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Hang 'em all...it is easier than figuring out who is guilty.

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As reported in the March 2019 issue of Fraternal Law, the zoning ordinance of the City of Bloomington, Indiana, was found to violate both the Indiana and U.S. Constitutions because of the manner in which it regulated fraternity and sorority houses. The ordinance stated that, in order for chapter houses to be a legal use in the only zoning district where they were allowed, it was required that "Indiana University has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such sanction or recognition." The trial court found that requirement to be an unconstitutional delegation of legislative authority to the University, in violation of the Due Process Clause of the U.S. Constitution.

Not surprisingly, Blominton has appealed that decision. What is slightly more surprising is that Indiana University (IU) has filed an *amicus curiae* brief in support of Bloomington. The justification for the University's support is disturbing, yet provides proof of what many leaders in the fraternity and sorority world have voiced concern about for some time. Too often universities fail to deal appropriately with the wrongdoers who harm both their college and their fraternity or sorority. Instead, schools attribute the misconduct of a small number of wrongdoers to a chapter that could number into the hundreds. On many occasions, members of fraternities or sororities who violate both the rules of their own organization as well as of the university end up causing an entire chapter, and in some cases even the entire Greek system, to be punished.

One paragraph in Indiana University's *amicus* argument makes clear why:

> Although IU could try to discipline individual members, this proves to be difficult in practice given the reluctance of individuals to provide information and/or evidence against a single student rather than against an entire organization. It is also inefficient, placing many students at risk, and does not allow IU to effectively mitigate against the risk posed by the problematic culture, attitude, and behavior fostered by the organization .

The bottom line is that IU—and frankly many other universities across the country—finds it easier to act against an entire chapter, punishing the many innocents, rather than to take the time and make the effort to identify and deal with the far fewer wrongdoers.

To be clear, when chapter leaders or members with knowledge seek to cover up for the wrongdoer, they too should be held accountable. Indeed, in cases like Tim Piazza's death at Penn State, chapter leaders who lied to investigators and attempted to cover up facts and evidence were criminally

charged. Members need to understand that they only bring greater harm to the larger brotherhood or sisterhood they are a part of when, through misguided loyalty, they cover up for wrongdoers; those who engage in a cover up bring no honor to themselves and jeopardize the entire organization.

Yet such cover ups remain no excuse for a university to punish those who did no wrong, hoping to catch the wrongdoers with a broad net of punishment, just because it is easier and more efficient.

Later in its brief IU claims to recognize that: "IU must respect and adhere to the students and student organizations due process rights and these Procedures [the Student Code of Conduct] are designed to protect those rights."

Nowhere do they bother to explain how they are protecting the rights of the innocent when they know they are punishing both miscreants and those who did no wrong.

The growth of zoning codes across the country linking legal status for chapter houses with a requirement that the fraternity or sorority be recognized by a local university will likely have the opposite effect that universities who are cooperating in that effort hope for.

Fraternity and sorority houses are often worth hundreds of thousands, and not infrequently millions, of dollars. They are just as critical of assets to the house corporations that own them as a university's dormitories are to a university. House corporations are going to take action to defend their assets in court if they are forced to do so.

Zoning litigation is happening more and more across the country. In recent months, in addition to the Bloomington case, Fraternal Law has reported on litigation in New Hampshire (Dartmouth) and State College of Pennsylvania (Penn State). When efforts are underway to amend zoning codes to add such a requirement, it is quite likely that local house corporations, just as many did in Ann Arbor, may well abandon university recognition before such zoning amendments can become effective. In that way, they may preserve their status as a legal, even though nonconforming, use. Zoning law is clear: once a legal use is established, even a change in zoning law cannot make the use illegal. And to the extent that the local university is working with the local zoning authority to change the law to mandate such a requirement, it will make it all the more difficult for fraternities and sororities to work with universities for the betterment of their members and the universities students.

Good news and not so good news in the challenge to USC's deferred recruitment policy

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On May 1st, the Court of Appeal for the State of California, Second Appellate District, announced its decision[1] in the lawsuit challenging the University of Southern California's deferred recruitment policy. That lawsuit, which was originally filed in the summer of 2018, had failed at the trial court level and was on appeal. The suit was based on California's Leonard Law[2]. That law incorporates the provisions of the First Amendment to the United States Constitution into the California law and prohibits even private schools from enforcing rules "subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communications that, when engaged in outside the campus or facility of a private post-secondary institution." As a result, because of California's unique law, a First Amendment claim could be brought against the University of Southern California (USC) even though it is a private institution.

The trial court denied a request for an injunction prohibiting USC from implementing the deferred recruitment policy because the plaintiffs could not show that the policy "was created as a disciplinary sanction." Alternatively, the trial court held that the Leonard Law applied only to free speech rights, not the right of association .

The Appellate Court disagreed with the trial court on both of those points. First, the Appellate Court made clear that the language of the Leonard Law did not require that the policy itself be imposed as a discipline but rather that a violation of the policy could subject those who violate it to discipline. As the Court noted, the Leonard Law applies "to University rules that had not yet been enforced but that render a student vulnerable to discipline for engaging in conduct proscribed in the rule. . . the deferred recruitment policy (in conjunction with USC's Student Handbook) does just that."

Perhaps of greatest benefit in the future, the Appellate Court clearly recognized that the Leonard Law language protection of on-campus "speech or other communication" does encompass expressive associational activity. The court cited several California cases and U.S. Supreme Court cases that have help the right of expressive association to be "closely linked" to the First Amendment free speech rights and implicit in those speech rights.

It is also worth noting that both the trial court and the Court of Appeal held that fraternity chapters have standing to assert the rights of their members. Based on those conclusions, the Court of Appeal reversed the trial court and sent the matter back for further consideration.

All that is good news for fraternities and sororities in the state of California, but there are significant challenges ahead based on comments by the Court of Appeal. First, the Appellate Court made it clear that the four fraternity and one sorority chapters who were plaintiffs in the lawsuit had standing to assert the rights of their members, but not also the rights of nonmember student who might be interested in joining. As the Court put it, in somewhat curious language in one of its section headings, "plaintiffs have standing to sue, but that standing cabins the interests they may assert." Thus, unless the plaintiffs are able to amend their complaint or potentially add nonmember plaintiffs, when this case goes back to the trial court, plaintiffs will be limited in what arguments they can make.

The Appellate Court also recognized that while its clear the fraternity chapters and their members have First Amendment rights, so does the University of Southern California. Language in the Court's decision suggests that "a university's exercise of genuine academic judgement is of First Amendment dimension and deserving of deference from the courts[3]."

Relying in part on the deference due to USC, the Court of Appeal questions the ability of the plaintiffs to succeed when this matter is referred back to the trial court. The Court of Appeal put it this way:

> If the deferred recruitment policy is the product of the University's genuine academic judgement that the policy will benefit student edification, these allegations of what is an attenuated effect on expressive associational activity would not suffice to establish a [Leonard Law] violation.

But the Court noted that plaintiffs' claim that the University's policy constituted viewpoint discrimination as the prohibition on first semester membership was only being applied to Greek groups. Even though the Court appeared to question the validity of those claims, given this stage of the litiga-

tion, the Court had no choice but to consider them true, concluding with this somewhat disconcerting warning:

> At this stage of the case, we must take as true Plaintiff's allegation that the deferred recruitment policy was enacted with 'no factual basis' and merely as a discriminatory attempt to place fraternities and sororities in a disfavored category.' We will therefore reverse the ruling of dismissal and give the Plaintiffs the opportunity to attempt to substantiate this allegation. If they cannot, judgement for USC will again be warranted.

Undoubtedly there will be more news about this case as it develops further after its trip back to the trial court.

[1]Omicron Chapter of Alpha Kappa Theta Sorority v. Univ. S. Cal., No. B292907, 2019 WL 1930153 (Cal. Ct. App. May 1, 2019).
[2]CAL. EDUC. CODE § 94367.

[3]*Omicron Chapter*, 2019 WL at *6 (citing Grutter v. Bollinger, 539 U.S. 306, 324, 328–29 (2003)).

[4] It should be noted that the court ordered this decision not to be published in the official reports. California rules of court limit how an unpublished decision can be cited or relied upon.

Charges Dismissed against Pi Kappa Alpha

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In December of 2017, in a highly unusual, indeed inexplicable move, Pi Kappa Alpha International Fraternity, Inc. was indicted for hazing.

Some fifteen months later, in a short Court Order, Judge Kelley Andrews—Presiding Judge of the County Criminal Court at Law No. 6, Harris County Texas—quashed the indictment and the charges against the national fraternity were dropped.

Hazing was alleged to have taken place by some members of the fraternity's chapter at the University of Houston ("Houston"). But none of the individuals who engaged in conduct were criminally charged. Instead, in a curious move, individuals who were responsible for the conduct at Houston were granted immunity in exchange for their grand jury testimony against the national fraternity.

The undergraduate delegates of the other Pi Kappa Alpha chapters across the country, when informed of the conduct, voted unanimously to revoke the charter of the chapter at the University of Houston. Pi Kappa Alpha has a strong policy against hazing and remains committed to seeing that its members who violate fraternity policy or the laws regarding hazing are held accountable for their actions.

Civil litigation remains pending in which those who individuals who actually engaged in the conduct that caused the injury to a potential new member may still be held accountable.

[1]*See* Tim Burke, *PKA International Indicted*, FRATERNAL L. (Jan. 2018).

Lawsuit Alleges Disturbing Hazing

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When a perspective member of a fraternity is seriously injured or dies as a result of hazing, in addition to likely criminal charges against the wrongdoers, a civil lawsuit will likely follow against the wrongdoers, their chapter, and the inter/national organization. The estate of Collin Wiant filed such a suit in February against Sigma Pi Fraternity, its Chapter at Ohio University, and ten not-yet-named perpetrators[1] of the alleged hazing that led to Collin's death.

Collin Wiant was a student at Ohio University (OU) in Athens, Ohio, and a pledge of Sigma Pi's OU Epsilon Chapter. According to the Plaintiff's Complaint filed February 14th, he was subjected to extreme hazing, included , but not limited to, "being (1) beaten with a belt; (2) forced to beat others with a belt; (3) punched; (4) pelted with eggs; (5) provided with and forced to take drugs (including nitrous oxide); (6) provided with and forced to drink a gallon of alcohol in 60 minutes; and (7) deprived of sleep[2]." Plaintiff alleges that "the hazing caused bodily injury, emotional distress, and ultimately, Collin Wiant's death."

In its summary of the background facts, Plaintiff alleges that "hazing continues to be a well-known occurrence" at Sigma Pi. The Complaint cites two examples of previous incidents—one in March 2016 at Hofstra University, and one in January 2019 at California Polytechnic Institute— in which Sigma Pi International suspended chapters after reports of hazing at those chapters.

The Wiant Complaint focuses on activities alleged to have occurred at a residence described as the "unofficial annex house of the Epsilon Chapter. . . at 45 Mill Street in Athens, Ohio." Plaintiff alleges that location, which is the residence of several active members, is "a hub for hazing activities and. . . social activities, including parties where drugs and alcohol were made available." The Complaint states that inside the residence was a room called the "Fun Room," or the "Education Room," which was "riddled with holes in the wall, egg shells all over the floor, and pillow cases that were used for some unknown purpose."

According to the Complaint, in addition to the physical abuse Collin and the other pledges were subjected to, abuse involving drugs and alcohol occured. In one instance, pledges were locked inside the bedroom of the fraternity president at the 45 Mill Street residence and forced to drink one gallon of alcohol in one hour. The Complaint also claims that the fraternity "provided and/or forced pledges, including Collin, to take cocaine, marijuana, Adderall, and Xanax along with moonshine and other types of alcohol."

On November 11, 2018, Collin went to two different bars with members of the Sigma Pi Epsilon Chapter. Witnesses from both locations describe Collin as "acting normal" or "seeming fine." Shortly after midnight, an active fraternity member, Corbin Gustafson, instructed Collin to go to the 45 Mill Street residence, to which Collin allegedly responded, "I know I'm going to get hazed." Collin and Gustafson went to Collin's dorm room and then "presumably directly to the 45 Mill St. residence." Witnesses from Collin's dorm room again described him as "acting completely fine."

At 2:50 am on November 12, 2018, Corbin Gustafson called 911 and indicated that Collin Wiant was unresponsive at 45 Mill St. In the 911 call, which has since been released, Gustafson can be heard

saying "I think my friend drank a little too much." When asked about Collin's condition, he stated that Collin was passing out but still breathing. Collin was found "surrounded by drug paraphernalia, including canisters of nitrous oxide." A later toxicology report showed that Collin died from asphyxiation from ingesting nitrous oxide. The complaint alleges that drugs, including the nitrous oxide, were "provided by and/or forced on Collin by members of the Epsilon Chapter of the Sigma Pi Fraternity."

The Complaint further claims that "within hours" of Collin's death, the Epsilon Chapter called an emergency meeting to initiate the remaining pledges as full members of the fraternity with the intent of "clos[ing] ranks within all fraternity members to make sure they all told the same story concerning the events of earlier that morning."

The Complaint alleges seven specific counts: (1) Violation of Ohio's Anti-Hazing Statue, R.C. 2307.44; (2) Negligent Supervision (against Sigma Pi); (3) Negligent Supervision (against the Epsilon Chapter); (4) Intentional Infliction of Emotional Distress; (5) Negligent Infliction of Emotional Distress; (6) Negligence; and (7) Civil Conspiracy.

Plaintiff argues that Collin was hazed by members of Sigma Pi in violation of Ohio Revised Code Section 2307.44[3], that defendants "authorized, requested, commanded, and/or tolerated the hazing," and "knew or reasonably should have known of the hazing. . . and did not take responsible steps to prevent it."

Plaintiff further asserts that Sigma Pi and the Epsilon Chapter owed Collin a duty of care and that Sigma Pi was negligent in allowing Collin to be hazed. Plaintiff argues that Sigma Pi was negligent in permitting harmful rituals and not adequately warning members of the dangers of such rituals or adequately assuring that such rituals were not taking place at its chapters, including the Epsilon Chapter. Also, Plaintiff argues that it was "foreseeable that a pledge, including Collin Wiant, could die as a result of hazing activities."

Finally, Plaintiff allege that defendants were negligent by claiming that Sigma Pi has rules against drug and alcohol use and hazing, and that the Epsilon Chapter, which is bound by those rules and policies, failed to enforce them.

Both Sigma Pi International and the Epsilon Chapter have filed answers to the Complaint in this case.

It its answer, Sigma Pi International denies the allegations in all seven counts of the Complaint, although in some cases only "as they are directed at the International Fraternity." They also deny: knowledge of hazing within the fraternity; owing a duty of care to Collin Wiant; that the International Fraternity is "responsible for instituting and enforcing the policies that provide adequate supervision of new and potential members from acts of hazing"; any negligence; and that it was foreseeable that a pledge could die as a result of the hazing activities.

The international fraternity also mounted five affirmative defenses. The first states that Plaintiff "failed to state a claim upon which relief can be granted."

The second argues that "Plaintiff's alleged harms and the underlying event were caused solely and exclusively by acts and/or omissions of others besides the International Fraternity, over whom the International Fraternity possessed no control and was not legally or otherwise responsible for. Furthermore, the International Fraternity is not legally responsible for the alleged acts or omissions of any other defendants, including but not limited to the defendants named by Plaintiff as John Does 1-

10."

The third affirmative defense addresses primary and secondary assumed risk and argues that Collin Wiant "voluntarily and knowingly" participated in the events that took place and therefore "assumed all of the risks incident to said events." Because of this, the International Fraternity argues that Plaintiff are limited in and/or barred from recovery.

The fourth affirmative defense similarly states that all of the "alleged events and happening, injuries, losses, and/or damages referred to in the Plaintiff's complaint were directly and proximately caused and contributed to. . . by the carelessness, recklessness, negligence, and/or intentional acts of Wiant."

In its own separate answer to the Complaint, the Epsilon Chapter also denies most of Plaintiff's claims. The Chapter also denies that the residence where Collin died—45 Mill Street—is an unofficial annex of the Epsilon Chapter, the existence of the "fun/education room" inside that residence, and that Collin was hazed and suffered abuse at the hands of members of the Chapter.

Most notably, the Chapter denies that Collin was a pledge of the Epsilon Chapter at the time of his death because the Chapter "suspended him and removed him from its pledging process on or about October 24, 2018, upon receipt of information that an allegation of sexual assault had been made against Collin Wiant and that a police investigation of such allegation had been commenced." The Chapter also "denies that Collin was killed."

The Epsilon Chapter also offers four additional defenses. Like the international fraternity, the Chapter claims that Plaintiff have failed to state a claim upon which relief may be granted and that Collin Wiant knowingly and voluntarily participated in the events described, thereby assuming the risk of those events and creating negligence only on his own part.

As a matter of note, Ohio Revised Code Section 2307.44 states:

> "The negligence or consent of the plaintiff or any assumption of the risk by the plaintiff is not a defense to an action brought pursuant to this section. In an action against a school, university, college, or other educational institution, it is an affirmative defense that the school, university, college, or other institution was actively enforcing a policy against hazing at the time the cause of action arose."

There has been no ruling to date in this case, but Fraternal Law will of course keep up to date on any developments. Ohio University, however, had made a deicison about the future of Sigma Pi on its campus. The Epsilon Chapter was charged with 10 violations of the Student Code of Conduct and on May 1st the University announced it had expelled the chapter in a move it described as "final."

[1]It can be expected that as discovery proceeds, the identity of these individuals will become clear and they will be added as named defendants.

[2]Court of Common Pleas, Athens County, Ohio. *Wade Wiant and Kathleen Wiant as Co-Administrators of the Estate of Collin Lewis Wiant v. Sigma Pi Fraternity, Epsilon Chapter, et al*. 14 Mar. 2019.

[3]Ohio R.C. § 2307.44 addresses Hazing Civil Liability and reads in relevant part:

Any person who is subjected to hazing, as defined in division (A) of section 2903.31 of the Revised Code, may commence a civil action for injury or damages, including mental and physical pain and suffering, that result from the hazing. The action may be brought against any participants in the hazing, any organization whose local or national directors, trustees, or officers authorized, requested, commanded, or tolerated the hazing, and any local or national director, trustee, or officer of the organization who authorized, requested, commanded, or tolerated the hazing.

First Sentances Handed Down following Tim Piazza's death

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More than two years after the death of Timothy Piazza at Penn State, the first four members of the Beta Theta Pi chapter who were involved in his death have received sentences of jail terms ranging between thirty (30) days and nine (9) months, and a fourth defendant was ordered to serve three-to-ten (3-10) months of house arrest. Press reports indicated that all four had pled guilty to hazing relating charges and that the jail sentences could still be reduced to house arrests. Charges against other members of the chapter remain pending and it is likely there will be more jail sentences.

Gregory Parks, a law professor at Wake Forrest College of Law, a frequent attendee at the Fraternal Law Conference, was quoted extensively in an Associated Press article commenting on the importance of criminal prosecution. According to the article, Parks "seriously doubted that African American fraternity members" would be dealt such light sentences if they had been convicted of the same crime. The article specifically quoted Parks as saying:

> I think there's sympathy for young, educated, good-looking white men… I think that's part of it. I think folks feel sympathetic towards them even though the victim is usually of the same background. So the organizations have to advocate in ways that deter harmful behavior, but are also mindful of how race plays a major role in the criminal-justice system and how harsher sentences are netted out against people of color.

[1] Michelle Mark, *3 Penn State Frat Brothers Were Given Rare Jail Sentences in a 2017 Hazing Case*, Insider (Apr. 4, 2019), https://www.insider.com/penn-state-hazing-death-frat-brothers-sentenced-to-jail-2019-4.

California Court of Appeal instructs on what constitutes minimum due process

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It is understandable that colleges and universities are taking far more seriously issues related to sexual assault on campus than was historically the case. But, one court after another has found that far too frequently the disciplinary process fails to be conducted fairly. When that happens, it is a major disservice to both the individual who complains of sexual assault and to the accused.

Such was the case in the very recent decision by California Court of Appeal in a matter involving an allegation of sexual assault involving students at Westmont College[1]. John Doe, who was accused of sexual assault, sued Westmont after he was suspended for two years following a college disciplinary panel's conclusion that the preponderance of the evidence showed he had committed sexual assault. The appellate court upheld the trial court's decision that Westmont "did not provide John a fair hearing." The appellate court summarized its decision this way:

> Westmont's investigation and adjudication of Jane's accusation was fatally flawed. Westmont did not provide John with a fair hearing; indeed, it did not comply with its own policy and procedures. The panel did not hear testimony from critical witnesses, yet relied on these witnesses prior statement to corroborate Jane's account or to impeach John's credibility. The panel withheld material evidence from John, which its policies required it to turn over. As a result, John was denied a meaningful opportunity to pose questions to Jane and other witnesses on material disputed facts .

The Court was also concerned that the University administrator who investigated the complaint and prepared a report of the investigation was also a member of the three person panel that conducted the hearing.

While noting that a college disciplinary hearing is not the same as a criminal proceeding, the Court did an excellent job of summarizing the minimal standards that should apply at such a hearing:

> At a minimum, the college must comply with its own policies and procedures. Those procedures must provide the accused student with a hearing before a neutral adjudicatory body. The accused must be permitted to respond to the evidence against them. The alleged victim and other critical witnesses must appear before the adjudicatory body in some form—in person, by video conference, or some other means—so the body can observe their demeanor. This is because 'the opportunity to question a witness and observe [their] demeanor while being questioned can be just as important to the trier of fact as it is to the accused.' The college must provide the accused student with the names of witness and the facts to which each testifies. The accused must be able to pose questions to the witnesses in some manor either, directly or indirectly, such as through the adjudicatory body. The body need not ask every question posed by the accused . (internal citations omitted.

It should be noted that this Court was applying California Law and that Westmont College is a private institution, which, in other states, may not be held to constitutional due process standards except perhaps in Title IX sexual assault matters. But federal courts and other states courts have reached similar conclusions, as have been reported in prior issues of *Fraternal Law* .

[1]Doe v. Westmont Coll., No. B287799, 2019 WL 1771631 (Cal. Ct. App. Apr. 23, 2019).

Important Title IX decision involves unnamed fraternity parties

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The U.S. Court of Appeals has affirmed the denial of Kansas State University's Motions to Dismiss in a consolidated case that will likely have a lasting impact in how colleges and universities handle claims of sexual assaults that happen at fraternity houses or at off-campus fraternity events.

Two students from Kansas State University (KSU) filed suits against KSU claiming, among other things, Title IX violations in the wake of two separate reports of sexual assault. The first plaintiff attended a fraternity party where she became intoxicated. A designated driver took her back to her dorm room. Sometime later, another student invited her to return to the party. That student picked her up and took her back to his room where they had consensual sex. When he left the plaintiff in the room, a second student emerged from hiding in a closet and assaulted the plaintiff.

The second plaintiff also attended a fraternity party at a location described as "a frequent k-state party location not far from campus ." After becoming intoxicated, a fraternity designated driver took her to his truck. Instead of taking the plaintiff back to her room, he assaulted her in the truck in front of multiple other students, some of whom recorded the assault and later posted the images to social media sites. He then drove the plaintiff to the fraternity house, took her to a room lined with beds, and assaulted her again. The plaintiff was then left in that room where a second student also assaulted her. Both plaintiffs reported their assaults to KSU and the local police.

The University's refused to address the assaults since they took place "off campus" became the basis for the plaintiffs' claims that KSU was in violation of Title IX because it was "deliberately indifferent" to their assaults.

The relevant provision in Title IX states:

> [N]o person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.

In its decision the Court of Appeals pointed to the Supreme Court's decision in *Davis v. Monroe County Board of Education*, which set a precedent for Title IX violations almost twenty years prior. In *Davis*, the Court ruled that in order to be liable for a Title IX violation based on deliberate indifference, a funding recipient's "deliberate indifference must, at a minimum, cause students to undergo harassment or make the liable or vulnerable to it."

The Plaintiffs argued that KSU's deliberate indifference put them in the position of having to continue to attend school with their "student-rapists," and that the fear of encountering their "student-rapists" or other students who knew of the assaults on campus caused them to withdraw from participating in educational opportunities or using KSU resources.

Both plaintiffs reported an ongoing inability to go to class, continued fear, and a withdrawal from campus life and educational opportunities. One of the plaintiffs reported self-destructive behavior including a dependence on alcohol and self-harm. The other's grades "plummeted" so much so that she lost her academic scholarship.

KSU argued that in order to establish harm from KSU's deliberate indifference, the plaintiffs had to prove that they endured "further actual incidents of sexual harassment." The Court of Appeals quickly rejected that position and instead ruled, based in large part on the *Davis* decision, that the plaintiffs only had to establish that the deliberate indifference made them liable or vulnerable to further sexual harassment.

In considering whether or not the plaintiffs' claims met that test, the Court of Appeals noted that "KSU's deliberate indifference to [the plaintiffs'] reports of rape made them vulnerable to harassment by alleging that the fear of running into their student-rapists, among other things, caused them to struggle in school, lose a scholarship, withdraw from activities KSU offers its students, [and] avoid going anywhere on campus without being accompanied by friends or sorority sisters ."

The Court described what happened to the plaintiffs as "horrific," and found that "KSU's deliberate indifference caused them objectively to fear encountering their unchecked student-assailants on campus which in turn caused plaintiffs to stop participating in educational opportunities KSU offered."

It is important to understand the procedural status in this case at the time of the decision. KSU filed a Motion to Dismiss, which was denied by the original trial court. That decision was appealed to the Court of Appeals. When considering a motion to dismiss from a defendant, courts must assume that all the facts in a plaintiff's complaint are true. When a motion to dismiss is denied, as it was here, the plaintiffs must then prove the truth of those facts at trial. Unless the Court of Appeals decision is overturned by the U.S. Supreme Court, an unlikely event at best, or settled by the parties, the case will be referred back to the trial court for trial.

There can be little doubt that this decision may cause universities across the country to reexamine the way they respond to allegations of sexual assault. It should also be noted that the IFC suspended the chapter involved in the second case because of an anonymous complaint of alcohol violations.

Relevant to the issues at hand in this case but not commented on in the Court's decision are the new Title IX regulations recently proposed by the Department of Education. The proposed regulations appear to narrow the obligation of colleges and universities to investigate allegations of sexual misconduct to incidents alleged to have happened on campus, but may still cover campus-related sites like fraternity houses, even if they are on private property.

[1]Farmer v. Kan. St. Univ.,918 F.3d 1094 (10th Cir. 2019).
[2]Title IX, 20 U.S.C. §§ 1681–88.
[3]Davis *ex. rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644–45 (1999).
[4]The Court's decision does not name either of the fraternities in whose houses the alleged assaults took place. Only one Greek organization is named, Chi Omega, because one of the plaintiffs was a member of that organization and noted relying heavily on her sorority sisters after the assaults.

California Appellate Court Breaks New Ground in Fraternity Litigation

Clark J. Brown, North American Interfraternity Conference, General Counsel

OVERVIEW

In California, no state appellate court had considered the issues of duty of care and vicarious liability in the fraternity context until the Court of Appeal of California issued its opinion in *Barenborg v. Sigma Alpha Epsilon Fraternity* in March 2019 .

Plaintiff Carson Barenborg, a 19-year-old college student, was seriously injured at when she fell from a dance platform at an event at Sigma Alpha Epsilon's (SAE) chapter at the University of Southern California (California Gamma). She sued, among others, the SAE national for negligence. The trial court granted summary judgment to SAE national. That court found SAE national "owed [Ms. Barenborg] no duty of care and was not vicariously liable for its local chapter's actions." Ms. Barenborg appealed to the Court of Appeal of California, which affirmed.

BACKGROUND & FACTUAL INFORMATION

For background, SAE is a large national organization that operates over 200 chapters with over 13,000 collegiate members. The court reviewed SAE national's mission statement, national bylaws, and other governing documents such as its risk management policy guide. Like other national organizations, SAE is the chartering authority for local chapters and may grant, suspend, or revoke charters pursuant to its bylaws. The national organization can also discipline chapters and individual members, and while the national organization sets certain eligibility requirements, local chapters have autonomy to extend invitations to join within those bounds.

As with other national organizations, SAE's risk-management policies are binding on its chapters and members. Of note in this case was SAE's policy requiring "construction for events must be done by third-party professionals." Before turning to the court's analysis, it is important to highlight one provision of SAE national's bylaws that the court highlighted: no chapter has any authority to act for or bind SAE national, and SAE national has no power to control chapters' activities or operations.

As to California Gamma, it had a history of disciplinary violations with SAE national and with the University of Southern California (USC), involving alcohol violation, public disturbances, and sexual misconduct. When Ms. Barenborg was injured, California Gamma and other USC fraternities were having large parties. California Gamma was "serving alcohol without checking IDs," in violation of SAE national's policies. Ms. Barenborg arrived having already consumed "seven alcohol beverages and some cocaine."

Ms. Barenborg's injury occurred after she and her friends had climbed onto a six- or seven-foot tall makeshift dance platform erected by the chapter (also a violation of SAE national's policies). From there, another person knocked Ms. Barenborg to the ground, and she suffered serious injuries.

Following the incident, SAE national took two primary disciplinary actions against the chapter: the charter was transferred to the authority of an alumni commission and the chapter's house was mandated to become completely alcohol-free at all times. When California Gamma violated the alcohol-free mandate in 2014, the chapter was closed.

OPINION

On appeal, Ms. Barenborg asserted that the trial court's ruling should be reversed because SAE national owed her a duty of care because (1) there was a "special relationship between SAE national and California Gamma; (2) there was a special relationship between her and SAE national. She also argued that SAE national voluntarily assumed a duty of care under the "negligent undertaking" doc-

trine. Finally, Ms. Barenborg asserted that SAE national should be vicariously liable for its chapter's actions because of an agency relationship. The appellate court affirmed, holding SAE national "owed no duty to protect [Ms. Barenborg] for the actions of its local chapter and is not vicariously liable for them."

DUTY OF CARE BASED ON A SPECIAL RELATIONSHIP

The court spent a bulk of its opinion analyzing plaintiff's assertion that there was a special relationship between SAE national and its local chapter, California Gamma. Because of the absence of California case law on point, the court reviewed many out-of-state opinions familiar to this publication's readers.

Under California law, there may be a duty to control "if a defendant has a special relationship with the foreseeably dangerous person that entails an ability to control that person's conduct." The defendant must be "in the best position to protect against the risk of harm." In reviewing many out-of –state fraternity decisions, the noted that two themes emerged:

> Having policies governing chapter conduct and an ability to discipline a chapter "does not justify the imposition of a duty on a national fraternity;" and
>
> "National fraternities cannot monitor the day-to-day activities of a local chapter contemporaneously, and . . . absent an ability to do so, there can be no duty of control."

Ms. Barenborg pointed to SAE national's policies and disciplinary authorities as bases for her argument that SAE national had control over California Gamma. This argument has been rejected time and again by courts across the country, and the court held that these documents do not alter the fact that SAE national "was unable to monitor and control Cal. Gamma's day-to-day operations, and thus it owed no duty to protect [Ms. Barenborg] from Cal. Gamma's conduct."

Ms. Barenborg also argued that a special relationship existed between herself and SAE national. Under California law, "a defendant may have an affirmative duty to protect the plaintiff from the conduct of a third party if the defendant has a special relationship with the plaintiff." Ms. Barenborg argued that SAE national controlled California Gamma's premises. SAE national did not own or posses the chapter's house, however. The court soundly rejected Ms. Barenborg's argument that SAE national's risk management and event policies establish control over the premises.

The court also rejected Ms. Barenborg's attempt to impose a duty of care upon SAE national pursuant to the negligent undertaking doctrine, under which a defendant who renders services to a person may owe a duty of care to that person or someone else. She asserted that "through its rules and policies, [SAE national] undertook a duty to provide service to Cal. Gamma, creating a duty to protect Cal. Gamma's guests. The court found that any services SAE national might provide to its chapter "did not include direct day-to-day oversight and control" of the conduct of the chapter or its members. The court further concluded any duty undertaken by SAE national through its policies and rules, "such a duty was educational, rather than one of direct supervision and control."

VICARIOUS LIABILITY

Finally, Ms. Barenborg argued that SAE national should be vicariously liable based on an agency relationship between national and the chapter. An agency relationship cannot exist with the principal's ability to control the agent's operated conducted on behalf of the principal. Again, the court found that there was not the level of control sufficient to create an agency relationship. The court also highlighted provisions from SAE national's bylaws that state it "has no power to control the activities or operations of any Chapter Collegiate" and that chapters are "virtually independent," in control of their own activities, and responsible for making their own arrangements as to living quarters.

In all, the court's decision aligns California with the increasing number of states that have decided

duty of care and vicarious liability issues in favor of national fraternal organizations.

DEVELOPMENTS

In recent days, Ms. Barenborg has petitioned the California Supreme Court for review of the appellate court's decision. Ms. Barenborg asserts that the appellate court got it wrong and goes to great lengths in her petition to the California Supreme Court to say that the decision should be reviewed because "this issue goes far beyond just the facts of this one case. She points to alarming headlines and articles to assert that the opinion should be reviewed so California does not become like the "courts in most other jurisdictions [that] have allowed national fraternities to get away with avoiding liability for the conduct of their own local chapters." SAE national will respond to the petition later this month.

Overtime Regulation Revamp Continues Forward Under Trump Administration With Two Notices of Proposed Rule-making

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On Thursday, March 7th, the Department of Labor published a proposed rule which, if implemented, would substantially modify the rules governing overtime pay—including increasing the salary threshold for overtime exemption from $23,660 ($455/week) to $35,308 ($679/week). The current salary threshold of $23,660 was implemented in 2004 and has remained unchanged since then.

The prior administration similarly sought to substantially modify the salary threshold in 2016, raising it to $47,476 and providing for the threshold to increase every three years. That proposal never become effective as a result of an injunction issued by a Nevada federal court.
In addition to increasing the salary threshold, this latest proposed rule change includes the following:

- Allows the inclusion of certain nondiscretionary bonuses and incentive payments to count toward up to 10 percent of the salary threshold—the current rule excludes these types of compensation;
- Increases the salary threshold for "highly compensated employees" from $100,000 to $147,414 (approximately $13,000 higher than previously proposed level); and
- Commits to consider modifications to the earnings thresholds every four years—each proposed modification would be subject to a comment period during which the public may provide feedback on the proposed modification. In contrast, the 2016 proposal called for regular predetermined increases to the salary threshold without public comment.

Exemption from overtime has two factors. The above described salary test, and a duties test. As with the prior proposed rule change, the duties test will remain unchanged.

Following closely on the heels to the above proposal, the Department of Labor published another proposed rule change to overtime pay on March 28th, seeking to clarify the circumstances under which certain employee benefits, including tuition and travel reimbursements, unused paid leave, and meal breaks, may be excluded from the calculation of an employee's regular rate of pay. The Fair Labor Standards Act requires employers to pay nonexempt employees an overtime rate of one-and-a-half times their "regular rate of pay" for all hours worked in excess of forty (40) hours in a

given week. The current rule requires all "remuneration for employment" be included in the in the regular rate of pay determination, with the exception of seven narrow categories of remuneration.

The proposed rule would expand upon those seven categories to specifically exclude certain additional categories of remuneration from the determination of an employee's regular rate of pay. Those additional categories include:

- Pay for forgoing holidays or leave;
- Compensation for bona fide meal periods;
- Reimbursed travel and business expenses; and
- Tuition reimbursement, among many others .

The proposed rule change would allow employers to exclude remuneration falling under the new categories from the regular rate of pay calculations, provided those benefits are not tied to the employee's hours worked or services rendered.

The proposed rules changes are anticipated to become effective in 2020. However, as learned with the previous administration's proposal, legal challenge should be expected. In fact, the legal challenge to the previous proposal continues and the new proposal is likely to face legal challenges of its own.

[1] *See* John Christopher, *Proposed Overtime Regulations Would Significantly Limit Overtime Exemptions*, FRATERNAL L. (July 2015).
[2] *See* Sean Callan & Jacklyn Olinger, *Federal District Court Blocks New Overtime Rule*, FRATERNAL L. (Nov. 2016).

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