FRATERNAL LAW™

A fraternity law periodical
published by ManleyBurke
A Legal Professional Association

March 2008 Number 104

MANDATORY, BINDING ARBITRATION WILL IT WORK IN THE GREEK SYSTEM?

As many states have implemented various forms of tort reform over the last several years, fraternities and sororities have not been the beneficiaries of those changes. Cases involving injured members continue to be filed and settlements paid because of an on-going fear that a local jury, upon hearing inflammatory evidence that is rarely favorable to the organization, may award a large verdict. There is also concern about the negative publicity that comes from trials involving serious injuries at fraternities and sororities. In the last ten years, there has been a growing trend across the country, led by the United States Supreme Court, to encourage resolution of disputes by arbitration versus a jury trial. Arbitration has been a standard in the financial services industry for some time, and a large number of employers have begun to implement this system to resolve employee disputes. Recently, this law firm has recommended that the Greek system create its own form of "tort reform" by implementing mandatory, binding arbitration for disputes and injuries by its members, coupled with clear and unambiguous exclusions of coverage for individuals and chapters who violate the Risk Management Policies, and the implementation of sublimits for the Chapters and individuals who may be covered by the National insurance policy.

What is Mandatory, Binding Arbitration?

Essentially, in lieu of a jury or a judge deciding the outcome of a civil case, one or more neutral arbitrators are picked to determine the outcome of a claim or lawsuit filed arising out of an injury or other type of dispute with the Chapter or with the National fraternity. The substantive law that is applied in each case is the same – an injured plaintiff would have the same causes of action as in the civil courts, be entitled to the same types of damages, and the defendants would be able to raise the same types of defenses. However, the procedure is quite different -- it is much more informal, much less expensive, and usually is resolved in a much shorter period of time. You still have discovery that is exchanged between the parties (such as interrogatories, request for production, and request for admissions), you still have depositions under oath, and you still have a trial but without the jury. Instead of the jury selection process whereby a large number of jurors are brought in, questioned about their life experiences, and each side makes strikes until there are 12 jurors, the parties are able to select the arbitrator(s) by agreement. Another significant difference between the existing jury system is there is virtually no right of appeal from the decision, except in limited circumstances usually involving fraud, conflict of interest by the arbitrator, or something unusual in the process.

One limitation exists with this system -- it only applies to pledges, members and alumni, not outside third parties who may be injured as a result of the negligence of an individual member or the Chapter. For example, if a fraternity member becomes intoxicated at a party, drives his vehicle into a family on the street injuring them, the claims by the injured family would not be subject to the mandatory, binding arbitration. However, statistics indicate that somewhere around 50% of all claims come from members or pledges. If you have had a significant injury by a member that resulted in a serious lawsuit and a substantial settlement or verdict, imagine that the playing field is the private resolution of a dispute in front of a neutral arbitrator that you have had input in selecting, and imagine if you don't think that the outcome might have been different than when that serious claim was in the civil court system.

Notice and Acceptance is the Key

Many federal courts strongly embrace the concept of arbitration as do many state courts; however, local district judges are often reluctant to impose arbitration unless you can show that notice of this dispute resolution plan was provided to the members and it was accepted by them. However, the courts in most states have made it quite easy for organizations to prove notice and acceptance - if you can prove that an individual member was provided with a clear and unambiguous statement, either in writing or by e-mail, that your organization was adopting a mandatory, binding arbitration plan for all future injuries or claims, and if that member continues his membership with the organization after such notice, the courts have held that notice and accep-

Fraternal Law is published by Manley Burke. Suggestions or articles for future publication are welcome at tburke@manleyburke.com

tance have been completed and will usually order the case to arbitration. It is my personal belief that collecting each individual's signature to an acknowledgement form is the best form, as you can show to the court a signature of the claimant that he has read the plan, acknowledged receipt of the plan, and accepts the terms of the plan. However, this can often be difficult as a practical matter, and in today's electronic world, electronic acknowledgement is both acceptable and the most practical. The essence is to be able to prove that the member got a copy and continued as a member to accept the benefits of membership after receiving notice that the organization plans to adopt this plan.

There are multiple approaches to establishing notice and acceptance:

1) You roll out the dispute resolution plan at the National Convention with publication to all members and alumni;

2) Include the acknowledgement and acceptance on all pledge and membership cards;

3) Make sure that as new members, pledges, and alumni register they have to check off a box electronically that they have received notice of the arbitration plan and by their continued membership agree to accept it;

4) Make sure that it is prominently displayed on the website;

5) Make sure it is included in the pledge manual and risk management policy;

6) Make sure that as your education consultants conduct meetings and risk management that the plan is discussed and signatures collected;

7) Mandate that the Chapter president or risk management officer make a presentation on the arbitration plan to pledges and members and certify that each member was presented with the plan;

8) Make sure it is included in multiple publications for a minimum of four years to catch all existing members and alumni.

Advantages and Disadvantages

The advantages of mandatory, binding arbitration are many - it is typically less expensive, less formal, less discovery occurs, and you usually obtain a quicker resolution. Many court dockets are backed up for one or two years, and often times it can be 3 or 4 years after an incident before a matter gets resolved. Arbitrations, on the other hand, are often resolved within six – twelve months of the filing of the claim. Arbitration tends to discourage small claims from even being filed; once an attorney realizes that there is a mandatory, binding arbitration clause, plus there is an exclusion for insurance coverage for the Chapter and the individuals who actually committed the wrongdoing, and the Chapter has a maximum liability sublimit of $100,000 (even less if it is an eroding policy), often times they will not even take the case. By the same token, arbitration tends to limit damages in big claims - you typically do not have the high degree of emotion and sympathy with a neutral arbitrator than you typically see with local juries who have difficulty identifying with Greek organizations. Often times, the arbitrators are local lawyers or former judges who may well have been in a Greek organization themselves. Once you remove the emotional component from a jury, then you are more able to try the cases which have big damages but very poor liability facts for the plaintiff. A very important reason to adopt arbitration is the setting - instead of the newspaper covering the trial down at the county courthouse, the arbitration tends to occur in a private setting without any media attention at all.

In essence, you have more control over the outcome when you choose arbitration - beginning with the right to select or have input into the selection of the arbitrator and all the way through the process.

There are certainly disadvantages that need to be assessed and evaluated in making the decision to adopt arbitration or not. Some states prohibit or won't apply arbitration to personal injury claims. Keep in mind that your right of appeal could be limited or even eliminated in the event there is a verdict that YOU don't like. Many courts have held that virtually all of the expenses of the arbitrators need to be paid by your insurance company, as courts have held that if the financial burden on the claimant is too great, that is unconscionable and the arbitration will not be enforced. There is no guarantee that arbitration will be easily enforced; it is likely that your organization will be forced to file a motion to compel arbitration in every case, as plaintiff's attorneys do not like arbitration. Finally, there are a handful of states that set the age of majority at 19, so therefore arbitration agreements signed by minors may not be enforceable.

While there are disadvantages, it is our belief that the advantages far outweigh those. Remember, if you have arbitration and it is denied, your worst case scenario is to be stuck in the system you have now - a jury of individuals who are not necessarily your peers.

- Jim Ewbank

Jim is a partner at Ewbank & Byrom in Austin, Texas, and may be contacted at 221 W. 6th Street, #900, Austin, Texas 78701, (512) 476-1080..

THOUGHTS AS AKA TURNS 100

In January, *The Cincinnati Enquirer* carried an almost full page story on the 100th anniversary of the founding of Alpha Kappa Alpha. The article highlighted the sorority's community service based on its credo "Service to All Mankind." That anniversary is cause to reflect on the incredible longevity and diversity of opportunity that the Greek system offers to college students.

For any social organization to survive 100 years is remarkable enough. It is particularly impressive when the organization must recruit new active members every year and loses them four years later.

College social fraternities come in many shapes and sizes. From the single chapter professional mining fraternity, which has maintained a chapter and a house at Michigan Tech University (formerly Michigan College of Mines) in Houghton, Michigan since 1892, to National Panhellenic Conference Women's Organizations with more than 140 chapters spread all across the country.

What links them all is the challenge of recruiting college students to become active members of their organizations knowing that in a short three or four years those new members will become alumni members, so the effort to recruit new members is an almost continuous process. And they must do it in the face of uneven support from the colleges and universities with which chapters are associated. On some campuses, they are warmly welcomed and encouraged; on other campuses, barely tolerated; and on still other campuses, looked upon as something to be gotten rid of. Like with the colleges themselves, fraternities and sororities face the challenges of the times – hazing, alcohol, risk management, the good and the bad of the Internet – all complicate the lives of collegian members of Greek organizations. Still, they thrive, built generally around common interests, be it a profession, a religion, a social background or other commonality. The diversity of interest from group to group doesn't take away from the common opportunities and benefits that each group offers its members – mutual support, leadership opportunities, commitment to community and the pursuit of academic excellence.

There is much criticism of fraternities and sororities today, some of it deserved. The challenge is to be continuously prepared to tell the positive side of the Greek life story, reminding all of their longevity, diversity and universal commitment to personal development and the betterment of society through philanthropic efforts and community good works.

• Timothy M. Burke

FRESHMAN DIES AT CLEMSON UNIVERSITY

On December 9th, Benjamin Sprague, a freshman student at Clemson University, was found dead lying on a futon in the Sigma Nu Fraternity House where he was a member. He had a blood alcohol content almost five times the legal driving limit in South Carolina.

In the aftermath of his death, all the activities of the chapter were suspended by both the fraternity and the University. In late January, three members of the fraternity were charged with misdemeanor crimes related to providing alcohol to a minor. One of those students was also charged with providing false information (a fake I.D.) in order to purchase beer and wine.

The *Associated Press* reports that the local prosecutor, Chrissy Adams, explained that the charges were not more serious because the activities of the three charged did not lead directly to Sprague's death. The *Greenville News* quoted the prosecutor as explaining "these are the events that took place the night of December 8th. Ben was picked up at his dorm room by friends around 8:00 p.m. Ben and friend Jetin Patel went to the Bi-Lo in Clemson and Mr. Patel purchased beer and champagne with a false ID. Ben and his friends went to a pre-party where alcohol was consumed but not provided. Everyone at that party brought their own alcohol."

In the aftermath of the charges, a statement was released on behalf of the Sprague family which said, in part:

> Ben was smart, fun and loving. We were, are, and always will be proud of him. His spreading of joy should be an inspiration to us all. While we acknowledge Ben's errors in judgment, we do not believe his errors overshadow his goodness.
>
> Now, we must turn to constructive pursuits. We hope that, collectively, we can find a way to engage the energy and resourcefulness of young people and families, along with the power of institutions and the media, to bring a greater good from our family's loss.

The three charged students face potential fines and jail time of up to 30 days. They may have the option of a pre-trial intervention program which, if completed, would allow the charges to be removed from their records.

• Timothy M. Burke

CHI IOTA COLONY V. CSI: WHAT HAPPENED AND WHY

The United States Court of Appeals for the Second Circuit issued an opinion on September 13, 2007, that poses a potential problem for social fraternities and sororities asserting freedom of association rights against public colleges and universities. While the appellate court found that the plaintiff fraternity colony, which was seeking official college recognition, was indeed an intimate association as that term is used in constitutional law, the court also held that the fraternity was not "intimate enough" and the defendant college's denial of official recognition and its benefits was not burden enough, defeating the fraternity members' claim that their constitutional right to freedom of intimate association had been violated. Ironically, while the court rested the second finding in part on the fact that the colony had persisted despite the absence of recognition, the colony folded while the appeal was pending, at least in part from the limitations of and frustrations from being denied recognition.

Policy on Recognition

The defendant was the College of Staten Island ("CSI"), a senior college unit of the City University of New York (despite its name, a state institution as a legacy of New York City's fiscal crisis in the 1970s) and an overwhelmingly commuter school. For official recognition of a student organization, CSI requires, among other conditions: that the organization be open to all students, *i.e.*, that it not be selective; that it not discriminate on the basis of a litany of bases including sex; that its meetings be open to all students; and that it not engage in any activity constituting "rush" or pledging. The policy was very obviously aimed at social fraternities and sororities. Official recognition brings with it access to campus facilities, College publications concerning student organizations, and periodic student activity "fairs" that attract students interested in joining campus organizations. In addition, each officially recognized student organization receives an allotment of money but is in return prohibited from charging dues.

AEPi Starts a Colony and Challenges Policy

CSI had no fraternity until a group of students established a colony of Alpha Epsilon Pi in 2004. They sought recognition, which was denied based on the long-standing recognition policy. The colony and its members sued CUNY in federal court in June 2005 claiming a violation of their constitutional rights to intimate association, expressive association and equal protection as well violation of Title IX and certain civil rights provisions of New York State law, and they sought both recognition and an exemption from the rules against selectivity, sex discrimination, closed meetings, rush, pledging and charging dues (in return for which they agreed to forego any money from the College). The plaintiffs moved for a preliminary injunction requiring recognition during the pendency of the suit, and the state moved to dismiss. The state law claims were withdrawn once the state raised the 11th Amendment.

The state deposed the colony president, who testified at length concerning their membership selection practices, why the group chose to be and wished to remain single sex, the burdens imposed by lack of recognition (including the difficulty for commuter students dependent on mass transportation in setting up meetings off campus), and other topics. Relying on his testimony and a handful of documents produced by the fraternity, the matter was argued at a lengthy hearing before the district court judge. The plaintiffs argued: (1) that their size, selectivity, exclusion of non-members from "critical aspects" of their relationship, and their purposes entitled them to constitutional protection as an intimate association; (2) that their expressive message on the merits of an all-male organization entitled them to constitutional protection as an expressive association; (3) that denial of recognition violated equal protection since other student groups were granted recognition; and (4) that the College's denial of recognition, because it was based on the fraternity's single sex nature, was a violation of Title IX.

The state argued that the eighteen man group was too large compared to other groups that had been granted intimate association by the courts, that they were insufficiently selective, and that because they engaged in public recruitment and invited outsiders to their social activities they were insufficiently intimate to qualify for constitutional protection, that their application for official recognition by a public institution was inconsistent with their claim of intimacy, that the lack of recognition was not a constitutionally cognizable burden, and that the state had a sufficiently compelling interest in the prevention of discrimination to justify enforcement of the current policy.

The plaintiffs countered that the landmark Supreme Court decision of *Healy v. James*[1] established that denial of recognition to a student organization by a public institution of higher education on an unconstitutional basis was undue interference with freedom of association and that the specific exemption of the membership practices of fraternities and sororities from the federal and state civil rights statutes defeated any finding that there was a state interest in reaching those practices with anti-discrimination rules.

The District Court Grants Plaintiff's Motion

The district court spent most of its August 2006 opinion analyzing the intimate association claim and found that the plaintiffs had established a likelihood of prevailing on the merits of that claim, including that the claim required the application of strict scrutiny, which the state's asserted interest could not satisfy, and granted a preliminary injunction. The trial court also found that the expressive association was a closer call and held any further finding on the issue for trial and, in brief discussions, dismissed the equal protection and Title IX claims.

Reversal on Appeal

The state appealed, making the same arguments it had made in the district court but placed heavier emphasis on an argument it had raised only in passing at the oral argument, that the fraternity was effectively seeking a subsidy for its discriminatory activities to which it was not entitled. The plaintiffs pointed out that part of the relief they sought was exemption from the financial straight jacket imposed by the College's policy, including foregoing any monetary support.

The Court of Appeals reversed to District Court. The decision applied a balancing test, with a sliding scale standard, in which the extent of the association's intimacy is assessed to determine the extent to which it is entitled to protection and to which the contested state action might be an infringement. The Court held that, while the fraternity colony was an association of some intimacy, there was insufficient intimacy when compared to the paradigmatic intimate association of a family to merit strict scrutiny, that the college's policy was only a limited interference with the plaintiffs' associational rights, and that the college's interest in preventing discrimination was both compelling and substantial. The decision completely ignored both *Healy v. James* and the blatant conflict with federal and state policy as established by the legislatures in the statutes relied upon by plaintiffs. (At oral argument, two of the judges seemed to express a tendency to view the expressive association claim with less skepticism than the intimate association claim, but the opinion did not address the issue, apparently leaving it for further proceedings by the district court.)

Consequences for the Colony and Other Greeks

In the meantime, while the appeal worked its way to a decision, the colony gave up the ghost, mooting the plaintiffs' claims. The colony's demise defeated the possibility of pursuing the expressive association claim before the district court.

The Second Circuit decision was not necessarily a fatal blow to an intimate association claim by a social fraternity and sorority against a state public institution of higher education. It leaves open (a) a limited possibility that in another situation denial of recognition might be a sufficient burden to constitute a civil rights violation, *e.g.*, if the campus were so small and isolated that non-recognition is more clearly effectively an insurmountable barrier for existence, or (b) the claim that any attempt by a college or university to restrict students from participating in a non-recognized fraternity or sorority is a more direct and substantial infringement of associational rights meriting relief. The decision also, in applying the balancing test, augmented an existing conflict among the circuits concerning the standard to apply in freedom of intimate association claims.

The Second Circuit's decision poses a potential conflict with *Healy v. James* and blew right by a weighty issue of how a state college could have a compelling interest in opposing fraternity and sorority membership practices that the state's own legislature had decided by statute should be exempt from any state concern. Law review commentators have noted both the lack of uniformity among the circuits in the standard applied in intimate association cases and the lack of clarity in federal jurisprudence concerning what constitutes a compelling state interest, making both candidates for resolution by the U.S. Supreme Court.

The case nonetheless poses a major challenge to fraternities and sororities in any effort to assert that the constitution and the civil rights laws provide them with rights and protection from certain treatment by public institutions of higher education. Beginning to meet that challenge on the intimate association side requires taking the risk of pursuing a similar claim in a different circuit and hoping for a better result. On the expressive association side, the district court's finding that the fraternity's documents and activities did not necessarily add up to a convincing claim of expressive association is a clarion call for every fraternity and sorority to examine the extent to which they actually do constitute organizations that by word and deed express explicitly that among their purposes is promoting the value of single sex organizations.

- Gregory F. Hauser

Greg is a partner with Wuersch & Gering, LLP in New York City and represented the plaintiffs during all stages of their litigation with CUNY. Greg may be contacted at 100 Wall Street, 21st Floor, New York, New York 10005.

[1] Healy v. James, 408 U.S. 169 (1972).

HOUSE CORPORATION SUES NORTHWESTERN UNIVERSITY

The Wranglers is a House Corporation that has leased a fraternity house from Northwestern University since 1916. During that time it has provided housing to five different fraternities with its current tenant being Sigma Alpha Epsilon (SAE). The current lease runs to 2012.

On February 13th The Wranglers filed suit against Northwestern seeking a declaratory judgment that the University could not enforce obligations on the House Corporation that were not contained in its lease.

Northwestern has sought to require the House Corporation to pay for a new automatic sprinkler system in the house in order to meet requirements of the City of Evanston ordinance and to pay for changes to meet the accessibility requirements of the Americans With Disabilities Act (ADA). The Wranglers estimate that the total cost to be in excess of half a million dollars.

In addition, Northwestern unilaterally began billing the Wranglers in the 2006-2007 academic year a "pillow" tax of $256.00 per bed, almost $10,000.00 in total for the year. The purpose of the pillow tax is to assist Northwestern in paying for various services provided to the residents of the house including campus safety, student transportation and other services.

The lawsuit, pending in the Circuit Court of Cook County, Illinois, seeks a declaration that under the terms of its lease, The Wranglers is not responsible to pay for improvements mandated by the City of Evanston or to achieve ADA compliance. Further, The Wranglers seek a declaration that it has no obligation under the lease to pay Northwestern for its "cost of operation for campus safety, student transportation and other such services" included in the pillow tax. The Wranglers' argument on all issues is based on precise terms of its lease which obligate The Wranglers to maintain the house but do not obligate it to make improvements (additions) to the house. Neither does the lease make any provisions for charges such as the pillow tax.

The Wranglers last signed a lease with Northwestern for a ten-year term in 1992, but the lease also provided that it would automatically renew for an additional ten years unless, at least three months prior to the end of the ten-year term, one or the other party notified the other that it would not renew. That did not happen and as a result the lease automatically rolled over for an additional ten years. It appears that the University may have overlooked its non-renewal option because a few years after the automatic renewal, the University contacted the treasurer of the current tenants and asked whether they were "assuming" that the lease had renewed for an additional ten years or if they would be willing to enter into either a new opt-in or opt-out lease.

This dispute is instructive for both house corporations that enter into leases with host institutions and for chapters that enter into leases with house corporations. Terms contained in the leases and terms which aren't contained at all are important. Leases should be carefully reviewed before they are entered into. It is always wise to have an attorney familiar with local lease law review such documents. Where house corporations lease from a college or university, it is still not unusual to find long-term 99-year or perpetual leases or leases that have renewal clauses that automatically extend a lease or terminate a lease unless one party notifies the other to the contrary.

Leases should be periodically reviewed to be certain no rights are being waived or obligations being undertaken unknowingly. New officers in a house corporation should always ask to review any existing leases, whether with a chapter or with a university. Chapter officers responsible for relationships with house corporations should be familiar with the lease between the chapter and the house corporation, know where a copy of it is and know what is required.

- Timothy M. Burke

HAZING RESOURCES ON-LINE

Though all Greek organizations have hazing prevention resources in place, it is wise to be familiar with the numerous outstanding resources available to victims of hazing. In addition to the National Anti-Hazing Hotline (1-888-NOT-HAZE), many outstanding websites address the issue. Some of the best sites include stophazing.org, hanknuwer.com and hazingprevention.org. This list is by no means comprehensive, but these sites provide excellent examples of the in-depth resources available on-line. These sites all contain great information on hazing definitions, laws and prevention tips.

The national organizations and their individual chapters are the best tools to prevent hazing. However, the national organizations need to ensure that their student members are aware of the numerous resources available to them.

- Daniel J. McCarthy

Fraternal Law is published four times yearly as a non-profit service of ManleyBurke, A Legal Professional Association, 225 West Court Street, Cincinnati, Ohio 45202 U.S.A. (513) 721-5525. Please address all editorial inquiries and all subscription correspondence to this address. Individual subscriptions by first class mail are available at $12.00 per year. Bulk subscriptions are available upon request at reduced rates. Second class postage paid at Cincinnati, Ohio.

Printed in U.S.A.