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FRATERNITY NOT RESPONSIBLE FOR VOLUNTARY UNDERAGE DRINKING

The Supreme Court of Iowa recently issued a well-crafted decision[1] carefully distinguishing between the liability of a fraternity and a wrongdoing member. The decision also placed at least some responsibility on a decedent for his own death when that death resulted from the voluntary excessive intake of alcohol. However, a sharply divided court suggested that chapters that ignore the illegal provision of alcohol to minor members on chapter premises may be liable in the future even though the chapter had no direct involvement in providing the alcohol and the activity took place in members' private rooms.

Shortly after the University of Iowa opened for class in the fall of 1995, Lambda Chi Alpha conducted a Big Brother/Little Brother ceremony at its fraternity house to welcome new associate members. Each new pledge was introduced to his "big brother." No alcohol was served or consumed during the ceremony; however, as the court described, "it was traditional following the ceremony for each big brother to invite his new little brother to his room to toast their new relationship with drinks before adjourning to downtown taverns for more serious partying." The beer and liquor consumed was purchased by each individual big brother, not by the fraternity and, in fact, there was a written fraternity policy prohibiting the use of chapter funds to purchase alcohol.

Matt Garofalo was invited to the room of Chad Diehl, his new big brother. Diehl had purchased beer and a bottle of Southern Comfort to share with Garofalo, even though Garofalo had not yet reached the legal drinking age. Garofalo drank heavily and soon showed signs that he was in no shape to go to the downtown bars. He ultimately passed out on the couch. While there was evidence that for several hours, and periodically thereafter, individuals checked on Diehl's condition, around 11:30 a.m. the next morning it was discovered that Garofalo was dead. He had apparently vomited and died from, what the court described as "pulmonary edema caused by aspiration of his gastric contents after consuming excessive quantities of beer and hard liquor." The medical examiner who conducted the autopsy concluded that prior to Garofalo's death, his alcohol level may have peaked at .250 to .300 percent.

As could be expected, Garofalo's death was investigated by his fraternity, the university and local police. The police and the university both concluded that there was no hazing involved in the event and that no one forced Garofalo to drink. In fact, the police report stated "indications regarding Garofalo's intake of alcohol reflect a decision on his part to consume rather than a mandate from his housemates to that effect." Other evidence indicated that at least one of the little brothers consumed no alcohol at all that evening.

Garofalo's parents, on behalf of themselves and their son's estate, sued the Lambda Chi Alpha Fraternity, its chapter, Diehl and another member of the fraternity. They urged that the fraternity and its chapter were liable because there exists between a fraternity and its members a "special relationship" that imposes on the fraternity a heightened duty to care for and protect their members. When members of the fraternity, in violation of state law, provided alcoholic beverages to minors like Garofalo, they were engaging in conduct that the fraternity should have reasonably foreseen as being dangerous and should have controlled. According to Garofalo's parents, ignoring that conduct violated the chapter's and the fraternity's special duty to its members.

The Iowa Supreme Court made it crystal clear that a violation of the Iowa criminal law against providing alcohol to minors could be the basis to impose civil liability on the person furnishing the alcohol to the minor if that action resulted in death or injury. In this case, it was Diehl who purchased and furnished the alcohol and neither the national fraternity nor the chapter had any involvement in that enterprise. For this reason, the claim against Diehl was not dismissed and this case will apparently go back for trial against Diehl to determine his liability and financial responsibility, if any.

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With regard to the liability of the national fraternity, the court noted that "the majority of courts have held that the adoption of institutional policies prohibiting underage drinking do not establish custodial relationships between the institution and its members so as to impose a duty of protection on the part of the institution." The court, therefore, upheld the trial court's recognition that the fraternity "is not a custodial institution and its members, as adults, are free to make choices about their use and abuse of alcohol. No care-taking function is involved."[2]

In reviewing the issue of whether or not the chapter was liable for Garofalo's death, the court noted that in some other jurisdiction, fraternities have been held liable for the alcohol-related deaths of their members. The court reviewed a number of those cases and recognized that in all of the cases reviewed, organized hazing and the forced consumption of alcohol played critical roles. That was not the case in Garofalo's death. The Court found that there was no evidence to suggest or imply that "Garofalo or any other members' consumption was coerced or required as a condition of chapter membership. To the contrary, the record yields proof that Garofalo was an experienced, if not sensible, drinker and that at least one of his peers chose not to drink at all." In upholding the dismissal of the chapter, three Justices specifically stated "the ideals of fellowship espoused by the chapter are insufficient, standing alone, to create a duty on the part of the chapter to protect Garofalo from his voluntary, adult choice to drink to excess."

While the Supreme Court unanimously upheld the Motion for Summary Judgment granted in favor of the national fraternity, the court was actually deadlocked three-to-three on the issue of whether the Motion for Summary Judgment in favor of the chapter should stand. Under Iowa law, that deadlock meant that the decision of the lower court was affirmed.[3]

It is important to recognize that three of the six Supreme Court judges ruling on this case would have overturned the Motion for Summary Judgment granted to the chapter and sent the case back for trial against the chapter. Those judges were clearly bothered by the fact that drinking, including drinking by underage members, was known to be traditional following the Big Brother/Little Brother Ceremony. Iowa law, the three dissenters argued, would have allowed a jury to find that the chapter, which ignored the known illegal consumption of alcohol, was responsible for the actions of its member Diehl when he supplied alcohol to a minor. The Court, the dissenters observed, had previously held that host liquor liability could be imposed on those who made alcohol available but that a host "need not personally fill his guest's beer glasses" in order to be liable. The clear implication of the dissenters' logic was that the chapter could be placed in the role of a host and be held liable for the consequences of illegal consumption on its premises.

The dissenting justices were particularly critical of the atmosphere in the chapter house noting "the evidence in this case is that underage drinking in the Iowa chapter house was the norm rather than the exception long before the incident in question.... Virtually every witness testified that beer and other alcoholic beverages were made available to underage members. A reasonable inference from the record is that virtually every member was aware this was happening and virtually every member, passively, if not actively, approved the practice." Informal bars were set up in six separate rooms of the fraternity house and some of the chapter officers, including Diehl, who was a vice president of the chapter, purchased alcohol to supply to the underage Little Brothers.

The three dissenting justices were also impressed that the university itself had concluded that the "post ceremony activities took place in the course of the Iowa chapter's affairs." As a result, the university had suspended the chapter, finding that it did not exercise reasonable preventative measures to ensure compliance" with the law and underage drinking. According to the dissenters, a jury could conclude that the chapter had vicarious liability for the supplying of alcohol to minors, permitting underage drinking on its premises in clear violation of Iowa law, and negligently supervising activities in its chapter house on the night of the tragedy.

At least in Iowa, this case goes a long way in reducing the National's exposure to liability while imposing liability directly on those individuals most responsible for a death. However, the deadlock on the issue of the chapter's liability should send a strong warning to those chapters who engage in or permit the voluntary consumption of alcohol by its underage members on chapter property. In this case, the liability of the chapter could just as easily have gone the other way if either of the two justices on the court who did not take part in the case had instead participated and voted.

It is an unwise chapter and very short-sighted officers who would knowingly engage in or permit the conduct that occurred in this case.

• Timothy M. Burke

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[1] *Garofalo v. Lambda Chi Alpha Fraternity, et al.*, 616 N.W.2d 647, 2000 Iowa Sup. LEXIS 149 (Sept. 7, 2000).

[2] The second member of the fraternity was also granted summary judgment on the grounds that there was no evidence that he had harmed Garofalo by furnishing him alcohol, nor did he have any responsibility for Garofalo once Garofalo became drunk.

[3] The denial of the chapter's Motion for Summary Judgment would not have necessarily meant that it was liable for Garofalo's death. Rather, the case would have gone back to a trial at which a jury would have heard the complete evidence and would have made the decision as to whether or not the conduct of the chapter was the cause or a part of the cause of Garofalo's death. If the jury found that it was, the jury would then have determined how much damage the chapter was liable to pay.

IRS ADDITIONAL GUIDANCE CONCERNING POPULAR FOUNDATION PROGRAMS

Introduction

Two popular programs sponsored by many fraternal foundations are the maintenance of an "aid to needy members" fund, which is often named after a significant person in the fraternal organization's history or a generous benefactor, and the maintenance of a museum or historical house, usually at a site related to the founding of the fraternal organization. The IRS has recently issued further guidance relating to these types of programs and this column will discuss some of the ramifications of such guidance for fraternal foundations that sponsor one or both of these programs.

Aid to Needy Members Fund

In the mid-1990's, the IRS issued several private letter rulings holding that employer-related disaster assistance and hardship relief foundations further charitable purposes within the meaning of Code Section 501(c)(3). (Such foundations are operated somewhat similarly to those maintained by fraternal foundations to aid needy members and consequently, these private letter rulings provide much of the guidance upon which the recommended procedures for operation of such funds is based.) Recently, however, the IRS revoked (a fairly rare procedure) these rulings and ruled that the same foundations did not further charitable purposes because of prohibited private benefit to the employers. The IRS also discussed disaster relief and emergency hardship funds in its 1999 Continuing Professional Educational Technical Instruction Program.

Even assuming the rationale of the new rulings is viable, since IRS private letter rulings apply only to the organizations to which they are issued, and there are significant differences between employer funds of this type and the fraternal foundation funds, it does not appear that the Service's recent change in position should apply to funds established by Greek foundations. Nevertheless, in light of this guidance, there are some steps recommended to all fraternal foundations maintaining this type of fund in order to incorporate some of the concepts emphasized in the recent guidelines. These are as follows:

- Foundations should establish an objective set of criteria concerning eligibility for awards from the fund. For example, very often no definition of "needy" is provided. The definition of "needy" in the Treasury regulations suggests that a definition such as the following would be acceptable for these purposes. As noted below, an individual does not have to be totally destitute to be needy. "A person is considered 'needy' if he or she lacks the necessities of life, involving physical, mental, or emotional well-being, as a result of poverty or temporary distress. Generally, the person will have become needy as a result of sudden and severe financial burdens as a result of events that are beyond such individual's control. Examples of needy persons include a person who is financially impoverished as a result of low income and lack of financial resources, a person who temporarily lacks food or shelter and the means to provide for it, a person who is the victim of a civil disaster, and a person who is temporarily not self-sufficient as a result of a sudden and severe personal or family crisis."

- The foundation should always determine the amount of an award from such a fund based upon all of the facts and circumstances of the individual's situation. An outright transfer of monies without regard to meeting the individual's particular financial needs would likely result in prohibited private benefit and could even threaten the foundation's exemption. For example, the foundation should avoid a pattern of granting the same amount to each applicant in every situation. In this regard, foundations should consider adoption of the following guidelines:

  > "The foundation will determine whether a person is needy as a result of poverty or financial hardship based on all of the facts and circumstances. Poverty or financial hardship shall be determined by examining whether the potential recipient's available cash, assets that can be disposed of without causing further personal hardship, and anticipated cash flow (income, insurance proceeds, etc.) from all sources can reasonably be expected to be insufficient to provide for timely retirement of existing obligations and basic living needs, such as food, housing, clothing, medical care, transportation, household repairs, or other similar necessities. A recipient does not have to be totally destitute to be needy. Instead, the person must lack the resources to meet the basic necessities of life. The foundation will determine the amount of the award based upon all of the facts and circumstances of the individual's situation and the foundation's resources."

- Such a foundation must maintain adequate records and case histories to justify the individual grants as being in furtherance of charitable purposes if a question were to be raised. It is recommended that a foundation incorporate into its procedures governing such a fund guidelines like the following to carry out this requirement:

> "The fund shall maintain records concerning each applicant containing basic information such as names, addresses, telephone numbers, social security numbers, a brief description of temporary financial distress, the type and amount of assistance needed, and the type and amount of assistance granted (if any). Moreover, the fund shall maintain records concerning each applicant's financial condition such as available cash, expenses, other financial obligations, assets that can be disposed of without causing further personal hardship, and anticipated cash flow (income, insurance proceeds, etc.). The fund shall also retain records for each applicant concerning whether the applicant's resources are insufficient to provide for timely retirement of existing obligations and the continuing basic living requirements (food, housing, clothing, medical care, transportation, household repairs, or other similar necessities)."

- The foundation should always advertise the availability of the fund to all of its alumnae(i) members.

Note that the above is not an exhaustive list of all procedures which apply to this type of fund and foundations maintaining these funds are urged to consult with their counsel in order to ensure that their funds are operated in a manner to benefit only the truly needy.

Museums and Historical Houses

Another IRS private letter ruling arose out of an audit of an organization that operated a historic site including a manor house which contained a valuable and significant collection of antique furnishings and household effects and was registered as a national historic landmark. While the IRS had initially granted the organization recognition of charitable tax exempt status provided that the house remained open to the general public at regular set hours, upon an IRS audit, the Service determined that the organization had not made the house adequately accessible to the general public. In order to resolve the matter, the Service and the organization agreed that the organization would take the following additional steps in the interest of public accessibility:

- The house would be open to the public on set days and times during the week, in addition to being open at other times by appointment.

- Visitors would be provided with detailed printed material describing the history, architecture and furnishings of the house, and a tour of the public rooms of the house.

- The brochure would include detailed directions to the house, a telephone number, and the times of operation, along with a detailed history of the house and a map of the house.

- A permanent sign would be placed at the main entrance on the public road to the house with information about the house and times of public access to the house prominently visible.

- The brochure would be distributed to a number of area tourism groups, such as chambers of commerce, for distribution and display at their visitor centers.

- The organization would advertise at least annually in an historical or antiquities interest periodical of wide circulation and more frequently in an appropriate periodical of regional circulation and a newspaper of general circulation in locations frequented by area tourists. The advertisement would include an historical identification, as well as the information in the brochure.

- The organization would keep a visitor register.

Again, the foregoing items apply by their terms only to the specific factual situation addressed in the IRS private letter ruling in question. Nevertheless, the above items provide insight into the type of factors that the IRS could well apply to the typical historic site maintained by a fraternal foundation. It is therefore recommended that fraternal foundations supporting such properties work with their counsel to determine how to adapt as many as possible of these factors to their own particular situation.

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THE FINAL SETTLEMENT: SIX MILLION DOLLARS

On September 27, 1997, Scott Krueger, an 18 year old freshman at the Massachusetts Institute of Technology, died from an alcohol related incident in the Phi Gamma Delta Fraternity house where he was living. Subsequent to his death, the fraternity chapter was criminally charged with manslaughter. The criminal case was ultimately not pursued when the chapter disbanded and there was no defendant left to take to trial in the criminal case.

Now, three years after his death, MIT has reached a settlement with the parents of Scott Krueger. According to a statement released by Charles M. Vest, the President of MIT, on September 13, 2000, "MIT will contribute $1.25 million for scholarships to be established by Mr. and Mrs. Krueger and, in addition, will pay them $4.75 million to be used as they determine." MIT apparently had exposure to liability because with an undersupply of housing, even freshmen lived in fraternity houses, and as the County District Attorney said at the time of the chapter's indictment, MIT "moved too slowly in addressing a trouble-plagued fraternity."

President Vest also released the following letter to Mr. and Mrs. Krueger. Because of its important message, the body of that letter is reprinted in its entirety.

> Dear Mr. and Mrs. Krueger:
>
> I am grateful that Rosalind Williams and I were able to talk with you and come to understand even more deeply your family's unimaginable anguish over Scott's death. Despite your trust in MIT, things went terribly awry. At a very personal level, I feel that we at MIT failed you and Scott. For this you have our profound apology.
>
> The death of Scott as a freshman living in an MIT fraternity shows that our approach to alcohol education and policy, and our freshman housing options were inadequate. I am deeply sorry for this.
>
> Scott's death galvanized us to action. It impelled us to greatly intensify our consideration and accelerate our actions with regard to alcohol, our housing system, and other issues of student life and learning. Starting in 2002, when additional housing has been constructed, all of our freshmen will be required to live for their first year in residence halls. Our approach to alcohol education as well as to policies regarding its use -- and their enforcement -- have been greatly strengthened. We are building a stronger sense of community and community responsibility. All this takes longer than I would like, and will never be perfect, but MIT is, and will be, a better institution for having undertaken substantial change.
>
> I am a parent, and have devoted my entire career to teaching and academic administration because I believe in young people and in the importance of their education. The death of your son has profoundly affected me. My MIT colleagues and I will continue to apply the lessons of this tragedy and make MIT the better for it.
>
> It is with great respect and personal gratitude that I thank you for the opportunity to meet in person. With your help, I now have a greater understanding of your terrible loss and of MIT's responsibilities to its students and their families.
>
> I understand that you wish to make this letter public. You certainly have my permission to do so.
>
> Sincerely yours,
>
> Charles M. Vest

In addition to the settlement, MIT emphasized, in a separate statement, other steps that the university and its fraternities had taken since Scott Krueger's death. These included the banishment of Phi Gamma Delta from MIT in perpetuity; a change in MIT's housing policy which, beginning in 2002 will require all first year students to live on campus; five fraternities voluntarily declared themselves to be alcohol free; educational, medical and counseling programs were increased; and the regulation of events with alcohol was increased as was method of enforcement and sanctions for violating university alcohol policy.

Fraternity and sorority officials, including chapter officers, must recognize that tragedies like that of Scott Kruger's at MIT, are totally avoidable through the exercise of common sense and compliance with the law. From among those that fail in these obligations may well come the next writer who must pour out his or her heart to grieving parents.

• Timothy M. Burke

MASSACHUSETTS SUPREME COURT RULES IN THE BRANDEIS CASE

On September 25, 2000, the Supreme Judicial Court of Massachusetts ruled on the case reported in the September 2000 *Fraternal Law* involving private universities and the extent to which courts can intervene in the disciplinary proceedings of private colleges and universities. In *Schaer v. Brandeis*, the Supreme Judicial Court shut down any possible expansion of the rights of students attending private universities and colleges in Massachusetts.

The conflict between David Arlen Schaer and Brandeis University commenced over four years ago when a female Brandeis student filed a report with the Brandeis student judicial system alleging that Schaer, then a Brandeis student, engaged in sexual intercourse with her against her wishes. As a result of that hearing, Schaer was suspended for four months and placed on disciplinary probation. Following the denial of an appeal hearing, Schaer requested judicial intervention.

The Supreme Judicial Court of Massachusetts examined Schaer's case by focusing on an alleged breach of the contract between the University and Schaer. The Court, at least impliedly, recognized that there is a contract between a university and its students. The basic terms of this contractual relationship provide that, in exchange for the student's tuition and compliance with the rules set forth by the university, the university will not act in an arbitrary or capricious manner when disciplining the student. In reviewing whether Brandeis breached the contractual relationship, the court focused on the rights that Schaer should reasonably expect to receive as a Brandeis student. The Court also examined whether the disciplinary process provided Schaer comported with the basic fairness owed by a university to its students. In its decision, the Court pointed out that a university is not bound by the same rules of evidence that a trial court would be bound by and determined generally that the facts alleged by Schaer in his complaint, even when construed in his favor, were not sufficient to show that he was denied "basic fairness" in the University's disciplinary process. In addition, the Court ruled that Schaer's factual allegations failed to establish that the disciplinary proceedings failed to meet the "reasonable expectation of the contract rights to which he was entitled."

The bottom line in the Court's decision can be found in the second last paragraph of the majority decision:

> "We adhere to the principle that 'courts are chary about interfering with academic and disciplinary decisions made by private colleges and universities.' A university is not required to adhere to the standard of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. 'A college must have broad discretion in determining appropriate sanctions for violations of its policies.'"

Two justices dissented, arguing that the three member majority did not apply the appropriate standard of review to a motion to dismiss. They noted that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove a valid claim based on the facts alleged in the complaint. Furthermore, the motion to dismiss was granted before the University was required to file an answer and before any evidence was presented to the court. Rather, the motion to dismiss was granted solely on the face of the complaint filed by Schaer, thus ruling that his claims did not even warrant consideration by the court.

While the *Brandeis* case dealt with the interpretation of Massachusetts law, the case was one that was being monitored across the country by many private educational institutions and those groups which interact with them. It is likely to be a case that receives significant attention in those circles.

• Mackenzie Becker

On October 6, 2000, a football player from the University of Cincinnati ("U.C.") filed suit against the University and two of its administrators alleging violations of his constitutional right under the Fourteenth Amendment to the Constitution. The football player had been disciplined by U.C., a state university, for acts similar to those alleged in the Brandeis case. The player claims in his lawsuit, among other alleged violations of his rights, that the University failed to apprise him of his rights, failed to apprise him of what the charges were against him, and denied him the opportunity to confront his accuser. This case places the Brandeis issues squarely in the context of a public university dispute. Whether the fact that the University of Cincinnati is a public university as opposed to Brandeis which was a private university, will make a difference in the outcome of the litigation remains to be seen. It is a case that bears watching.

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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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