

[78] Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

II. CONTRACTING WITH CONCESSIONAIRES, AND THE INDEMNIFICATION PROVISIONS THEREIN

A. CONCESSIONS GENERALLY

Professional sports organizations, like the Giants in *Verni*, commonly contract with independent concessionaire companies to handle food and beverage distribution at their venues.[79] In 2013, 123 United States professional teams had independent concessionaires operating their general and premium food and beverage services.[80] This number has increased because demand for higher-quality concessions at sports venues has heightened.[81]

Sports organizations benefit from employing concessionaires because they often lack the personnel needed to operate food and beverage services.[82] Allowing an independent concessionaire to assume this responsibility saves team executives from dealing with multiple vendors and restaurant brands.[83] Instead, concessionaires are tasked with procuring and training concessions staff, establishing food and beverage menus, securing food and beverage licenses, distributing concessions during live events, and cleaning up after an event.[84]

Aramark, Delaware North Sportservice, and Levy Restaurants are among the largest concessionaire companies in the world.[85] Aramark oversees food and beverage concessions for twelve MLB stadiums, including Fenway Park.[86] Delaware North

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[79] Sunnucks, *supra* note 17.

[80] *Id.*

[81] Pat Evans, *Executives Outline Predictions for Arena and Stadium Concessions in 2019*, FRONT OFFICE SPORTS (Jan. 4, 2019), https://frntofficesport.com/2019-concessions-predictions/.

[82] Lisa White, *Stadium Foodservice Sports the Latest Trends*, FOODSERVICE, https://fesmag.com/departments/segment-spotlight/14174-sporting-the-latest-trends (last visited Nov. 11, 2019).

[83] *Id.*

[84] *See e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, MINNESOTA SPORTS FACILITIES AUTHORITY (March 25, 2013), https://www.msfa.com/df-data/files/CONCESSIONS%20SERVICES/CONCESSIONS%20AGREEMENT.pdf.

[85] Sunnucks, *supra* note 7.

[86] Sam Oches, *Foodservice at the Bat*, QSR (May 2011), https://www.qsrmagazine.com/menu-innovations/foodservice-bat.

Sportservice manages concessions domestically and internationally at venues such as Lambeau Field, Busch Stadium, and Emirates Stadium.[87] Levy Restaurants is the largest food service concessionaire in the United States, serving Dodgers Stadium, Wrigley Field, and Gillette Stadium.[88] Together, these companies handle concessions for most popular United States sports venues.

B. CONCESSIONS CONTRACTS GENERALLY

Concessionaires typically use standard long-form contracts when forming agreements with sports organizations.[89] These contracts generally define the agreement's duration (the "Term"), each party's exclusive or nonexclusive rights and responsibilities, and the fees associated with expected performance (the "Fees").[90]

While terms in these agreements may vary, the standard rights and responsibilities allocated among the parties generally remain the same. According to the Minnesota Vikings concession agreement, the Licensor (team) grants the Contractor (concessionaire) the "sole and exclusive right to render" concession services at the stadium.[91] Such services include, but are not limited to: providing all employees for service distribution; training all employees to perform services; procuring all permits, licenses, and operating authorizations to provide food and beverage services; and providing general maintenance and janitorial services in concession areas.[92] The Vikings' agreement states, "Contractor (concessionaire) shall be permitted and required to serve and sell alcohol beverages at the Events which will take place at the Stadium and on the Plaza (including

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[87] *Venues*, DELAWARE NORTH, https://www.delawarenorth.com/venues (last visited Nov. 16, 2019).

[88] Robert Channick, *From a Chicago Deli to a Super Bowl: How Two Brothers Built a Food Industry Powerhouse*, CHICAGO TRIBUNE (Jan. 31, 2019, 3:25 P.M.), https://www.chicagotribune.com/business/ct-biz-super-bowl-food-provider-levy-chicago-20190129-story.html.

[89] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[90] *See id.*

[91] *Id.* at 11.

[92] *Id.*

specifically, Home Games)." [93] With this permission, the concessionaire must properly train employees in accordance with alcohol-serving policies, and must procure and maintain all applicable liquor licenses.[94] These responsibilities are limited, as the Licensor (team) retains final approval over all alcohol-related policies.[95] The contract states: "the sale or other distribution of other intoxicating or alcohol beverages by Contractor (concessionaire) at the Stadium…will be subject to Licensor's (team) reasonable discretion."[96]

Although the concessionaire has permission to sell and distribute alcohol, the sports organization retains authority to oversee the process.[97] Reserving this power is significant given sports organizations often attempt to abandon their oversight authority via indemnification clauses with concessionaires when alcohol-related injuries arise.[98]

C. INDEMNIFICATION CLAUSES IN CONCESSIONAIRE CONTRACTS

Indemnification clauses appear in many standard, long-form contracts. Indemnification provisions serve to shift potential liability costs among parties in designated situations.[99] Teams grant concessionaires expansive responsibility in food and beverage distribution.[100] To insulate themselves from liability, teams include indemnification clauses in their agreements with concessionaires. [101] For example, the Minnesota Vikings indemnification clause states:

> Contractor shall indemnify and hold harmless (i) Licensor, the Team…*from any and all* Claims or Damages arising from, related to or in connection

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[93] *Id.* at 25.
[94] *Id.*
[95] *Id.* at 26.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 41—42.
[99] 41 AM. JUR. 2D *Indemnity* § 1 (2019).
[100] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.
[101] *Id.* at 41—42.

> with (A) Contractor's Services…including any Damages to real property, personal property, or *personal injury to any third Person* or Licensor (including its agents and employees) resulting from the intentional misconduct *or negligent acts or omissions* of Contractor or its agents or employees.[102]

This broad contractual language leaves the concessionaire solely responsible for damages resulting from all food or beverage-related incidents, which is alarming because of the Licensor's (team) final authority with "regard to contractual management of the services to be provided by Contractor (concessionaire)," and the Licensor's ultimate control and "management of the Stadium Site."[103] In short, the team is insulating itself from liability arising from a situation within its control.

D. LEGAL OVERVIEW OF INDEMNIFICATION CLAUSES

In general, indemnity refers to the obligation resting on one party to compensate a second party for damage the second party incurs to a third party.[104] Indemnity is a form of restitution and encompasses any duty to pay for another's damage; it is more than reimbursing a third party's claim.[105] The Third Restatement of Torts defines indemnification as follows:

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:

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[102] *Id.*

[103] *Id.* at 20.

[104] 41 AM. JUR. 2D *Indemnity* § 1 (2019).

[105] Dream Theater, Inc. v. Dream Theater, 21 Cal. Rptr. 3d 322, 329 (Ct. App. 2004).

> (1) the indemnitor has agreed by contract to indemnify the indemnitee.[106]

A party's right to indemnify can rest on three bases: an express contract, an implied contract, or equitable concepts arising from the indemnity tort theory.[107] Express indemnity refers to an obligation established by contract.[108] For example, one party may agree to release another if a specified third party injury occurs. Express indemnity provisions are subject to general contract principles, so the indemnity relationship is determined by the parties' intent and language used in contract formation.[109] Express indemnity agreements are generally enforced in accordance with the contracting parties' intent.[110] Therefore, express indemnity contracts avoid equitable considerations or a joint legal obligation among liable parties.[111] The indemnification provisions between sports organizations and concessionaires in this Note concern express contractual agreements.

Express indemnity clauses are generally valid and enforceable.[112] Such agreements will be enforced between parties according to the language of the indemnification clause as it appears in the contract.[113] An indemnity clause is unenforceable when the agreement's terms are inexplicit, or the provision's nature runs counter to public policy.[114] Indemnification provisions between sports organizations and concessionaires have generally been enforced in accordance with these principles despite attributable fault to both parties for the alcohol-related injury.

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[106] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 (AM. LAW INST. 2000).

[107] 41 AM. JUR. 2D *Indemnity* § 2 (2019).

[108] Prince v. Pacific Gas & Elec., Co., 90 Cal. Rptr. 3d 732, 737 (2009).

[109] 41 AM. JUR. 2D *Indemnity* § 7 (2019).

[110] *Prince*, 90 Cal. Rptr. 3d at 737.

[111] *Id.*

[112] *See* Pitt v. Tyree Org., 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002).

[113] *Id.*

[114] 41 AM. JUR. 2D *Indemnity* § 11 (2019).

III. PARTIAL INDEMNIFICATION: THE MODERN MERGER OF INDEMNIFICATION AND CONTRIBUTION

Historically, express contractual indemnity was not subject to equitable considerations.[115] Courts were reluctant to apportion fault based on a party's role in creating an injury.[116] Instead, judges relied on the express language of an indemnification clause as evidence of the parties' intent at drafting to shift full liability among parties.[117] Express indemnification's all-or-nothing approach became difficult to apply as the legal principle of contribution began to develop.

Contribution means sharing an injury's cost.[118] Contribution "contemplates the distribution of loss among joint tortfeasors based on relative fault, whereas indemnity shifts the entire loss to the joint tortfeasor" who was primarily at fault.[119] Indemnification developed when contribution was unavailable.[120] Thus, courts analyzed contribution and indemnification "in terms of two, ostensibly mutually exclusive doctrines."[121]

Over time, courts recognized indemnity's all-or-nothing approach was in tension with contribution.[122] Indemnification was a rigid and often inequitable remedy when two parties jointly contributed to a plaintiff's injury. Situations arose where the "indemnitee was definitely at fault but not to as great an extent as the indemnitor—so that a decision between all and nothing would be made for all rather than nothing."[123] Courts were concerned the

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[115] *Prince*, 90 Cal. Rptr. 3d at 737.

[116] *See id.*

[117] *Id.*

[118] Downey v. W. Cmty. Coll. Area, 808 N.W.2d 839, 854 (Neb. 2012).

[119] Schulson v. D'Ancona and Pflaum LLC, 821 N.E.2d 643, 647 (Ill. App. Ct. 2004).

[120] RESTATEMENT (SECOND) OF TORTS § 886B(1) (AM. LAW INST. 1979).

[121] Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

[122] RESTATEMENT (SECOND) OF TORTS § 886B(1) (AM. LAW INST. 1979).

[123] *Id.*; *Downey*, 808 N.W.2d at 854.

dichotomy of indemnification and contribution was "more formalistic than substantive."[124]

As a remedy, courts began to move away from the all-or-nothing approach of indemnification, and began apportioning financial responsibilities between the parties based on comparative fault.[125] Courts recognized distributing loss among multiple tortfeasors was the common goal of both indemnification and contribution, and therefore suggested reexamining the concepts' relationship.[126] As the influential Judge Learned Hand noted, "indemnity is only an extreme form of contribution."[127] Thus, progressive states like New York and California merged indemnification and contribution principles to create the doctrine of "partial indemnification," respectively.[128]

Partial indemnification is rooted in the comparative negligence doctrine.[129] Comparative negligence is a common-law tort principle that serves to allocate damages based on a party's contribution to harm.[130] Fault is measured as a percentage.[131] Thus, damages awarded to a plaintiff shall be allocated based on the percentage of negligence attributable to a party.[132]

Like comparative negligence, partial indemnification apportions responsibility among joint tortfeasors depending on each party's relative contribution to the injury.[133] Partial indemnification applies these equitable principles even when an express indemnification agreement exists among tortfeasors.[134] States reasoned "indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and

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[124] *Am. Motorcycle Ass'n*, 578 P.2d at 907.

[125] *Id.* at 910.

[126] *Id.* at 907.

[127] Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951).

[128] RESTATEMENT (SECOND) OF TORTS § 886B(1) & cmt. m (AM. LAW INST. 1979).

[129] *See id.* at cmt. m.

[130] Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975).

[131] *See e.g.*, Owens v. Truckstops of Am., 915 S.W.2d 420, 425 (Tenn. 1996).

[132] RESTATEMENT (SECOND) OF TORTS § 886B(l) & cmt. m (AM. LAW INST. 1979).

[133] *Id.*

[134] *See* Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

fair that the indemnitor should bear the total responsibility."[135] But where both parties are culpable in creating an injury, and one party is slightly more culpable, fault should be divided proportionately between the parties.[136] Thus, in these states, indemnity is absorbing principles of contribution.

A. NEW YORK

New York was the first state to develop and apply partial indemnification. *Dole v. Dow Chemical Co.* modified New York's traditional indemnity doctrine to permit a tortfeasor to obtain partial indemnification from another tortfeasor on a comparative fault basis.[137]

Dow Chemical Co. ("Dow") was a chemical manufacturer which produced a "penetrating and poisonous fumigant used for control of storage insects and mites."[138] Urban Milling Company ("Urban Milling") purchased the chemical from Dow and used the poison to fumigate a grain storage bin.[139] Shortly after, Urban Milling directed its employee to clean the grain bin.[140] While cleaning, the employee was exposed to the poison and died from inhalation.[141]

The deceased employee's administratrix brought a claim against Dow.[142] The claim asserted Dow was negligent in labeling its chemicals, and failing to warn and instruct users about the chemical's dangerous nature.[143] Dow filed a third party claim against Urban Milling, both denying its own negligence and asserting Urban Milling was negligent for taking improper precautions when fumigating the storage bins.[144] Dow sought full indemnification from Urban Milling.[145] The court reasoned:

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[135] RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (AM. LAW INST. 1979).

[136] *Id.*

[137] Dole v. Dow Chem. Co., 282 N.E.2d 288, 290—91 (N.Y. 1972).

[138] *Id.* at 290.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

> There are situations when the facts would in fairness warrant what Dow here seeks—passing on to Urban all responsibility that may be imposed on Dow for negligence, a traditional full indemnification. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification.[146]

The court concluded the deciding factor in adjudicating indemnification suits should be "fairness as between the parties." [147] Creating a complementary indemnification and contribution scheme was "necessary to handle the growing problems created by multiple tort liability." [148] Furthermore, merging the two legal principles would closely align with deterrence goals: equitable loss sharing by all wrongdoers and rapid compensation for the plaintiff.[149]

The *Dole* decision created the partial indemnification doctrine in New York and provided a framework for courts to use in resolving indemnification disputes in the future. *Dole* instructed juries to consider a third party defendant's negligence in causing an injury. [150] If that party has negligently contributed to an injury in any way, then the third party defendant shall bear damages in proportion to their fault.[151] If no negligence is found, then full indemnity is an appropriate remedy.[152]

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[146] *Id.* at 291.
[147] *Id.* at 294.
[148] *Id.* at 293.
[149] *Id.*
[150] *Id.* at 295.
[151] *Id*.
[152] *Id*.

1. *NEW YORK GENERAL LIABILITY STATUTE § 15-108*

The partial indemnification doctrine created the predicate for passage of New York General Liability Statute § 15-108.[153] In 2007, New York codified the judicial doctrine:

> When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death … but it reduces the claim of the releasor against the other tortfeasors … in the amount of the released tortfeasor's equitable share of the damages…[154]

The statute's primary goals are to preserve *Dole*'s equitable fault sharing principles and encourage settlements that would have otherwise been inhibited by a traditional indemnification scheme.[155] The statute assures "…a wrongdoer is responsible for no more than his equitable share of damages, but also that once a defendant settles he purchases an everlasting peace."[156]

B. CALIFORNIA

The emergence of New York's partial indemnification doctrine prompted California to reexamine its indemnity regime. In 1978, *American Motorcycle Assn. v. Superior Court* illuminated the deficiencies of the state's traditional all-or-nothing indemnification approach, and spurred reform.[157]

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[153] *In re* E. & S. Dist. Asbestos Litig., 772 F.Supp. 1380, 1392 (E.D.N.Y & S.D.N.Y 1991).

[154] N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 2019).

[155] *In re E. & S. Dist. Asbestos Litig.,* 772 F.Supp. at 1393.

[156] *Id.*

[157] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

American Motorcycle Association ("AMA") organized and sponsored a cross-country novice motorcycle race.[158] Glen Gregos was a teenage participant.[159] During the race, Gregos was involved in a severe crash and became paralyzed.[160] Gregos filed suit against AMA claiming negligence in designing, supervising, managing, and administering the race.[161] AMA responded by filing a cross-complaint against Gregos' parents.[162] AMA asserted Gregos' parents negligently failed to exercise their supervision power by allowing their minor son to participate in the race.[163] AMA sought indemnity from Gregos' parents if found liable.[164]

California, following New York, determined its current indemnification scheme was inadequate.[165] The court reasoned traditional indemnification principles "precluded courts from reaching a just solution in a majority of cases in which equity and fairness calls for an apportionment of loss between the wrongdoers in proportion to their relative culpability, rather than imposing the entire loss upon one or the other tortfeasor."[166] As a policy matter, "there is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were unintentionally responsible, to be shouldered onto one alone…while the latter goes scot-free."[167]

The court adopted 'comparative indemnity,' mirroring New York's partial indemnity principles.[168] Comparative indemnity permitted concurrent tortfeasors to obtain partial indemnity from cotortfeasors on a comparative fault basis.[169] The court remanded *American Motorcycle Association* to the lower courts to determine the outcome in accordance with the state's new comparative indemnity doctrine.[170]

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[158] *Id.* at 902.
[159] *Id.*
[160] *Id.* at 902—03.
[161] *Id.* at 902.
[162] *Id.* at 903.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 914.
[166] *Id.* at 910.
[167] *Id.* at 918.
[168] *Id.* at 917.
[169] *Id.*
[170] *Id.*

C. OTHER APPROACHES

New York and California paved the way for other states to adopt doctrines similar to partial and comparative indemnity. Minnesota followed suit in 1977 with *Tolbert v. Gerber Industries, Inc.*[171] In *Tolbert*, a workman installed allegedly defective equipment, and the employer was named a third-party defendant.[172] The trial court awarded the employer 100% indemnity from the manufacturer of the defective part.[173] The manufacturer appealed to the Minnesota Supreme Court.[174] After reviewing the facts, the supreme court determined "in a situation where joint tortfeasors are each culpably negligent, the rule of 100% indemnity…is no longer to be followed but, rather, loss is to be reallocated under principles of contribution based on relative fault."[175] The court found both defendants liable to the plaintiff and ordered damages awarded in proportion to each party's contribution to injury.[176] The court concluded, "the more culpable tortfeasor will continue to bear a greater share of the loss, but at the same time his joint tortfeasor will not continue to escape all liability as in the past."[177]

Missouri adopted the same rationale in its leading case, *Missouri Pacific Railroad v. Whitehead & Kales Co*.[178] The court held despite indemnification, liability should be apportioned based on comparative fault.[179]

New York, California, Minnesota, and Missouri exemplify state courts' willingness to look beyond the application of traditional indemnification law. These courts recognize "the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case."[180] Indemnification issues may arise in any context and these cases

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[171] Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 364 (Minn. 1977).

[172] *Id.*

[173] *Id*.

[174] *Id.*

[175] *Id.* at 362.

[176] *Id.* at 367—68.

[177] *Id.* at 367.

[178] Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978).

[179] *Id.* at 474.

[180] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 909–10 (Cal. 1978).

illustrate that partial indemnification principles can be applied universally. Courts no longer have to grapple "to find some linguistic formulation…for determining when the relative culpability of the parties is sufficiently disparate to warrant placing the entire loss on one party and completely absolving the other."[181] Instead, courts can weave contribution concepts into indemnification, and apportion fault on an equitable basis.

Partial indemnification principles can govern alcohol-related injury disputes in the sports organization and concessionaire context. Sports organizations and concessionaires both play large roles in hosting a sporting event. When alcohol-related injuries occur, both parties likely contributed to the injury. The concessionaire is likely liable for overserving the patron who injured the other fan or third party. While on the other hand, the sports organization is arguably liable for failing to mitigate the risk the intoxicated patron presented to others at the event. If traditional indemnification law governed, a sports organization could successfully contract away their liability through an indemnification clause when they may actually be at fault. This one-sided outcome exculpates potentially culpable sports organizations who may ultimately make a large profit from hosting the game itself. Forcing courts to apply bright-line, all-or-nothing indemnification principles to decide these disputes runs counter to public policy. Instead, courts should apply partial indemnification principles to appropriately apportion fault between concessionaires and sports organizations when alcohol-related incidents arise.

IV. PROPOSED SOLUTIONS

Partial indemnity principles can be directly applied to indemnification disputes involving sports organizations and concessionaires. When an injury occurs because of excessive alcohol consumption, both the sports organization and concessionaire can be held liable as joint tortfeasors.[182] This section explores the duty and potential liability sports organizations owe to injured third parties, and proposes a statutory solution courts can utilize in adjudicating these issues.

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[181] *Id.* at 909.

[182] *See* Verni *ex rel.* Burstein v. Harry M. Stevens, Inc., 903 A.2d 475, 503 (N.J. Super. Ct. App. Div. 2006).

A. SOLUTIONS GENERALLY

1. *SPORTS ORGANIZATIONS' AND CONCESSIONAIRES' DUTY OF CARE*

Sports organizations are liable when inebriated fans cause injury to others at the team's venue. "[S]tadium owners have been found to owe a duty of care to the common fan to protect him or her from foreseeable harm that can occur in the stadium, including the acts of third parties."[183] Sports organizations know fans who enter their venue have the opportunity to purchase and consume alcoholic beverages.[184] Therefore, teams could reasonably foresee fans becoming too intoxicated while at the game. As a result, sports organizations have a duty to mitigate the risks an intoxicated fan poses to others.

Sports organizations breach their duty of care owed to fans and third parties when they fail to address the foreseeable risks intoxicated fans pose. Patrons buy tickets to a live sporting event with the expectation general safety measures will be in place.[185] This duty to provide general safety is breached when teams fail to prevent an intoxicated person, overserved on their own premises, from harming others. Additionally, the sports organization, as the licensor of the concession services supplying the alcoholic beverages, has sole discretion to oversee selling and distributing alcohol at its venue.[186] This general oversight is outlined in most concessionaire contracts.[187] Failing to properly manage concessionaires may constitute a further breach of duty.

As evidenced in the Stow, Cooke and Verni cases, various sports organizations authorized alcohol sales to the defendant who

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[183] Steven J. Swenson, *Unsportsmanlike Conduct: The Duty Placed on Stadium Owners to Protect Against Fan Violence*, 23 MARQ. SPORTS L. REV. 135, 142—43 (2012); *see id.* at 484.

[184] *See* Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196, 1198 (Ind. Ct. App. 1983); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (AM. LAW INST. 1965).

[185] *See Bearman*, 453 N.E.2d at 1198; RESTATEMENT (SECOND) OF TORTS § 344 cmt. f.

[186] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[187] *Id.*

injured these parties.[188] Though the concessionaire supplied the defendant with alcohol, the sports organization failed to mitigate the risks drunk fans presented to others. The sports organizations could have taken precautions by removing the intoxicated fan from the venue or refusing to serve the fan altogether. Additional safety measures would have likely decreased the chances of a drunk fan injuring others. Failing to implement such precautionary measures is a breach of duty because both the concessionaire and the sports organization had the "ability to reach the customer (fan) before an accident occurred."[189]

Once a breach of duty is found, sports organizations and concessionaires should be considered joint tortfeasors. The partial indemnification doctrine can be applied to resolve disputes involving these parties. Thus, an injured plaintiff could recover equitably from both the sports organization and the concessionaire for their injuries, despite an express indemnification provision prompting a contrary outcome. This result closely aligns with the favored judicial objectives of deterrence and accident prevention.[190] One court noted, "[t]o shift the entire loss to [concessionaires] would not serve these [judicial] objectives, for then the [sports organization] would escape scot-free."[191] Partial indemnification warrants against such an unjust outcome.

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[188] *Verni*, 903 A.2d at 175; Complaint, *supra* note 2; Complaint, *supra* note 35.

[189] Ford Motor Co. v. Robert J. Poeschl, Inc., 98 Cal. Rptr. 702, 705 (Ct. App. 1971) (holding Ford and the subsequent car dealer had an ability to reach the customer regarding vehicle recalls before an accident occurred, and because of such ability, fault should be apportioned comparatively among both negligent parties).

[190] *Id.*

[191] *Id.*

2. *APPLICATION OF THE PARTIAL INDEMNIFICATION DOCTRINE TO THE SPORTS CONTEXT*

Courts should apply the partial indemnification doctrine when both a sports organization and a concessionaire have breached their duty of general care to a fan or third party. Concessionaires can breach their duty of care when they overserve an intoxicated fan.[192] Sports organizations can also breach their duty of care when they fail to provide adequate security or oversight at the premises to prevent intoxicated fans from injuring others.

Once a breach is found, courts should apply partial indemnification principles to settle the dispute. As evidenced by *Dole*, situations exist where full indemnification may be appropriate, but more often fairness principles dictate otherwise.[193] If a court determines the sports organization upheld their duty of care, then adherence to the language of the express indemnification clause, effectively releasing the sports organization from full liability, would be reasonable. On the other hand, if the court determines the sports organization contributed to the third party's alcohol-related injury, fairness principles would warrant a different outcome under partial indemnification principles. Partial indemnification should be applied only after finding joint liability between the sports organization and concessionaire.[194] The sports organization and concessionaire's fault will be apportioned based on each party's attributed percentage of fault in causing the plaintiff's injury.

Partial indemnification is the most fair and just outcome in this context. This doctrine allows courts to fully adhere to express indemnification language, honoring the contracting parties' original intent, or allows courts to issue an alternative equitable remedy. In situations where full indemnification is unwarranted, unjust enrichment policy concerns stress applying partial indemnification in this context. Unjust enrichment dictates "each obligor should bear his part of the burden; and if one discharges the burden of another, without being reimbursed, the other has gained a financial advantage to which he is not equitably entitled."[195]

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[192] *Verni*, 903 A.2d at 491.

[193] Dole v. Dow Chem. Co., 282 N.E.2d 288, 290 (N.Y. 1972).

[194] *Id.* at 295.

[195] Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 UNIV. PENN L. REV. 130, 136 (1932).

Unjust enrichment occurs because the sports organization makes large profits from both fan attendance and alcohol sales. Essentially, a sports organization profits while escaping financial responsibility for breaching their duty of care. This creates a disincentive for sports organizations to increase security efforts to protect fans and third parties if they can simply contract away full liability for alcohol-related injuries. Reinforcing safety at live sporting events is accomplished by applying partial indemnification in this context. According to relevant case law and public policy concerning just compensation and accident prevention, partial indemnification is the appropriate remedy for adjudicating alcohol-fueled disputes involving indemnification clauses.

B. THE STATUTORY SOLUTION

Though *Dole*'s partial indemnification principles have been codified by statute, such widespread statutory practice is limited.[196] Thus, state legislatures should adopt statutes to ensure the uniform enforcement of partial indemnification principles in the sports and concessionaire context.

Partial indemnification principles are legislative in nature.[197] Justice Clark noted, "such a new public policy [of partial indemnification, or comparative indemnification in California] departing from intelligent notions of fairness may be warranted, but, if so, its establishment should be left for the Legislature."[198] The Legislature is best positioned to transition from an all-or-nothing indemnification approach to a codified partial indemnification regime.[199] A legislative act is both quicker to implement and more easily amended than altering common law principles and precedent.[200] Thus, state legislatures should adopt statutes encompassing partial indemnification, and should use these laws to resolve indemnification issues between

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[196] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 911 (Cal. 1978).

[197] *Id.* at 913.

[198] *Am. Motorcycle Ass'n*, 578 P.2d at 921 (Clark, J., dissenting).

[199] *See id.* at 924 (J. Clark, dissenting, argues the legislature is in the best position to effectuate the transition from "contributory to comparative or some other doctrine of negligence.").

[200] *See id.* at 915 (majority opinion).

concessionaires and sports organizations when alcohol-related injuries arise.

Considering the preference for legislative action, state legislatures can use the following statutory language as a model to draft their own statutes governing partial indemnification principles. The following proposal urges each state to adopt 'equitable indemnity.' Equitable indemnity mirrors partial indemnification in New York and comparative indemnification in California. This proposed law requires courts to analyze express indemnity clauses within contracts in accordance with uniform equitable principles.[201] States are also encouraged to adopt a special provision, as enumerated in subsection (1), to govern indemnification disputes between sports organizations and concessionaires if an alcohol-related third-party injury occurs. The statute proposes:

> **§ 1. Equitable Indemnity Among Joint Tortfeasors**[202]
>
> (a) *Effect of equitable indemnity among joint tortfeasors*. When two or more parties to a contract expressly agree to full indemnification upon the occurrence of an injury to a third party, full indemnification may be set aside, and instead, distribution of the fault between the joint tortfeasing parties may be distributed based on each party's equitable share of the damages.
>
> *(1) Sports Organizations.* Where a sports organization enters into an express indemnification agreement with a concessionaire, or other service provider, liability for injury of a subsequent third party will be adjudged according to each party's respective breach of general duty owed to that third party and the principles enumerated in section (a).

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[201] Prince v. Pac. Gas & Elec. Co., 90 Cal Rptr. 3d 732, 737 (2009).

[202] The following statutory language has not been adopted by any states, but instead serves as a model for state legislatures to draft future laws in accordance with the foregoing principles. As mentioned, the doctrine of 'equitable indemnity' is merely identical to New York's 'partial indemnification' and California's 'comparative indemnification,' but has been given a different name so as not to be confused with those state statutes.

(b) *Release of Liability*. In the event that full indemnification is warranted, and a party to an express indemnification agreement is found not to have contributed to a third party's injury, release of all liability for the innocent party is granted.

If adopted, courts can use these statutes to adjudicate indemnification disputes between sports organizations, concessionaires, and third parties in alcohol-fueled violence scenarios. Though the proposed statutory language in (a)(1) is limited to disputes involving sports organizations and concessionaires, the language in section (a) can be universally applied where two parties have contributed to a single injury. Therefore, if a state lacks a professional sports team, such as North Dakota, Hawaii, and South Carolina, it can still adopt the equitable indemnity doctrine and apply it to other incidents. Furthermore, this proposed legislation is functional in the collegiate athletics context. Many large athletic departments employ concessionaires to facilitate food and beverage services at their stadiums on gameday. [203] Thus, equitable indemnification principles could serve to settle potential disputes at collegiate venues. Equitable indemnification legislation provides reasonable solutions for stakeholders in the professional sports context and beyond. Legislative action codifying "equitable indemnity among joint tortfeasors" would be an effective way to ensure victims are compensated and responsible parties are liable, despite the presence of express contractual indemnity provisions.

C. PUBLIC POLICY CONSIDERATIONS

The proposed legislation aligns with well-recognized public policy considerations governing indemnification clause enforceability. Several states have recognized the potential negative effects indemnification clauses may have in protecting

[203] Sunnucks, *supra* note 17.

the public.[204] Thus, state legislatures have enacted statutes selectively precluding indemnity for a party's own negligence.[205]

As a public policy matter, nearly one-half of states recognize indemnification provisions in construction contracts as void.[206] These provisions most commonly appear in contracts between general contractors and subcontractors.[207] According to a New York statute:

> A covenant, promise, agreement or understanding…in connection with …a contract or agreement relative to the construction, alteration, repair or maintenance of a building…purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee…is against public policy and is void and unenforceable.[208]

This law voids an indemnification clause where the party seeking indemnification was negligent.[209] The New York legislature noted the statute's purpose was to prevent coercion by requiring parties to assume liability for others' negligence.[210] This statute was intended to allocate responsibility in joint fault cases, which directly aligns with the proposed equitable indemnity legislation above.[211]

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[204] *See* FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC, ANTI-INDEMNITY STATUTES IN THE 50 STATES: 2020, 1—8 (2020).

[205] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. f (AM. LAW INST. 2000).

[206] FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC., *supra* note 204.

[207] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[208] N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2019).

[209] Castrogiovanni v. Corp. Prop. Invs., 714 N.Y.S.2d 332, 333 (App. Div. 2000).

[210] Westport Ins. Co. v. Altertec Energy Conservation, 921 N.Y.S.2d 90, 93 (App. Div. 2011).

[211] Onondaga Cnty. v. Penetryn Sys., Inc., 446 N.Y.S.2d 693, 694 (App. Div. 1981).

The construction context is directly analogous to the sports organization and concessionaire context. Sports organizations, like general contractors, contract with concessionaires.[212] Concessionaires, like subcontractors, are generally required to indemnify the other party for injuries arising from the bargained-for services.[213] If an incident occurs, the concessionaire or subcontractor assumes liability instead of the sports organization or general contractor.[214] A general contractor, like a sports organization, usually retains control over the workplace and contributes to the workplace environment and services.[215] The New York legislature, and many other state legislatures, realized this practice was unjust given the contribution these general contractors may have in creating injuries.[216] These construction situations pose similar issues as do sports organizations' contributions to alcohol-related third party injuries. Sports organizations seeking indemnification for their potential role in creating an injury is coercive. Thus, state legislatures should feel justified in adopting statutes apportioning fault based on contribution to alcohol-related injuries in the sports concessionaire context.

Indemnification provisions between 'masters and servants' are another area of concern for state legislatures. About one-fourth of state legislatures have adopted statutes prohibiting mandatory acceptance of indemnification provisions for injuries as a hiring condition.[217] In Arizona, it is illegal for any person or company to require its servants, as a service condition, to release them from liability for personal injuries arising from the professional relationship.[218] Any such agreement, if made, is void in violation of public policy.[219] The legislature recognized the trend of moving away from the "common-law action of

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[212] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[213] *See id.*

[214] *See id.*

[215] *See id.*

[216] *See Onondaga Cnty.*, 446 N.Y.S.2d at 694.

[217] FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC., *supra* note 204; *see* e.g. N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2019).

[218] ARIZ. REV. STAT. ANN. § 18-3 (2020).

[219] *Id.*

negligence and the rules governing it as between master and servant."[220] Instead, parties must bear the burden of fault in creating the injury.[221] Otherwise, the responsible party would be unjustly enriched. This places extreme burden on the servants and risks under-compensation for the injured plaintiff. Legislatures recognized these public policy concerns and implemented legislation addressing indemnification provisions in the employment context.[222]

The relationship between a sports organization and a concessionaire is like a master-servant relationship. Essentially, the 'master' sports organization retains the concessionaire to 'serve' food and beverages at the team's venue. Concessionaires are often forced to sign an indemnification clause limiting the sports organizations' liability as a service condition.[223] A result where an alcohol-related injury arises, and a sports organization is fully exculpated, would run counter to public policy. The sports organizations should bear some responsibility for creating the injury if such fault is found.[224]

Public policy considerations should play a vital role in assessing whether indemnification clauses are enforceable between sports organizations and concessionaires. The main goal in resolving these alcohol-related disputes should be compensating victims and correctly apportioning fault among the parties who created the injury. State legislatures are justified in adopting an equitable indemnity approach for joint tortfeasors in the sports context because most legislatures in other states have codified these principles in analogous situations. Allowing sports organizations to insulate themselves from alcohol-related liability runs counter to public policy. Thus, state courts and legislatures have a duty to recognize the unjust nature of indemnification clauses in this context, and work to restructure the law in this area.

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[220] Oatman United Gold Mining Co.v. Pebley, 250 P. 255, 256 (Ariz. 1926).

[221] *Id.*

[222] Daniel v. Magma Copper Co., 620 P.2d 699, 702 (Ariz. Ct. App. 1980).

[223] *See generally* Sample v. Eaton, 302 P.2d 431, 434 (Cal. Dist. Ct. App. 1956) (quoting Winn v. Holmes 299 P.2d 994, 996 (Cal. Dist. Ct. App. 1956)).

[224] *Daniel*, 620 P.2d at 701.

CONCLUSION

Alcohol consumption at live sporting events is commonplace today. The ability to purchase and consume alcohol at these events, however, can place others in danger. Unbeknownst to third parties, sports organizations regularly contract with concessionaires to provide alcohol at their venues, but escape liability for injuries resulting from alcohol distribution through express indemnification clauses. While full indemnification may be warranted in some situations, sports organizations often breach their duty of care in failing to mitigate the risks an intoxicated fan poses to others. This failure qualifies sports organizations as a joint tortfeasor in this context. Allowing sports organizations to contract away full liability when they may have contributed to an alcohol-related third-party injury is inequitable and unjust.

Courts should resolve these alcohol-related disputes by applying the proposed equitable indemnity principles. Equitable indemnity considers a party's responsibility in causing a plaintiff's injury. Then, fault is apportioned based on each party's culpable contribution to the injury, regardless of an express indemnity clause between the contracting parties. Equitable indemnity can be most effectively and uniformly applied if state legislatures adopt statutes codifying these principles. Equitable indemnity assures entities responsible for alcohol-related injuries will be held accountable. In addition, these principles further public policy goals like compensating injured victims, and incentivizing sports organizations and concessionaires to engage in safe practices at sports venues. Sports fans should know proper safety measures are in place when they attend a sporting event. A different result would deter eager fans from attending games, which would negatively affect sports organizations, concessionaires, and the sports industry as a whole. Thus, equitable indemnity provides a fair solution to settle alcohol-related injury disputes while improving the fan experience at live sporting events.