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ANTITRUST IMPLICATIONS OF FRATERNITY MISTREATMENT BY COLLEGES

That colleges can be illegal monopolists is well-settled law.¹ Based upon this well-established principle of law, four fraternities sued Hamilton College when the College demanded that they sell their houses to the College so that the College could take total control of the local housing market and the market for food services to Hamilton College students. This gave Hamilton College monopoly power over student housing and food services in the vicinity of Hamilton College. The fraternities were Alpha Delta Pi, Delta Kappa Epsilon, Psi Upsilon and Sigma Phi.

The fraternities lost because the court defined the relevant market as the market for students who want to attend small, expensive liberal arts colleges in the northeastern part of the United States.² Thus, Hamilton College got away with monopolizing the housing and food services market for its students and putting itself in a position of a monopolistic buyer. By forcing the house corporations to sell their houses, Hamilton College was the one buyer and that gave the Hamilton College monopoly power.

The fact is three of the four fraternities had to retreat from the litigation because they ran out of money. The fourth carried forward to a defeat. This dumped ice water on defenders of student rights who had hoped to rely upon the antitrust laws.

The Sherman Act "prohibits every agreement in restraint of trade."

Recently, a thorough analysis of the issue was published in an article written by Mark D. Bauer.³ In the article entitled "Small Liberal Arts Colleges, Fraternities and Antitrust: Rethinking *Hamilton College*,"⁴ Professor Bauer argues persuasively that the Hamilton College case was decided incorrectly and that future cases will probably be decided differently. Indeed, he cites what happened at Hamilton College after the takeover of the fraternity houses as evidence of the monopolistic consequences of Hamilton College's fraternity

takeover.

To put it in context, the United States Congress passed the Sherman Antitrust Act in 1890 to "curb the power and monopolistic abuses of the trusts that had come to dominate the American econom[y]."⁵ The Sherman Act "prohibits every agreement in restraint of trade," as explained by Professor Bauer in his article.

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It should be clear that in regard to residential services provided by colleges and fraternities, the product market is the market for "residential services for college students at individual colleges, which include housing, meals, and social facilities." Professor Bauer describes the Hamilton College case as providing a "helpful discussion," but "unfortunately it does not represent settled or well-reasoned law."

Before Hamilton took its action against fraternities, the College controlled 80% of the residential services market for Hamilton students. Around 1992, it began a campaign to take over the fraternity houses to expand its residential capacity.

After Hamilton College secured its monopoly power, charges for room and board at Hamilton College increased \$2,310, exceeding the charges of its closest rival, Colgate University. At the same time, available living facilities were reduced and students were crowded into spaces designed for fewer people. Hamilton College students received lower quality services at higher prices. A similar issue is festering on the campus of Colgate University at the present time.

Professor Bauer's analysis of the antitrust law suggests that there is life for future antitrust lawsuits against small colleges that force fraternities to sell their houses, because of the college's intention to prohibit students from living in fraternity houses. It may be that the reason the fraternities

lost at Hamilton College was that they did not have adequate funding for their litigation, including the mustering of effective expert testimony by economists.

It is unlawful for a college to attempt to monopolize the market, or to actually monopolize the market. If the market is defined to be the local market around the campus for housing services for students, what Hamilton has done and what Colgate is in the process of doing is unlawful under both state and federal antitrust laws.

It is undoubtedly true that there is a market for students who want to attend small liberal arts colleges in the north-eastern part of the United States. Formerly having competed in that market, when the College ties in a mandatory use of student housing services provided only by the University, it is unlawfully monopolizing the market for student housing services. Professor Bauer explains this in detail in his analysis of the issues. When the College is successful in destroying competition between fraternities and the college dormitories for student housing services, the College solidifies a

monopoly position which enables the College to produce poor quality facilities and services at higher prices. This is exactly the type of predatory practices that both the state and federal laws are designed to make unlawful.

• Robert E. Manley

¹ *Sunshine Books, Limited v. Temple Univ.*, 697 F. 2d 90, 91 (3d Cir. 1982).

² *Hamilton Chapter of Alpha Delta Phi, Inc., et al. v. Hamilton College, et al.*, 128 F. 3d 59, 121 Ed. Law Rep. 956 at 59.

³ Visiting Assistant Professor, Chicago-Kent College of Law.

⁴ 53 Catholic Univ. L. Rev. 347 (2004).

⁵ III Earl W. Kintner and Joseph P. Bauer, *Federal Antitrust Law* 4 (1983).

THOUGHTLESS PRANK CLOSES FRATERNITY

What apparently began as someone's ill-conceived idea of a prank has led to the banning of the Phi Kappa Sigma Fraternity at the University of New Hampshire and the criminal conviction of two of its members.

In March 2003, a University co-ed fell asleep on a couch in the men's fraternity house after an evening of drinking. When she awoke she found drawings in red and black indelible ink on her face, neck, arms and back. The drawings included swastikas, penises and the fraternity letters.

Not until ten months after the incident did the victim report it to the University. That report was apparently made after she suffered harassment from one or more members of the fraternity for seeking an apology. The harassment consisted of late night phone calls and messages left on her house and cell phones containing obscenities.

Subsequently, two members of the fraternity were charged with assault for having drawn on the woman without her permission. While the state did not treat the matter as a "hate crime," apparently in reaction to the swastikas, the University did find the conduct to constitute discriminatory harassment. Had the state been able to prove that the conduct was motivated in response to the victim's religion, race, creed, sex or sexual orientation, the perpetrators may have been subject to more severe criminal sentences. As it was, the two individuals were convicted of assault and fined \$600 and sentenced to 50 hours of community service.

The University proceeded with disciplinary action against the fraternity and, in relatively short order following the filing of the complaint, the University permanently dismissed the Phi Kappa Sigma Fraternity from campus.

This bizarre incident drew substantial media attention, perhaps because the New England Regional Office of the

Anti-Defamation League became very publicly involved. The League contacted the University about what the League referred to as a "deeply troubling incident" and commended the University for its swift action against the Fraternity.

Reactions from the Fraternity varied. The International Fraternity expressed concerns over the failure of the University to notify the International of the issue until after the disciplinary action had been completed. Obviously, that failure of communication extended to the Chapter as well. The Chapter President claimed that the matter was an "innocent, spontaneous thing that went too far" and that it was something that "happens at every college campus." He also acknowledged that given the punishment imposed by the University, the Chapter won't be able to participate in the formal rush process or in the IFC.

Obviously, the conduct engaged in by those who drew on the woman's body was absolutely wrong. No doubt, it was made more offensive by the drawing of swastikas and penises, but fair questions can be raised about how far a university should go in making an entire chapter collectively responsible for the criminal conduct of two of its members.

If the assault had occurred in the private apartment of two fraternity members, would the Fraternity be responsible? In this case, perhaps the University may have felt that the Fraternity had a greater deal of responsibility, not simply because the conduct occurred in its house, but because of the harassment of the victim that occurred afterward. That harassment may have been known to other members of the Fraternity.

• Timothy M. Burke

UNIVERSITY DENIES DUE PROCESS MUST PAY \$350,000 IN FEES

A district court in Brazos County, Texas recently ruled that Texas A&M University had to pay over \$349,000 in attorney's fees to students who claimed that they had been subjected to improper disciplinary proceedings by A&M.

The University, in an apparent effort to crack down on what it perceived as hazing, adopted revised rules and then sought to discipline the students for violations of those rules that occurred well before the rules had been adopted. Twenty-three students sued Texas A&M. In the spring of 2003, the plaintiffs obtained court orders enjoining the University from proceeding with disciplinary proceedings or the imposition of sanctions against the students. A trial was held in the fall of 2003 and a final judgment issued by the court on August 13, 2004.¹

The plaintiffs argued they had been denied basic due process rights during the course of the disciplinary proceedings. Texas A&M is a state-supported University. As a result, unlike private universities, there is a well-established body of case law that requires state universities to recognize the constitutional rights of their students. That extends to disciplinary proceedings.

The District Court ultimately made specific Findings of Fact and Conclusions of Law. Among the Findings of Fact were that the University had attempted to discipline students for past conduct which was not proscribed at the time it occurred, that the University hindered the plaintiffs' right to consult with counsel, coerced self-incriminating statements from plaintiffs, considered evidence kept secret from the plaintiffs, and that the University's hearing officers were not neutral or impartial. The court also found that A&M had failed to provide the students notice of the specific conduct that they were accused of committing in violation of the new rules.

The rules of a private organization should provide "fundamental fairness" – notice of the infraction, the right to be heard and to hear evidence against the member and a fair presider at any hearing or meeting at which discipline is being considered.

Plaintiffs maintained that the highest officials of the University had predetermined the disciplinary cases before they ever proceeded to hearing. They produced evidence that the President of the University had sent correspondence to other University officials inquiring if "any students [had] been expelled yet?" Plaintiffs produced evidence at trial that hearing officers were shown videotapes and statements that

were not shown in their complete form to the students involved. Even though the University Student Rules gave a student the right to remain silent in any disciplinary hearing, students were not advised of that right and, in fact, at least one university official told plaintiffs that if they availed themselves of the right to remain silent, they would be found responsible for the alleged violation. Plaintiffs also argued that they could not have known that the conduct that they were now told was a violation of University rules was a violation at the time it was committed because the conduct had long been known to the University, it was not prohibited and no action had been taken against those involved previously. Plaintiffs cited similar activity having taken place in front of University officials and even yearbook photos suggesting the activity was going on even after the students involved in this case were threatened with punishment.

The Court ultimately made a series of Conclusions of Law, including:

- "While school officials must be given considerable freedom to achieve effective school administration, courts should not hesitate to act when fundamental constitutional liberties are contravened."
- "An undergraduate student has a constitutionally-protected liberty interest in his undergraduate education that must be afforded procedural due process."
- "When a public school or state university takes disciplinary action against a student which, for any substantial length of time, deprives the student of the opportunity to continue his or her education, the school must afford the student due course of law."

While the Court specifically ruled that due process or, as the court put it, the "due course of law" does not require that student disciplinary hearings take the form of full-dress judicial hearings (i.e., it does not require cross-examination), a state-supported university is prohibited from compelling a student to give evidence against themselves, from using evidence against a student which was obtained in violation of the due course of law, and requires that evidence be disclosed to a student and the student be given an opportunity to contest the evidence. The State university is also required to provide a neutral and detached hearing officer and may not punish students for conduct which was not proscribed at the time it occurred.

In the end, the Court issued a series of orders against the University designed to prevent the University from further proceeding against the students involved and providing certain other relief to those students. Perhaps the most stunning of the orders was the requirement that Texas A&M pay a total of \$349,340 to the plaintiffs as their attorney's fees and further ordered that additional fees be paid should the University choose to appeal the case and not succeed.

It is critical to note that Texas A&M is a state university. The law is not nearly as clear on the obligations of a private university to follow constitutional due process in their disciplinary proceedings. However, a private university which commits to doing so in its Student Handbook or other university publication, may be required by contract to afford these same protections.

A fraternity or sorority, acting in its private capacity to discipline its own members, has no obligation to provide Constitutional due process. Rather, what is clearly required is that the fraternity or sorority follow its own rules. A court will generally not interfere in the private disciplinary matters

of a fraternity or sorority, so long as its own rules are followed. [The rules of a private organization should provide "fundamental fairness" – notice of the infraction, the right to be heard and to hear evidence against the member and a fair presider at any hearing or meeting at which discipline is being considered.]

Should a court find that a private organizations has not followed its own rules, the court is not likely to award attorney's fees since under the American system of justice, each side generally pays its own attorney's fees. Texas A&M was required to pay attorney's fees because the United States Civil Rights Statute provides that if a state actor deprives someone of their civil rights, the state actor can be liable not only for damages, but also for the attorney's fees incurred by the plaintiff.

• Timothy M. Burke

¹ *Hole, et al. v. Texas A&M University*, 272nd Jud. Dist., Brazos County, Texas, Cause No. 03-00858-CV-272.

TRADEMARK ENFORCEMENT

Trademarks of distinctive letters and insignia of a fraternity are not very useful unless they are aggressively enforced. A decision in late October 2004, by the United States District Court in Indianapolis, exemplifies the importance of aggressive enforcement.¹

A group of fraternities² sued a North Carolina corporation known as Pure Country, Inc. for trademark infringement.

The fraternity plaintiffs hired Affinity Marketing Consultants, Inc. to assist in policing the enforcement of licensing of their trademarks. Affinity recruited Pure Country, Inc. as a licensed vendor starting in 1998. Prior to that, Pure Country, Inc. had been marketing Afghans bearing insignias of various Greek groups without a license for more than a year. Pure Country, Inc. entered into a licensing agreement with the plaintiffs through Affinity. The Agreement expired on June 30, 1999. Pure Country, Inc. chose not to renew the Agreement. It confirmed this in a letter dated September 3, 1999. Pure Country, Inc. continued to use the trademarks. The Greek groups sued.

The plaintiffs moved for summary judgment. Their assertion was there were no contested issues of fact and under the facts they were entitled to judgment as a matter of law. The court agreed and found that Pure Country, Inc. violated the trademark laws in Section 32(1)(a) of the Lanham Act, 15 U.S.C. Section 1114(1)(a) and engaged in unfair competition as prohibited in Section 15 U.S.C. Section 1125(a) which applies to both registered and unregistered trademarks.

In addition, Indiana common law was found to forbid conduct that has a natural or probable tendency to deceive so as to pass off the goods or business of one person as that of another.

The court had no difficulty in concluding, "Continued use of a trademark by a former licensee, after it decides to drop the licensing arrangement, constitutes an unauthorized use likely to cause confusion as a matter of law."

In addition, the court found that Pure Country, Inc. violated its contract with the Greek organizations. The contract required Pure Country, Inc. to "cease any production, use, marketing or distribution of any merchandise bearing the insignia" when the contract expired or was terminated.

Such a ruling typically leads to a settlement. It is possible that if it does not lead to a settlement that there could be a subsequent hearing on damages and, perhaps, an injunction to restrain Pure Country, Inc. from further violations.

• Robert E. Manley

¹ *Alpha Tau Omega Fraternity, Inc., et al., v. Pure Country, Inc.*, 185 F. Supp. 2d 951 (2004).

² The full list of Plaintiffs is: Alpha Tau Omega Fraternity, an unincorporated association; Alpha Tau Omega, Inc., a Maryland corporation; Delta Delta Delta Sorority, an unincorporated association; Delta Delta Delta, an Illinois not-for-profit corporation; Delta Tau Delta Corporation, a New York corporation; Kappa Sigma Fraternity, an unincorporated association; Sigma Nu Fraternity, an unincorporated association; Sigma Nu Fraternity, Inc., an Indiana corporation; Sigma Phi Epsilon Fraternity, an unincorporated association; and, Sigma Phi Epsilon, a Virginia corporation.

IOWA FRATERNITY SEEKS DAMAGES BASED ON ILLEGAL USE OF AUDIOTAPE

In fall 2001, a former pledge of the Phi Delta Theta fraternity at the University of Iowa approached a University official, and claimed that incidents of hazing and alcohol policy violations had occurred in the chapter house. The former pledge (who had been expelled from the fraternity) did not claim that he was hazed, or that he personally witnessed any hazing; instead, he offered a tape recording he claimed he made by secretly planting a voice-activated device in the basement of the house.

Iowa law provides for both civil and criminal penalties for any use of unauthorized recordings: Iowa Code § 808B makes use of such a recording a Class D felony, and authorizes civil damages of not less than \$100 per day, as well as punitive damages and attorney's fees, against anyone who uses such a recording.

The fraternity's alumni investigated the student's claims, and had a number of discussions with the University aimed at resolving the matter informally. The alumni admitted that they had discovered an alcohol policy violation, but steadfastly refused to admit that any form of hazing had occurred, or that the tape recording was authentic. In January 2002, Phillip Jones, the University's vice president for student services, notified the fraternity that its university recognition would be suspended for an indefinite period. As a result, Phi Delta Theta could not participate in formal rush activities and intramural sports, or use campus facilities.

Phi Delta Theta requested an evidentiary hearing on the matter, which was not held until August 2003. The disputed tape recording was the sole evidence against the fraternity in regard to the hazing charge, and was used over the fraternity's objections. Despite having no authentication of the tape, and despite testimony from two former pledges that no hazing had occurred, the hearing officer found the fraternity guilty of hazing, and re-affirmed the indefinite suspension of the fraternity's recognition.

The fraternity appealed the sentence through the University's administrative system. As part of this process, the fraternity's attorneys pointed out that both Iowa and federal law prohibit use of intercepted communications in any legal or administrative proceeding. And Iowa law provides for both civil and criminal penalties for any use of unauthorized recordings: Iowa Code § 808B makes use of such a recording a Class D felony, and authorizes civil damages of not less than \$100 per day, as well as punitive damages and attorney's fees, against anyone who uses such a recording.

In November 2003, on the advice of the University's counsel, Vice President Jones dismissed the hazing charge against Phi Delta Theta because the tape recording had been used in violation of Iowa law. However, the vice president affirmed the indefinite suspension of recognition, now based solely on the admitted alcohol violation. The fraternity continued with the appeal process, and the matter finally reached the desk of University President David Skorton. On June 29, 2004, President Skorton ended the suspension of Phi Delta Theta, declaring that there had been "sufficient passage of time to serve the interest of the university in the punishment of this organization." He did not address the claim that the suspension had been improper in the first place, or the use of illegally obtained evidence. But he made the formal re-recognition of the fraternity conditional on the approval by himself and Vice President Jones of a number of documents and reports.

Objecting to the "conditional" lifting of the suspension and seeking complete exoneration, Phi Delta Theta took its appeal up another level, to the Iowa Board of Regents. A few days before the matter would have come before the Regents, President Skorton lifted the suspension unconditionally.

From the fraternity's point of view, even this did not end the matter. According to its alumni, during the more than two years of the suspension, the fraternity suffered a 50% drop in membership, causing a loss of thousands of dollars in dues and rental income. The fraternity and its alumni also incurred over \$20,000 in attorney's fees in fighting to regain its status. In January 2004, the fraternity filed a claim with the Iowa State Appeal Board, seeking \$480,000 in damages, as a required precursor to a potential lawsuit. The bulk of the claim is based on the daily damages allowed under Iowa Code §808B; the fraternity plans to claim those damages for every day of the suspension.

Phi Delta Theta's international headquarters, which never suspended its Iowa chapter's charter, has stayed out of the present dispute. "Our only goal is to have a good chapter at the University of Iowa," commented Executive Vice President Robert A. Biggs.

As this article goes to press, there have been discussions between the fraternity and the University, but the matter has not been settled. Unless their claim is resolved, the fraternity and its alumni fully intend to file suit for damages against the University and Vice President Jones, according to Steve Snyder, the chapter's advisor.

• James C. Harvey

Mr. Harvey is an attorney in Orange County, California. He is a member of Phi Delta Theta and the NIC Law Committee.

UNC ATTACKS CHRISTIAN FRATERNITY

Alpha Iota Omega has filed suit in federal court against the University of North Carolina at Chapel Hill. AIO is a Christian fraternity that was denied official recognition because it would not agree to open membership to students of non-Christian faiths. AIO has filed suit in the United States District Court.

The suit grows out of an instance where a UNC administrator, Jonathan Curtis, refused to give official recognition to AIO. The fraternity claims its mission to be one of development of Christian leaders. It refused to sign a "nondiscrimination" clause that would forbid it from considering religion when determining "membership and participation."

UNC effectively denied the religious group the basic right of freedom of association and freedom of religion that all student groups should enjoy. These basic freedoms are undercut if the University forces a student group to include people who do not accept the core beliefs of the organization.

The University of North Carolina argues that federal law requires it to discriminate against religious association. This is directly opposite of what the Constitution requires. The First Amendment prohibits the state from discriminating

against groups based upon religion. It does not prohibit private organizations from being selective in who they choose as their members, colleagues and friends.

As a result of this controversy, Representative Walter B. Jones, a North Carolina Republican, requested that the U.S. Department of Education have its civil rights office open an investigation of the University of North Carolina. Congressman Jones accused UNC of practicing "abusive policies" against Christian students.

UNC Chancellor James Moser has stated that AIO was violating the school's nondiscrimination policy by not allowing students to join regardless of their religious beliefs.

Congressman Jones asserts that UNC's refusal to allow AIO continued access to campus facilities and services was discriminatory. "Alpha Iota Omega is the most recent victim of abusive policies at UNC," Congressman Jones said in a letter to Kenneth Marcus, the Education Department's acting Assistant Secretary for Civil Rights. Congressman Jones continued in the letter "these actions constitute an outright violation of student rights to free speech, free exercise of religion and freedom of association."

• Robert E. Manley

ALCOHOL - ATTRIBUTABLE DEATHS

A recent study of the Centers for Disease Control confirms that excessive alcohol consumption is the third leading preventable cause of death in the United States. The study estimated the number of alcohol-attributable deaths and years of potential life lost in the United States for 2001. According to the study, approximately 76,000 alcohol-attributable deaths and 2.3 million years of potential life lost were measured for the year 2001. The loss of life is approximately 30 years of life for every alcohol-attributable death.

Adverse health consequences include liver cirrhosis, various cancers, unintentional injuries, and violence.

Males represented 72% of all alcohol-attributable deaths. Six percent of the males were less than 21 years of age. Twenty-five percent of the deaths represented men over 35 years of age, of which 58% were attributable to chronic conditions. For both males and females combined, the leading chronic cause of alcohol-attributable deaths was liver disease. The leading acute cause of alcohol-attributable deaths was injury from motor vehicle crashes (13,674). Of the estimated 2,279,322 years of potential life lost, 788,005 (35%) came from chronic conditions and 1,491,317 (65%) resulted from acute conditions.

The study did not take into account alcohol-attributable deaths related to several conditions believed to be important risk factors contributing to alcohol-attributable deaths. Examples of these diseases are tuberculosis, pneumonia, hepatitis C, and sexually transmitted diseases.

• Robert E. Manley

F.Y.I.

The October 2004 issue of *Trial Magazine*, published by the Association of Trial Lawyers of America, contains a long article critical of fraternities. Written by Carmel Sileo, the article is titled "Fraternities Fail to Stem Tide of Binge-Drinking Deaths, Lawsuits Claim." The article paints fraternities from the perspective of plaintiff's counsel. *Trial Magazine* is available in most major public libraries and is worth looking at from the standpoint of how plaintiffs' legal counsel view fraternities.

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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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