Indiana Supreme Court Affirms Summary Judgment in Favor of National Fraternity

We are pleased to report that the position of the 23 NPC member groups who joined together in an amicus brief prevailed in Smith v. Delta Tau Delta, et al., Case No. 54S01-1405-CT-356. On May 28, 2014, the Supreme Court of the State of Indiana, in a unanimous opinion written by the Chief Justice, upheld the Motion for Summary Judgment granted in favor of the national fraternity, Delta Tau Delta.

Johnny Dupree Smith, a pledge of the Delta Tau Delta Fraternity at Wabash College, died of acute alcohol ingestion. His estate sued the national fraternity, its local chapter, Wabash College and several individuals. The complaint alleged that Smith had been the victim of hazing and was illegally provided with and forced to consume excessive amounts of alcohol.

The national fraternity argued successfully at the trial court, that as a matter of law, the undisputed facts did not justify the imposition of any liability for Smith’s death on the national fraternity. The Court of Appeals disagreed and would have sent the case back to the lower court for trial.

In response to Delta Tau Delta’s appeal to the Supreme Court, the plaintiffs argued two issues. First, that the national fraternity had assumed a duty to protect freshman pledges from the dangers of hazing and excessive alcohol consumption. Second, that the local chapter was the agent of the national fraternity and the national fraternity was, therefore, subject to vicarious liability for the actions of the officers and representatives of the local chapter.

Summary judgment is not easily granted. All evidence and inferences that may be drawn from the evidence must be viewed in the light most favorable to the non-moving party. In this case, the facts had to be interpreted most favorably towards the Estate of Johnny Smith.

National Did Not Assume A Duty of Care

The Supreme Court first considered whether or not the national fraternity had assumed a duty of care to protect freshman pledges against hazing and the dangers of excessive alcohol consumption. The court recognized that “to impose liability resulting from breach of assumed duty, it is essential to identify and focus on the specific services undertaken. Liability attaches only for the failure to exercise reasonable care in conducting the ‘undertaking’.”

The plaintiffs had argued that the national fraternity, by its adoption and promulgation of rules against hazing and its practice of investigating allegations of hazing documented that the national had as-

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Registration for 2014 Fraternal Law Conference, scheduled for November 6th and 7th, is now open. The 2014 Conference will start on Thursday afternoon and will continue all day on Friday. The Cincinnati Westin is once again our host hotel. More information and registration is available here: http://fraternallaw.com/library-annex/fraternal-law-conference/

We are still finalizing the schedule. But we already have great speakers lined up to speak, including Justice Robert D. Rucker of the Indiana Supreme Court. Other committed speakers include David Westol from Limberlost Consulting, Michael Osborne from Archer Norris, and Thomas Dement from Leitner, Williams, Dooley & Napolitan. Topics will include the recent cases from Indiana, Sigma Alpha Epsilon’s decision to end its pledging program, sexual assaults on campus, hazing, tax law update, and many more. We are again offering a dual-track program, with one track focusing on fraternal operations and the other on foundation operations.

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• Daniel J. McCarthy
sumed a duty to protect freshman pledges, including the plaintiffs’ deceased son.

Delta Tau Delta did not dispute the facts relating to its promulgation of rules, circulation of educational materials and ability to punish for violation of its rules, but argued that it lacked any direct oversight and control of individual fraternity members.

The Supreme Court looked at three prior fraternity cases in which it had found that similar facts did not lead to a conclusion that a duty had been assumed. Publishing posters against date rape and alcohol abuse did not make a national fraternity liable for sexual assault on a guest of a local fraternity.¹ The publishing of an advisory pamphlet regarding alcohol abuse, the conducting of inspections and compiling of reports are insufficient to establish the assumption of a duty to control alcohol consumption by local members.² Even having a strong disapproval of hazing in charters, bylaws and promotional materials, promoting an online course against hazing and being able to issue and suspend charters or discipline or expel individual members and appoint a local advisor, was insufficient to establish an assumption of duty by a national.³

In this particular case, the court noted that Delta Tau Delta had more involvement with the local chapter than the national had in the Yost case decided earlier this year. Delta Tau Delta's National Constitution Bylaws and Membership Responsibility Guideline clearly disapproved of hazing and irresponsible and underage drinking. The national had an online alcohol education program that all new members must complete during their pledgship. National recommended that local chapters elect a House Risk Manager. The national provided educational materials to that local officer. National could suspend charters and discipline or expel individual members. Each local chapter had a Chapter Advisor appointed by a national representative. That advisor was a deputy of the Arch Chapter, the governing body of the fraternity, and was the custodian of the local chapter's official documents, secret books and ritual. The local chapter’s Treasurer was required to report routinely, once per month, to the national regarding its records and accounts receivable.

While the court found the national's involvement with its local and its efforts to deal with hazing and alcohol abuse to be “seen as more robust and extensive” than in the prior three cases, the Supreme Court found there was no evidence showing the national fraternity had a right to exercise day-to-day oversight and control of the local fraternity and its members. Rather, the national’s policies and regulations regarding hazing and drinking were educational, but without any power of “preventative control.”

The court called it “commendable” for the national fraternity to engage in such programs but that doing so “did not rise to the level of assuring protection of the freshman pledges from hazing and the misuse of alcohol.” The court unequivocally stated, “the national fraternity did not have a duty to ensure the safety of the freshman pledges at the local fraternity.”

The Local Chapter Was Not an Agent of the National

The court next looked at plaintiffs’ argument that the local was an agent of the national and therefore the national was vicariously liable for the actions of the local and its members. To establish an agency relationship, it had to be shown that the local acted on behalf of the national. The local must consent to act on the national's behalf and be subject to the national's control. In short, both parties had to consent to the relationship.

Plaintiffs had argued that because the national had broad enforcement powers, it had the right to control the local's activities and alcohol use. The court noted that those enforcement powers were “remedial only” and that the ability to impose “post conduct sanctions” did not establish the control necessary to create an agency relationship. Even recognizing that the members of the local fraternity were subject to post conduct punishment, the court noted that, “in their choice of conduct and behavior, the local fraternity and its members were not acting on behalf of the national and were not subject to its control.”

The following analysis by the Supreme Court is worth noting in whole:

The relationship between the national fraternity and the local fraternity involves the national fraternity offering informational resources, organization guidance, common traditions, and its brand to the local fraternity. Additionally, the national fraternity furthers joint aspirational goals by encouraging individual members’ good behavior and by investigating complaints and reports that affect the health, reputation and stability of local chapters. The national fraternity has the right to discipline, suspend or revoke its affiliation with the local fraternity or its members, the local fraternity’s every day management and supervision of activities and conduct of its resident members, however, is not undertaken at the direction and control of the national fraternity. The local fraternity is responsible for electing its own officers without the consent or oversight of the national fraternity. Local officers are expected to abide by the aspirational goals promulgated by the national fraternity, but are never given the authority to act on behalf of the national fraternity.
This decision and that in the Yost case, which came just two months earlier, makes it clear that educational programs, the promulgation of rules, and punishing for violation of those rules do not in and of themselves, make the national liable for the conduct of the local chapter and its officers or members who violate those rules. To that extent, this decision is a very important one for national Greek groups.

**Lessons Learned From the Decision**

Two cautions are important. First, the fact that the national may not be liable for the wrongdoing does not mean that the fraternity is free and clear. That is particularly true for those groups where insurance may be obtained as a package providing liability coverage for a national and each of its locals. In the Smith case, the national is free from liability, but its local chapter remains a defendant in the underlying litigation. It may yet be found liable. If it is liable, given that the case is dealing with the death of a young man, the damages could be substantial. If the insurance is required to pay those damages as a part of its package of insurance coverage, there may well be an impact on future premiums and coverage availability.

Second, the decision in Smith is not a free pass to say that a national fraternity may never be held liable. In fact, the court recognized that a national fraternity does have a duty of reasonable care in the performance of whatever duties it does assume. When information and guidance is provided to a chapter, reasonable care must be exercised with regard to the content of that information.

Fraternal Law Partners, a division of Manley Burke, is pleased to have represented the 23 member groups of the National Panhellenic Conference who joined together on the amici curiae brief filed in this case with the Supreme Court of Indiana. We specifically want to acknowledge the assistance of Jeffrey A. Musser of the Rocap Musser, LLP firm in Indianapolis, Indiana who served as our local counsel and assisted in seeing that the filing with the Indiana Supreme Court were appropriately made.

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**California Court Dismisses Berkeley Resident’s Class-Action Claims Against Neighboring Fraternities But Allows Case to Move Forward as a “Representative Action” Under Berkeley’s Municipal Code**

A California trial court has recently again granted a dismissal of the class-action claims asserted by plaintiff Paul Ghysels against almost every fraternity located near the University of California at Berkeley. Just one week before the 4-year anniversary of the filing of the class-action complaint in Ghysels v. Interfraternity Council, et al., Judge George C. Hernandez, Jr., of the Alameda County Superior Court’s Complex Litigation Department, dismissed the class-action claims, finding that “there is no reasonable possibility that the class proposed by plaintiffs could be certified for the panoply of nuisances alleged.”

In language that is likely applicable to a class action for nuisance against neighboring fraternities brought anywhere in the United States, Judge Hernandez’s order states: “The court agrees that the claims, as pleaded, cannot be tried on a class basis because determining liability for common law nuisance involves a fact-intensive inquiry that is highly individualized in nature; because plaintiffs seek to try together claims against numerous defendants who have separate locations and management from other defendants; and because the court cannot envision, and plaintiffs have not proposed, methods to manage these individualized issues.”

While recognizing that “trial courts do not usually resolve class issues at the pleading stage,” the court issued its dismissal in reliance on the California Court of Appeal’s statement that when “a complaint, on its face, fails to allege facts sufficient to establish a community of interest as to the elements of the class claims, it would be a waste of time and judicial resources to require a full evidentiary hearing when the matter can properly be disposed of” by a summary dismissal.

After reviewing the law applicable to class actions, the judge concluded that “there does not appear to be any possibility that the nuisance claims pertaining to a substantial number of class members’ parcels can be tried together.” He offered the following reasoning: “For example, if Fraternity A played loud music on a particular Friday night, whether class members experienced an invasion of their right to quiet enjoyment of their property would depend upon their proximity to the fraternity, whether it was summer or winter (and thus whether windows were open, although persons with air conditioning

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might not be similarly affected), the orientation of their homes and the layout of their yards, the materials with which their homes were built, and whether the occupant was in fact at home. Persons living at the other end of the campus zone may not have been impacted at all, and persons living in some intermediate area may have been impacted, but not to a substantial or unreasonable degree. This example does not take into account the fact that, depending upon a location, an individual might be exposed to noise from two separate fraternities that only rise to the level of a private nuisance in the aggregate, but individually, would not constitute a nuisance."

Before the hearing on the motion, Judge Hernandez issued a tentative ruling in which he noted that plaintiff's attorneys "have requested leave to amend but have not stated how they would amend to address" the deficiencies of the claims. In his tentative ruling, the judge challenged plaintiff's attorneys to, at the hearing, "be prepared to state whether and how plaintiffs can amend the complaint" to survive another motion to dismiss. At the hearing, one of plaintiff's attorneys stated, "What do we do going forward? It seems to me, and this is something we all have to take under submission I think because we just thought of that, that we might want to recast the case as not a class action but as a representative action under the Private Attorney General Statutes." (Hearing Transcript, italics added.)

After hearing this last-minute suggestion that plaintiff could amend to allege a "representative action," the judge decided to allow plaintiff another opportunity to amend his complaint, acknowledging California's "liberal policy" on allowing amendments.

Plaintiff has filed a Fifth Amended Complaint, in which plaintiff now contends that the Berkeley Municipal Code authorizes him to pursue a "representative action" for public nuisance on behalf of every single property owner and resident of the City of Berkeley. As one of plaintiff's other attorneys admitted at the hearing: "And this is probably going to be, this is as far as I'm aware, the first case of attempting to enforce social standards using the" local Berkeley ordinance.

In April the judge, ruling on the plaintiffs' Fifth Amended Complaint, found that plaintiffs may be able to pursue a "representative action" under Berkeley's Municipal Code. The judge has allowed the case to proceed now on its merits — with no class claim for damages and no class claim for injunctive relief. The parties have begun preliminary discovery and return to Court in December for a further Case Management Conference.

Michael C. Osborne, a partner at Archer Norris in San Francisco, California, serves as lead counsel in the lawsuit originally filed in 2016 as a class action against 67 fraternity chapters and housing corporations, Ghyes v. Interfraternity Council et al. He and his Greek Organization Litigation Practice Group defend fraternities and sororities in high-stakes litigation throughout the United States. He can be reached at m Osborne@archernorris.com.

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A Brief History of Fraternity/Sorority Paddles and Recommendations

A. Introduction

The sorority paddle is most commonly used today as a decorative keepsake representing sisterhood and is given as a gift according to a local chapter's traditions. The history of the paddle, however, is rooted in violence and remains a tool and symbol of hazing in Greek organizations. Several national sororities and fraternities have decided to phase out the use and gifting of paddles and instead encourage alternative gifts not associated with hazing. Sororities should join the growing number of organizations that support these efforts by discontinuing the licensing of paddles with the sorority’s name and trademarks and instead promote viable paddle-gifting alternatives such as symbolic plaques and decorative symbols.

B. History of Paddling and Greek Hazing

The use of paddles as a form of punishment supposedly originated at sea used by sailors to discipline each other for minor offenses such as leaving one’s post. The English sailors referred to paddling as "cobbing," from the word "cob," which meant to fight or strike. The "cobbing board" was usually created from the plank of a wooden barrel that contained the "bunghole," which was a hole drilled into the barrel to allow liquid to flow out. As a means of punishment, the hole in the board allowed air to pass through resulting in harsher blows whereas a solid board would result in a more cushioned blow. Eventually, more holes were carved into the boards to increase the intensity of the punishment. Paddling at sea was eventually imitated on land and brought to the United States by slave traders as a way to punish slaves without leaving visible damage, thereby lowering their value to potential purchasers. By the early nineteenth century, paddles were specially carved for beatings to suit the beater's preference - shuttle necks were carved as a handle, many still contained holes, sizes and shapes ranged from tennis racquets to oars to pizza-style boards, and the larger paddles were made from oak or hickory. Prisons and schools also adopted paddling as a method of corporal punishment. Nineteen states still allow corporal punishment in schools, which often includes paddling. The ten states with the highest rate of corporal
punishment in schools include Texas, Mississippi, Alabama, Arkansas, Georgia, Tennessee, Louisiana, Oklahoma, Florida, and Missouri. Some schools have reportedly used shaved-down baseball bats as paddles to punish students.10

The practice of hazing, subjecting individuals to abusive or humiliating ritual activities for initiation purposes is traced back to the military in ancient Greece.11 European universities in the middle ages adopted hazing practices such as upperclassmen forcing new students to act as servants.12 These practices were then brought to America.13 Harvard has evidence of upperclassmen hazing freshman at as early as 1657.14 When the first fraternity was established in 1776, evidence of its use of hazing followed as soon as 1781.15

The use of paddling as a form of hazing in fraternities dates back to the late 19th and early 20th Centuries.16 A resurgence and intensification of hazing in fraternities began after World War II with the return of veterans who brought boot camp-style rituals of the military to campuses.17 Fraternity and sorority membership nearly doubled between 1980 and 1986, and with it reports of hazing also increased.18 The 1978 movie Animal House depicts the stereotypical hazing performed by fraternities at the time, including a scene depicting pledges being paddled.

C. Decline of Paddling and Rise of Decorative Paddles

In response to increased reports of hazing, many states began to adopt anti-hazing legislation, and today all but six states (Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming) have adopted statutes that prohibit hazing.19 These statutes are generally broad enough to preclude the use of paddling. Ohio’s statute, for example, defines hazing as “doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person.”20 Universities, fraternities, and sororities have also responded by passing their own anti-hazing policies, many of which specifically ban paddling or mirror the language in the statutes.21

As the use of paddles as actual tools of hazing significantly declined, their use as a symbolic gift and tradition emerged. Most Greek organizations developed an unofficial tradition where new members would decorate ceremonial paddles as part of their initiation into the fraternity or sorority. Paddles often purchase a blank wooden paddle to decorate commemorating their membership into the Greek Organization or to give as a gift to their “big brother” or “big sister” within the fraternity or sorority.22 To most sorority alumnae today, paddles represent sisterhood, pride, and tradition.23

Unfortunately, paddling continues to be used as a hazing tool in fraternities, and although less frequently, sororities too. In 2001, a pledge for the fraternity Kappa Alpha Psi at Louisiana State University was paddled so severely that he needed surgery and a skin graft on his buttocks for a 7 inch-long, half-inch deep open sore.24 In 2008, members of Southern Illinois University’s Zeta Beta Phi sorority were suspended after beating pledges repeatedly with paddles over a four-day period.25 Also that year, a sorority pledge of Sigma Gamma Rho at San Jose State said members beat her with paddles stating “so you can feel that your ancestors went through in slavery.”26 Another pledge of Sigma Gamma Rho at Rutgers University was hospitalized in 2010 after being paddled 201 times.27 In 2012, nine members of the fraternity of Alpha Phi Alpha of University of Florida were charged with hazing for paddling pledges.28 Also that year brothers of Sigma Alpha Epsilon at Salisbury University in Maryland beat pledges with a paddle in addition to other hazing rituals.29 Finally, this year pledges of University of Akron’s Alpha Phi Alpha chapter were hospitalized after “taking wood,” or being paddled, over multiple nights of beatings.30

D. Policies on Paddles and Alternatives

Although none of the sororities most recently accused of paddling pledges appear to be members of the National Panhellenic Conference (NPC), the continued practice of paddling as a tool of hazing and violence by other organizations affects the perception of the paddle for all sororities. Allowing paddles to be used symbolically at the same time as others continue to use them as tools of hazing creates a conflicting message by sororities with strong anti-hazing policies.

During National Hazing Prevention Week in 2012, HazingPrevention.org launched the “Put the Paddle in the Past” campaign, which invites individuals to pledge their commitment to eliminating the use of the ceremonial fraternity/sorority paddle as both a hazing tool and as a gift to others.31 HazingPrevention.org was founded by Tracy Maxwell to prevent hazing before it occurs through education and empowerment. Maxwell has shared that although her sorority paddles represent positive values to her, to others they are a symbol of “violence, abuse, degradation, humiliation, and punishment.”32 The objectives of the “Put the Paddle in the Past” pledge are to educate people about the negative connotations of the paddle and hazing, promote the replacement of the decorative paddle with other commemorative plaques, and to end the sale of paddles entirely. The pledge reads as follows:

I acknowledge that although the paddle has been used to symbolize sisterhood/brotherhood and used as gifts without any mal-intent, it is a symbol of hazing.

I understand that while the gift of the paddle has become a tradition in many fraternities and sororities, it is time to replace the negative perception of this symbol with a positive one.
I recognize that some have used and continue to use the paddle to haze rather than honor and as such, I pledge that I will not purchase a paddle for myself nor give paddles as gifts to others.

Instead, I will honor my brothers/sisters with gifts that are not associated with hazing, and I will support others who have pledged to put the paddle in the past as well.

By signing this pledge, I/we agree to have my/our name(s) posted on the HazingPrevention.org website, National Hazing Prevention Week website, social media sites and other public locations.

Many Greek organizations have already chosen to ban the sale of paddles with their letters in their licensing agreements as a way to send a positive message with the products they do promote. According to Greekt101.com, a retailer that has partnered with HazingPrevention.org, ten fraternities and sixteen sororities (fifteen of which are NPC members) currently restrict their licensing of paddles.33 Those sororities include Alpha Delta Pi, Alpha Omicron Pi, Alpha Phi, Alpha Xi Delta, Chi Omega, Delta Phi Lambda (non-NPC member), Gamma Phi Beta, Kappa Alpha Theta, Kappa Delta, Kappa Kappa Gamma, Phi Mu, Phi Sigma Sigma, Pi Beta Phi, Sigma Sigma Sigma, Theta Phi Alpha, and Zeta Tau Alpha. Fraternities that restrict licensing of their paddles include Alpha Gamma Rho, Chi Psi, Phi Chi Theta, Phi Kappa Tau, Pi Sigma Epsilon, Sigma Alpha Epsilon,Sigma Alpha Iota, Sigma Nu, Theta Xi, and Zeta Beta Tau.

E. Conclusion

Although many sororities preclude the licensing of paddles with their letters, many local chapters continue the tradition of paddle-gifting by purchasing blank paddles and decorating them unofficially. In order to truly phase out the use of the paddle and its negative connotation, guidance should be given to chapters on a suitable replacement that allows the positive aspect of these traditions to be preserved. A viable alternative to the paddle is a commemorative wooden plaque, either in the shape of a sorority mascot or other non-paddle shape. These plaques can be decorated and given as gifts in the same way paddles currently are, but with a positive message behind the symbol instead.

- Alexandra S. Lehman

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
9. Id.
10. Id.
12. Id.
13. Id.
15. Id.
18. Id.
19. Acquaviva, at 312-313.
25. Williams v. Wendler, 530 F.3d 584 (7th Cir. 2008).
27. Id.
32. Maxwell, AFLV Blog.