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## THE DARTMOUTH DECISION: THE END OF ANOTHER GREEK SYSTEM?

Is the news from Dartmouth the death knell of the fraternity system at another eastern liberal arts college? Not necessarily.

In early February, the news that Dartmouth College was about to end the fraternity and sorority system associated with its campus made headlines across the country. A careful reading of the pronouncements from the Dartmouth College Board of Trustees and the President of the College indicates that the obituary notice for the Dartmouth Greek system may have been prematurely published. Even if it is the intention of the College to close its fraternities, which is not entirely clear, the College may not have the legal ability to do so.

Dartmouth relies heavily on the Greek system to provide both social activities and housing for its students. Of the 4,100 Dartmouth undergraduates, approximately 35%, some 1,700 students, belong to Greek organizations. Its fraternity system includes 17 fraternities, 8 sororities and 3 co-ed groups.

Thus, it was a surprise to some that on February 6, 1999, the Dartmouth Board of Trustees announced a goal of providing students with "an environment that encourages them to reach their full potential in non-academic, as well as academic activities, that sees them as individuals, that permits them choices in their social life, and that encourages respectful relationships between men and women." Standing alone, that is not a controversial goal.

The Board went on to identify five principles intended to guide the residential and social system at Dartmouth: 1) greater choice in residential living; 2) improved social spaces; 3) more students living on campus; 4) the elimination of the abuse and unsafe use of alcohol; and 5) "the system should be substantially co-educational and provide opportunities for greater interaction among all Dartmouth students." Nowhere in the Board of Trustees' statement were the words "fraternities and sororities" even mentioned.

Similarly, in a letter of February 9, 1999, to the members of the Dartmouth community from College President James Wright, "fraternities and sororities" were not mentioned. Instead the President spoke of the Trustees having given the College community an "opportunity to participate in a discussion about the creation of an even stronger residential and social system."

Steven Bosworth, the Chairman of the Board of Trustees of Dartmouth College, made it clear that the Board was "fully behind" the decision and "committed to doing this." The College newspaper, *The Dartmouth*, reported that Bosworth would not say when single-sex fraternities and sororities would cease to exist at Dartmouth but quoted the Chairman as saying "It will become clear to everyone that the system is changing and that what you call 'traditional rush' is no longer relevant. I think [students] should realize that now."

A memo from President Wright on February 12, 1999, emphasizes the College's most important objectives:

1. The abuse and unsafe use of alcohol should be eliminated;
2. The residential and social system should be substantially co-educational and provide opportunities for greater interaction among all Dartmouth students.

In that memo, the President does speak specifically about the impact of these objectives on the fraternity system. According to President Wright, "I have stated that the fraternity and sorority system as we know it now would not survive." What is truly intended by that statement is not clear, particularly since it is immediately followed by the statement "I have not said, nor has the Board stated or concluded, that as we move to the new and evolving system, there would be no single sex residences or houses. The challenge to us, including fraternities and sororities, is to develop a system that is more fully inclusive – and even stronger." In that same memo, the President argues: "In fact, I have stated in response to some inquiries, that I assume that next fall there would still be a rush in fraternity and sorority houses."

In attempting to address the objectives set forth by the President and Board, Dartmouth has created a 12-member task force whose goal it is to "serve as a conduit to senior


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officers [of the College] and Trustees" to obtain ideas and proposals to respond to the objectives of the College. In pursuit of its announced intention to seek wide comment, the College has established a web site which can be accessed through the Dartmouth home page (http://www.dartmouth.edu/).

In an interview with *The Dartmouth*, President Wright appeared to recognize many of the difficulties likely to face the College if it were to attempt the total elimination of the Greek system. Apparently, recognizing that in many cases students have made commitments to fraternities and sororities and perhaps with an understanding that fraternities and sororities and their house corporations have made significant investments based upon the existence of the Greek system at Dartmouth, President Wright said "we want to work through this and make sure it works well. We don't want people to have made commitments or participating in organizations with certain understandings. We are not going to suddenly put them out. We don't have any authority to put them out. Most of these houses are privately owned."

**A partnership between the College and the Greek system to address alcohol abuse may have a much greater chance of success than killing the Greek system with its many positive attributes.**

It is also apparent that at least with regard to those fraternities that have been traditionally African-American, Dartmouth may tread lightly. When asked what would happen to black fraternities and sororities, President Wright said "I think that as with all of the organizations, we are probably going to talk with each of them. I think that those places here that are residential have more burden here than those places that are not residential. I think that most of the historically black fraternities and sororities are not residential, so they are not playing the same sort of role in the social life of this community that the residential houses are."

Concerns about the impact of a dramatic change of the fraternity and sorority system at Dartmouth are likely to be raised by women's groups. In a thoughtful column in the February 15, 1999 issue of *The Dartmouth*, Katie Milligan, a 1998 Dartmouth graduate, advocated for consideration of the special impact of this decision on sororities. Milligan pointed out that "Wright's proposal to eliminate single-sex social organizations on campus is arguably the most anti-women policy the administration could implement." The decision, she said, "would eliminate one of the precious few legitimate women-centered institutions at the College. Many female Dartmouth students find these communities of women to be a source of strength, support, self-affirmation, and empowerment."

Dartmouth, some 230 years old, has been co-ed for only the last 25 years or so. Sororities bring to the campus the traditions of women's organizations, many of which are well over 100 years old. Thus, sororities give Dartmouth's women historical grounding and a century of role models that simply cannot be found in Dartmouth's single-sex history.

Much remains unclear about what the ultimate impact of the Dartmouth decision will be. Given these uncertainties, it is far too early to list Dartmouth among the ranks of Bowdoin, Amherst and Colby that have eliminated fraternities and sororities entirely. Supporters of the Greek system can yet hope that in working with the Dartmouth administration, positive efforts can be made to eliminate problems sometimes found in the Greek system such as hazing and alcohol abuse. Certainly, eliminating the abuse and misuse of alcohol is a goal shared by all responsible leaders of the Greek system. A partnership between the College and the Greek system to address alcohol abuse may have a much greater chance of success than killing the Greek system with its many positive attributes. It is likely that forced elimination of a college recognized system would lead to the creation of secret, unregulated and unrecognized fraternity chapters operating off-campus and perhaps without national controls and guidance.

On the issue of elimination of the "abuse and unsafe use of alcohol," the College would find an ally in the national fraternities and sororities which have chapters on the College campus. In recent years, more fraternities and chapters have been moving toward alcohol-free houses. Led by Farm House, Phi Delta Theta, Phi Gamma Delta and Sigma Nu, that movement has had the consistent support of the National Panhellenic Conference which adopted resolutions supporting the effort. Similarly, the National Interfraternity Conference, over a year ago, adopted a resolution supporting alcohol-free housing. Most national fraternities have also adopted aggressive education programs dealing with alcohol abuse and have been willing to take strong disciplinary action when appropriate to deal with those chapters or members who violate fraternity policy and laws related to alcohol.

If, in spite of that, Dartmouth elects to proceed to attempt to eliminate its Greek system, it may find significant legal hurdles in its path.

There is no doubt that if Dartmouth were a state institution, the First Amendment to the Constitution of the United States and the freedom of association rights that it protects would prevent such a draconian step as eliminating the Greek system.

In 1972, the Supreme Court of the United States recognized the right of students on public university campuses

# HAZING IN NEW YORK STATE LEADS TO CRIMINAL & CIVIL PENALTIES

A New York Appellate Court recently held that New York's criminal statute against hazing can form the basis for a civil suit by the hazing victim against the perpetrator.

Binaya Oja was a 17-year old Clarkson University freshman pledge in the Theta Chi Fraternity. The summary of facts reported by the Appellate Court to have been alleged by the plaintiffs included that defendants supplied alcohol to Oja and after defendant had "become visibly intoxicated, unable to stand and incapable of aiding or protecting himself, fraternity members took him to the third floor of the house, laid him down on a couch with a bucket underneath his head and left him unattended in an unconscious state." Oja died as a result of having consumed excessive amounts of alcohol. The lawsuit was commenced by the administrator of his estate.[1]

Two of the defendants sought to dismiss the hazing claims[2] arguing that the criminal statute gave no right to the victim or the victim's estate to sue merely for violation of the state's criminal prohibition against hazing. A New York trial court had held that the plaintiff could proceed on the basis of the hazing claim and ultimately the New York Appellate Court agreed. The Appellate Court noted that decedent was within the class of individuals intended to be protected by the statute, and that permitting a private right of action would "clearly further the legislative purpose of deterring potentially dangerous hazing activities." The Court also pointed out that allowing a private right of action for hazing did not damage the state's ability to enforce its alcohol laws, particularly where in a case like this one, the alleged wrongdoing went beyond simply supplying alcoholic beverages.

The Court noted that the defendants "have not pointed to any legislative action (or inaction) that could be viewed as evincing an intent to bar recovery by adolescents who, like decedent [Oja], had been injured or killed because, as [the trial] court trenchantly observed, of their 'willingness ... to be bullied and humiliated in exchange for the social acceptance which comes from membership in a circle which, to the puerile, may seem alluring and even exalted'."

Apparently, this was a case of first impression in the State of New York and it only serves to underscore the criminal and civil penalties which may attach to hazing and the abuse and misuse of alcohol.

Previously, the Appellate Court had denied a motion to dismiss filed by the House Corporation.[3] According to the Court, plaintiffs claimed that the House Corporation had "actual or constructive knowledge of the dangerous activities taking place on its property and [failed] to control those activities despite having ample opportunity to do so." Plaintiff also claimed that the House Corporation knew of the "dangerous and criminal" activities that had been "recurring on the premises" and had sufficient control to have prevented the situation which led to Oja's death. These allegations were enough, in the eyes of the Appellate Court, to overcome the Motion to Dismiss. The court denied the motion in spite of the fact that a New York Appellate Court had previously held that a house corporation did not ordinarily have a legal duty to prevent house tenants from voluntarily engaging in conduct that creates a risk of harm to themselves.[4]

● **Timothy M. Burke**

[1] **Oja v. Grand Chapter of Theta Chi Fraternity, et al.**, New York State Appellate Division, 3rd Department, decided January 28, 1999.

[2] In addition to the hazing claim, other claims, including traditional negligence, were made in the case which were unaffected by this ruling. Motions to dismiss are difficult to win because the court must assume the facts alleged by the plaintiff are true. The only way for the court to grant the motion is if the court finds that, as a matter of law, even assuming the facts to be true, plaintiff has not stated a legally recognizable claim. The denial of a motion to dismiss does not mean plaintiff wins, only that the case proceeds. To win, plaintiff must still prove the facts are true to the jury.)

[3] **Oja, et al. v. Grand Chapter of Theta Chi, et al.**, 680 N.Y.S.2d 277; 1998 N.Y. App. Div. LEXIS 12511, decided Nov. 19, 1998.

[4] **Rothbard v. Colgate Univ.**, 235 A.D.2d 675, 652 N.Y.S.2d 146.

## PA Supreme Court Sides with Fraternity

Pi Lambda Phi prevailed in its efforts to defend the zoning on its house in Pittsburgh even though the chapter is without recognition by the University. As reported in previous issues of *Fraternal Law* the University withdrew its recognition from the Pi Lambda Phi Chapter at the University of Pittsburgh. The City of Pittsburgh then took the position that because Pi Lambda Phi was no longer recognized by the University as a Fraternity it was no longer in compliance with the City's Zoning Code. That code defined fraternity houses as being for students but did not specifically require recognition by the University. The Pennsylvania Court of Appeals sided with the fraternity and on March 3, 1999 the Pennsylvania Supreme Court refused to consider the appeal filed by the City of Pittsburgh and thus allowed the Court of Appeals' decision to stand as the final determination by the courts of Pennsylvania.[1]

● **Timothy M. Burke**

[1] For additional background on this matter, see the November 1997, September 1998, and January 1999 issues of **Fraternal Law**.

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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# AN UPDATE ON ROYALTY TREATMENT FOR AFFINITY ARRANGEMENTS

## INTRODUCTION

Many executives of exempt organizations, including fraternal organizations, who are involved in the negotiation of affinity arrangements, have wrongly assumed that, because of the favorable court decisions in the *Sierra Club* case and similar recent cases, the Internal Revenue Service was giving up on its position that at least some affinity arrangements produce income that does not qualify as royalty income for purposes of the Internal Revenue Code. Of course, the result of a non-royalty characterization is that such income is taxable to a Code Section 501(c)(3) charitable organization, and also is not eligible for set aside treatment by Code Section 501(c)(7) organizations, and is therefore taxable to those organizations as well. In two cases currently pending before the United States Tax Court (*Planned Parenthood v. Commissioner* and *Common Cause v. Commissioner*), the IRS is again arguing for non-royalty treatment. The purpose of this article is to provide guidelines for use by negotiators and drafters of these agreements to utilize in hopefully achieving royalty treatment.

## GUIDELINES

Of course, it should go without saying that in describing the revenues to be derived under such agreements, the words "royalty" or "royalties" should be used exclusively. In recent drafts of affinity agreements which this writer has been asked to review, such income has been described as "compensation," "revenues" and other phrases – this should be avoided. While terming the revenue as royalties is not dispositive of the issue, it is certainly difficult, if not impossible, to argue that something is in fact a royalty when it has not even been treated as such by the parties. Similarly, payments that are made as advances against royalties should also be denominated in such a way that they are clearly royalty payments.

The issue on which the IRS has apparently centered its efforts involves the argument that the exempt organization in the typical licensing agreement has provided services to the for-profit licensee, which violates the rule that royalties are passive investment income, and instead converts such income into active income not related to an exempt purpose. An example of such impermissible services is where the exempt organization agrees to assist the for-profit in marketing activities. It is very common to encounter such provisions which are often included unthinkingly by the for-profit organization which will often remove them quite willingly when the reason is explained. Accordingly, such agreements should very clearly state that the exempt organization is not required to participate in such marketing activities. In fact, it is recommended that the exempt organization be required to do no more than supply a copy of its regular mailing list (not a special list created for the for-profit organization) and have approval rights over the materials to make sure that quality and content standards are followed.

Other items that have been observed in recent proposed affinity agreements which should be avoided include the following:

1. Provision of a free advertisement for the affinity card in the fraternity's magazine.
2. Provision of free materials to the for-profit organization – the for-profit organization should clearly bear all of the costs of the program.
3. All materials should be produced in the first instance by the for-profit organization and reviewed only by the exempt organization.
4. All costs should be incurred by the for-profit organization. Even reimbursement by the for-profit organization to the exempt organization for costs it incurs can be attacked by the IRS. (See the United States Tax Court's decisions in the *Oregon State Alumni Association and University of Oregon* cases, now on appeal).
5. The exempt organization should not handle complaint calls about the program or perform oversight.
6. As indicated above, the exempt organization should agree to provide only its standard mailing list or diskette, not a special list created for the licensee.

Recent public comments by an IRS representative concerning these types of arrangements also sounded a warning about using nonprofit postal privileges to mail affinity promotional materials. It is virtually certain that the IRS would view this as a definite negative factor.

## CONCLUSION

If the above guidelines are observed in structuring and carrying out affinity agreements and arrangements, it is likely that the fraternal organization will be in a strong defensive position should the Internal Revenue Service raise this issue on audit. Those organizations which have problematic provisions in their current affinity agreements should consult their counsel to determine whether it is possible for those agreements to be amended so as to preserve the organization's right to claim royalty treatment for what are increasingly substantial sources of revenue for fraternal organizations.

• **Barbara Schwartz Bromberg**

would also be available to the successful plaintiff organizations.

Fraternities or their individual members could also raise claims that Dartmouth would breach its contractual obligations if it eliminated fraternities and sororities from the campus. Some state courts, in reviewing employment cases, have found that employee handbooks may constitute a contract between an employer and an employee. It is not a very far step from that legal theory to one that says the College handbook which details all of the social organizations available on campus and is frequently used as a recruiting tool by a college or a university, can form part of the basis of the contract between a student and the college which he or she is attending. For example, a handbook may contain a broad statement saying students are encouraged to participate in organizations of their own choosing, or make specific reference to the existence and benefits of a Greek system on campus. If a college that published such handbook provisions then acted to prevent a student from enjoying the benefits which had been advertised in the handbook, a breach of contract claim might be possible.

Similar breach of contract claims might be found more easily in a lease between Dartmouth and a fraternity or sorority chapter house corporation for land or building space. Such leases generally run for a period of some years. Where a fraternity or sorority has been encouraged, based on a long-term lease, to build a large and expensive house on college property, the College is not free to ignore the terms of such a lease. The lease is a contract capable of being enforced by either party.

A related legal theory, promissory estoppel, may exist when a party relied to its detriment on promises, commitments or written statements which served to induce that party to change its position to its detriment. For example, a university may have invited a fraternity or sorority to establish a chapter on or near campus. If in response to such an invitation, the fraternal organization expended substantial dollars in the construction of a fraternity house, the university may not be free to simply declare that students may not take part in the Greek system, or live in a fraternity house. Such an action by the university would be totally inconsistent with the college's action in inviting the chapter to campus in the first place and encouraging it or its house corporation to expend substantial dollars in reliance upon that invitation. Under such circumstances, Dartmouth could be liable for substantial financial damages.

Whether or not any of these legal theories could successfully be utilized to defend against an effort by Dartmouth to eliminate the traditional Greek system is unknown. Many facts would need to be gathered and numerous documents analyzed. Some of these theories may have merit, others may not. It will be difficult -- though not necessary impossible -- to legally challenge the decisions of a private institution like Dartmouth. It also remains unknown as to just how far Dartmouth intends to go in pushing for a change in the Greek system. It may be that reforming the system does not mean the death of the system. In which case, costly, protracted and uncertain litigation would not be necessary.

Given the prominence of Dartmouth College and the importance of the Greek system on its campus, this situation bears careful monitoring in the months ahead.

● **Timothy M. Burke**

[1] More information on this topic is available in "The Next Thirty Years of Civil Rights Litigation," Robert E. Manley, 13 Urban Lawyer, 541 (1981).

## MAINE PONDERS NEW LEGISLATION

The legislature of the State of Maine is considering adopting a law similar to the Federal Education Act Amendments of 1998 which would prohibit a private educational institution from denying the constitutional rights of its students. In contrast to the National Education Act Amendments, this state statute, if adopted, clearly provides for the enforcement of its terms. The proposed act specifically allows a student whose rights of speech or association were abridged by a post-secondary educational institution, even though it may be a private one, could sue that institution. The injured party could obtain either legal (damages) or equitable (a court order halting the violation) relief. In addition, the individual whose rights have been violated, could be awarded his or her reasonable attorneys fees by the court.

## ANOTHER ALCOHOL-RELATED DEATH

*The Indianapolis Star* reported on February 26, 1999, that Indiana University suspended the Pi Kappa Alpha Fraternity for one year. The suspension resulted from the death of Joseph Bisanz, a 19-year old junior, who apparently died after choking on his own vomit after he drank alcohol during a fraternity party. University officials determined that members of the chapter purchased an undetermined amount of alcohol and beer that was made available to those at the party, including Bisanz. Pi Kappa Alpha, with approximately 120 members on the IU campus, did not appeal the University's suspension.

The International Fraternity withdrew the chapter's charter for a minimum of one year and started interviewing members to determine who should be invited to reorganize the chapter.

According to *The Star*, the Indiana University Police Department is continuing to investigate Bisanz' death to determine whether or not criminal charges should be filed.

to join together in social organizations of their choice. In *Healy v. James*, 408 U.S. 169 (1972), the issue was whether or not a state university, Central Connecticut State College, was required to recognize a local chapter of the Students for a Democratic Society. SDS was widely regarded as a radical organization that was believed to include among its purposes the overthrow of the government of the United States. Yet, the Supreme Court of the United States held that students on a state campus could freely associate in groups they created, provided such organizations did not disrupt the campus or violate the reasonable rules of the university. Members of fraternities and sororities clearly have freedom of association rights, though a university which can identify disruptive behavior by a fraternity or sorority in violation of university rules and regulations, can discipline such an organization and can, under appropriate circumstances, deprive it of the benefits of recognition. In the absence of a documented history of disruption or rule violation, courts would likely enjoin a state university's effort to prevent its students from freely associating in fraternities and sororities of their choosing.

Until recently, it was relatively well-settled that a private campus was not required to recognize the federal constitutional rights of its students, including the right to freedom of association. Action by the Congress of the United States last year in adopting amendments to the *Higher Education Act of 1998*, made it clear that federal constitutional protections should be extended to students on private campuses.

The amendments, adopted by overwhelming margins in both the House and Senate, provided, in part, that "It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under an education program, activity or division of the institution directly or indirectly receiving financial assistance under the Higher Education Act of 1965...."

It is reasonably clear that a forced closure of the fraternity and sorority system at Dartmouth would deprive those students involved of their Constitutional rights and would be in violation of the Education Act amendments. What is unclear, because the issue has not yet been litigated, is the enforceability of these amendments. The Act does not have a specific provision defining how the amendments are to be enforced. It is certainly possible that an action could be brought to enjoin the distribution of federal funds, at least those funds distributed under the Education Act, to an institution which deprives students of rights that would, on a public campus, be constitutionally protected. Thus, if Dartmouth is determined to eliminate fraternities and sororities, it could jeopardize its federal funding.

Since the amendments to the Higher Education Act extend First Amendment protection to students in colleges and universities not run by government, if the colleges or universities receive federal aid, the individual members of fraternities may have civil rights claims. There is even a possibility that fraternities could have civil rights claims. The Supreme Court of the United States in *Maine, et al. v. Thiboutot, et al.*, 448 U.S. 1 (1980), held that a lawsuit under the Federal Civil Rights Statute, 42 U.S.C. 1983, can be brought by any person who is deprived of his rights, privileges or immunities "secured by the Constitution *and* Laws of the United States." This holding has been widely interpreted to make it possible to use the civil rights laws to enforce any right protected by the statutes of the United States.

**It is reasonably clear that a forced closure of the fraternity and sorority system at Dartmouth would deprive those students involved of their Constitutional rights and would be in violation of the Education Act amendments.**

In order to file a civil rights suit, it is necessary that the federal statute not have within it a comprehensive scheme of enforcement. *Middlesex County Sewage Authority, et al. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981). The 1998 Amendments to the Higher Education Act do not contain a comprehensive scheme of enforcement which may thrust these new statutes into a successful civil rights lawsuit.[1]

Other remedies may be available to Dartmouth's fraternities and sororities. For example, if Dartmouth College attempts to close all fraternity houses and require all students to live on campus, the college may run afoul of federal or state antitrust laws. Dartmouth has indicated in its recent pronouncements a desire to create more on-campus residential housing choices. If it can be established that part of the purpose in closing fraternity houses off-campus was to eliminate competition for these new on-campus residential services, an antitrust claim could be brought against the College. Such was the case at Hamilton College less than two years ago when four fraternities sued Hamilton College for doing some of the same things that Dartmouth may attempt to do.

If such a suit were successful, the fraternities and sororities involved as plaintiffs could look to the court to order Dartmouth College to stop its anti-competitive conduct, and to determine what actual damages have been suffered by each fraternity. Should damages be found in an antitrust case, the court would award treble damages (actual damages multiplied by three). Attorneys fees