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UCF Suspends Greek Life Activities

In February, the University of Central Florida ("UCF") unilaterally suspended all Greek Life social, new member education and initiation activities "in order to work with fraternity and sorority chapters on comprehensively addressing alcohol and hazing activities." This blanket, campus-wide suspension applied to all fraternities and sororities whether or not they had violated any university rules. The action is very similar to the action recently taken at Chico State, as reported in the January issue of *Fraternal Law*. Like Chico State, UCF is a public institution. With over 60,000 students, UCF is one of the largest colleges in the nation.

Since the suspension was announced, UCF has explained that the suspension was because "student leaders were becoming more and more concerned with the welfare of the community." In a presentation by three members of the UCF administration, UCF stated that 25 out of 47 Greek chapters on campus had disciplinary issues within the past three years, a lack of peer-to-peer accountability and continuous alcohol and hazing incidents. Further, according to UCF, at a campus leadership program, the participants did not address the "issues head on."

The suspension does not prohibit all activities. Chapters are still permitted to hold organizational business meetings and to participate in philanthropic activities. The Greek chapters are prohibited from participating in any social events, intramural sports, new member education, and new member recruitment.

UCF has created a Fraternity and Sorority Reinstatement Committee that will review each chapter and determine whether reinstatement with the Office of Fraternity and Sorority Life is appropriate. In order to be considered for reinstatement, each chapter must submit a detailed presentation to the Reinstatement Committee, with written answers to a host of questions as well as an oral presentation. According to UCF, the questions the chapters must respond to are based on the UCF Creed. The presentation outline includes sections on integrity, scholarship, community, creativity and excellence.

Some of the questions are concerning. For example, one questions asks, "Does your organization follow its national risk management policy? What is the most challenging aspect of adhering to the policy? Why?" There are 30 questions total on the presentation outline, some with multiple parts. Each chapter has to submit detailed answers to each question, then be ready for a 30 minute presentation, followed by a 10 minute case study, with 15 additional minutes for follow up questions by the Reinstatement Committee.

UCF's actions here, especially following Chico State, are very concerning. The unilateral suspension of all Greek chapters, without a shred of due process, is establishing dangerous precedent. Other public institutions may see what is being done at Chico State and now UCF and take similar action. Not to mention the possibility that a private college, where students typically do not have constitutional protections, may likewise follow in UCF's footsteps.

But the fraternity and sorority chapters, as well as their individual members, are not without constitutional protections. The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived "of life, liberty or property without due process of law." A long line of Supreme Court cases have discussed in great detail the procedural due process afforded to students in college disciplinary cases.

The leading case is *Goss v. Lopez*, 419 U.S. 565 (1975). In that case, the Court held in a disciplinary case involving short suspensions that an accused must be "given oral or written notice of charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." The Court noted that protected interests are generally created by and defined by sources "such as state statutes or rules entitling the citizen to certain benefits."

Here, UCF, like most schools, publishes a student handbook every year. UCF's student handbook, called the Golden Rule Student Handbook, contains detailed procedures that must be followed before students or student organizations can be disciplined. Students and groups are assured that UCF will provide a fair and impartial hearing. The procedural safeguards include, among other things, notice of the charges, notice of a hearing, and the opportunity to be heard. Rather than follow the procedures set forth in its own Golden Rule Handbook, UCF simply decreed that the above-listed Greek activities were suspended.

In addition to the due process concerns, UCF's actions also raise serious freedom of association claims under the First Amendment. The Supreme Court has long protected student groups on college campuses. In *Healy v. James*, 408 U.S. 169 (1972), the Court held that there can be "no doubt that an unjustified denial of official recognition to college organizations burdens or abridges that associational

right." Once a student group applies for college recognition, the "heavy burden" shifts to the college administration to justify its actions if the application is denied.

UCF has stated that it only acted as a last resort and as a "pro-active initiative to ensure safety and well-being of our students." However well intentioned their goals may be, UCF cannot simply ignore the constitutional due process and associational rights that protect its students. Even if the suspension is short-lived, as maintained by UCF, it must be remembered that, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

If left unchallenged the actions taken by UCF and Chico State may spread to other campuses. But before litigation, chapters, alumni leaders and national representatives should immediately and forcefully announce their concerns and objections. We will update this story as it develops.

- Daniel J. McCarthy

Court Dismisses Phi Kappa Tau's Suit Against Miami University

On February 4th, the United States District Court for the Southern District of Ohio dismissed Phi Kappa Tau's complaint against Miami University. The case stemmed from an incident that occurred in August, 2012 involving a "fireworks war" between the Phi Kappa Tau and Sigma Alpha Epsilon Fraternities on Miami University's campus. When responding to investigate the fireworks incident the police found and seized a bag of marijuana and two pipes, in addition to fireworks, at the Phi Kappa Tau chapter house. The University suspended the Phi Kappa Tau Fraternity and revoked the second-year student housing exemption for the fraternity's members, thereby requiring all second-year students living in the chapter house to move back into on-campus housing, as a result of the incident.

In response, the national fraternity[1], the chapter and the local house corporation filed suit against Miami University asserting various causes of action, which included a myriad of violations to their constitutional rights, including the 1st Amendment (freedom of expression and association), 4th Amendment (unreasonable search and seizure), 8th Amendment (excessive fines and cruel and unusual punishment) and 14th Amendment (due process) as well as the following state law claims: breach of contract, tortious interference with business, libel and malicious prosecution. The University filed a motion to dismiss the plaintiffs' claims. The plaintiffs then filed a motion for leave to file an amended complaint which would add as plaintiffs 78 members of the chapter, drop the University as a defendant and add in the University's place several university officials, in both their individual and official capacities.

The Court granted the University's motion to dismiss the plaintiffs' original complaint since the plaintiffs, by their own admission, abandoned their originally filed complaint, did not oppose the dismissal of their claims against the University and did not name the University as a defendant in their proposed amended complaint. The Court also denied the plaintiffs' motion for leave to file an amended complaint because it determined that the complaint, as amended, could not withstand a motion to dismiss, for the following reasons:

- The plaintiffs' federal and state law claims against the University officials in their official capacity were barred because the officials are entitled to immunity under the 11th Amendment to the Constitution. The 11th Amendment provides immunity to the state and its departments, including public universities like Miami University, as well as state officials sued in their official capacity.
- The Court lacked jurisdiction to hear the plaintiffs' state law claims against the University officials in their individual capacity. Ohio law requires that, as a condition precedent to asserting a cause of action against a state employee in his individual capacity, the Court of Claims must first determine that the employee is not entitled to the immunity provided for under Ohio law. The plaintiffs presented no allegation or evidence that such a determination was made by the Court of Claims. Thus, the Court determined that it did not have jurisdiction to hear the claims.
- Finally, the Court found that the plaintiffs' federal claims against the University officials in their individual capacity would not withstand a motion to dismiss because they did not allege facts necessary to form the basis of the claims and even if they had, the University officials would be entitled to qualified immunity.

Fraternities and sororities should keep in mind that public universities and university officials, whether sued in their official or individual capacity, are entitled to certain immunities from liability. Before filing suit against a public university and/or university official, a fraternity or sorority should determine whether these immunities can be overcome and should, in all cases, be sure to plead facts necessary to establish the claims alleged.

- Jacklyn D. Olinger

[1] The national fraternity later voluntarily dismissed its claims, leaving the chapter and the house corporation as the two remaining plaintiffs.

Paddletramps Decision Modified

The victory secured in protecting the trademark rights of fraternities and sororities in the Paddletramps case has been reaffirmed by the United States Court of Appeals for the Fifth Circuit. After the Court of Appeals original decision was issued in December of last year, Paddletramps sought a hearing *en banc*, requesting all of the judges of the Court of Appeals to hear the matter and alternatively sought a re-hearing before the original three judge panel.

On February 7th, the *en banc* hearing was denied and re-hearing granted, but only to the extent that the court modified its original decision, strengthening its conclusion that even though the Greek organizations were not entitled to compensation for Paddletramps' past infringements, they could and the courts would prohibit Paddletramps' future infringement of the fraternities and sororities trademarked property rights.[1] While Paddletramps may now attempt to appeal this case to the United States Supreme Court, it would appear to be highly unlikely for the high court to even accept the case for consideration.

The Paddletramps decision should stand as a strong deterrent against future infringers.

- Timothy M. Burke

[1] Abraham v. Alpha Chi Omega, 2013 U.S. App. LEXIS 2799 (5th Cir. 2013).

Death at NIU Leads to Criminal Hazing Charges

> "These kind of hazing incidences are commonplace on college campuses.... These kids don't understand that you can die from it…. This is a national health epidemic, which must be addressed."[1]

On November 2, 2012, David Bogenberger, 19, was found dead after what articles variously described as an "initiation party" or "parents night" party where pledges were introduced to their bigs hosted by the Pi Kappa Alpha Chapter at Northern Illinois University. A toxicology study found his blood alcohol content to be between four and five times higher than the legal limit of 0.08 to drive in the State of Illinois.

Four members of the Chapter, including the President, Vice President, Pledge Advisor, Secretary and Event Planner, have been charged with felony hazing. If convicted, they could each face between one and three years in prison. Seventeen other members of the Chapter have been charged with misdemeanor hazing, which allows for up to a year in jail.

While the pretrial process is only beginning, some of the defense counsel have been quoted in the press as being prepared to challenge the Illinois hazing statute as being unconstitutionally vague and overbroad.

Section 720 of the Illinois Code provides, "Hazing. A person commits hazing who knowingly requires the performance of any act by a student or other person in a school, college, university, or other educational institution of this State, for the purpose of induction or admission into any group, organization, or society associated or connected with that institution if:

a) the act is not sanctioned or authorized by that educational institution; and

b) the act results in bodily harm to any person.

Some may dispute the Bogenberger family attorney's statement that such incidents are "commonplace." What cannot be disputed is that any such incident is absolutely unacceptable. The Bogenberger family has shown amazing restraint with their attorney commenting that they were not seeking "an eye for an eye" and did not want to see harm done to those who are charged. Whether the courts will be as forgiving remains to be seen.

In addition to the criminal charges, 31 of the fraternity members are facing University disciplinary actions which could result in expulsion. The Chapter lost its status as a recognized student organization.

The reality is that until such conduct stops once and for all, families like the Bogenbergers will continue to experience the death of a loved one. Those fraternities and sororities which have done everything they can to address and halt hazing, in particular the deadly the mixture of hazing and alcohol, will continue to face harsh public criticism in spite of their efforts. Those individuals responsible for the conduct that leads to a death or serious harm will increasingly face criminal prosecution and jail.

- Timothy M. Burke

[1] Peter R. Colabarci, Attorney for the Plaintiff, David Bogenberger, quoted in the Chicago Tribune, December 18, 2012.

MARK YOUR CALENDARS!!!

The Fraternal Law Conference is scheduled for November 8 – 9, 2013. The Conference will once again be held at the Cincinnati Westin Hotel. Group rates are available at the hotel until October 8, 2013, so please be sure to book ahead! We will once again split into a fraternity track and a foundation track. In addition, we expect to have speakers from the institutional side as well making the Conference ideal for college and university officials with Greek and student oversight responsibilities. Registration will open May 1, 2013 at which time we will have more details on the Conference itself. See you in November!

IRS 2012 Annual Report & 2013 Workplan

Last month, the Exempt Organizations (EO) Division of the Tax Exempt and Government Entities section of the IRS issued its latest annual report and workplan (the "Report"). The Report contains some bits of information that we believe are of interest to fraternal organizations.

ANNUAL REPORT HIGHLIGHTS

State Agency Cooperation

As we have previously written, the Internal Revenue Code allows the IRS to disclose certain information about exempt organizations to state charity regulators that meet specified disclosure eligibility requirements. The Report describes the current breadth of this disclosure.

So far, eight state tax and charity agencies in seven different states have met the disclosure eligibility requirements for IRS information sharing. In FY 2011, EO made approximately 27,000 disclosures to these eight agencies. The state agency disclosure eligibility requirements include the submission of acceptable Safeguard Procedures Reports and a disclosure agreement with the IRS. So, despite only eight agencies having fulfilled these requirements, the IRS made 27,000 disclosures. We have begun to see the impact of some of these IRS disclosures to state charity agencies.

Governance

The Report discloses that the EO has produced preliminary findings from its review of the governance disclosures of 1,300 public charities. The Report characterizes its findings as an "interesting starting point" in that it offers some insight into which governance practices might be useful indicators of tax compliance.

As expected, the presence of the following factors was associated with compliance:

- Have a written mission statement
- Always use comparability data when making compensation decisions
- Have controls in place to ensure the proper use of charitable assets
- Provide for Form 990 review by the entire board of directors before filing

On the other hand, the factor of having control of the organization concentrated in one individual, or in a small, select group of individuals, was associated with noncompliance.

Automatic Revocation and Reinstatement

One of the challenges faced by fraternal organizations over the last couple of years is the automatic revocation of exempt status of undergraduate and alumni and alumnae chapters and house corporations. One of the challenging aspects of the automatic revocation process is the time lag between the effective date of the revocation and the date on which the revocation is published on the IRS' on-line list of revocations. The Report acknowledges this challenge and states that the EO will begin providing more current information about automatic revocations by including organizations on the Automatic Revocation List within a month of their effective date of revocation. Previously, organizations did not appear on the List until six months after revocation.

Interestingly, the Report states that more than 450,000 formerly exempt organizations have lost their exempt status, but only a few more than 30,000 have sought reinstatement so far.

WORK PLAN HIGHLIGHTS

Group Rulings

As many fraternal organizations know, the IRS mailed a comprehensive questionnaire to over 2,000 randomly selected organizations having group exemption rulings in place. According to the Report, the impetus for the questionnaire was the 2011 report on group exemptions by the Advisory Committee to TE/GE (ACT), together with the large number of subordinates whose exemption was automatically revoked for failing to file a Form 990-series return for three consecutive years. The report states that the EO hopes to learn about the relationship between central organizations and their subordinates and the ways in which central organizations and their subordinates satisfy their filing requirements. While the Report does not specifically state what is in store for group rulings, we believe it is clear that the IRS looks upon the current structure with some disfavor. The inclusion of Group Rulings in the Work Plan section of the Report indicates that the IRS is willing to dedicate its resources to the issue and perhaps restructure the Group Ruling structure in a substantial way.

Form 990-N Misfilers

The IRS has been monitoring the 990-N filing system to help make sure that only eligible organizations are using it. The IRS has determined that:

- Several hundred organizations submitted Form 990-N for tax years where other available information indicates they did not meet the Form 990-N filing criteria because they were too large.
- Several hundred apparent supporting organizations filed Form 990-N even though Pension Protection Act required most such entities to file a Form 990 or 990-EZ.
- Over 1,000 organizations "dual-filed" both Form 990-

N and another Form 990-series return for the same tax year.

The Report states that during the IRS' fiscal year 2013, several hundred organizations that have misfiled Form 990-N will be "contacted" or examined with respect to their filings.

Colleges and Universities

During Fiscal Year 2012, the IRS completed a significant number of examinations of Colleges and Universities, and has begun to draft a final report. It is expected that the IRS will complete the report, which will include results from the examinations as well as additional analysis of the data from questionnaire responses previously received from almost 400 institutions.

Using Form 990 Information in Compliance Efforts

As we know, the IRS released a new version of the Form 990 in 2008 and stated that its goals in doing so included promoting transparency and improving compliance. As we also know, the "new" Form 990 requires filing organizations to supply more in-depth information than previous versions. The IRS is using the more in-depth information to develop potential indicators of noncompliance for use in its examination process. As stated in the Report, "[t]he bottom-line message to organizations and practitioners alike: The IRS uses the Form 990 responses to select returns for examination, so a complete and accurate return is in your best interest." The Report goes on to say that as a result of the new ways the IRS is analyzing return data and selecting cases, it is more important than ever that filing organizations follow instructions, compute properly and report accurately on their Forms 990.

One long-range study the IRS is undertaking is an analysis of the sources and uses of funds in the charitable sector and their relationship to charitable accomplishments. The IRS is interested in organizations having high expenses in certain categories on their Forms 990. The example given in the Report of organizations being examined are those with relatively large fund-raising expenses when compared with the expenditures for the organization's charitable programs.

It is clear from the Report that the IRS is taking full advantage of the additional information required by the revised Form 990. Of particular interest appears to be the responses to governance questions, descriptions of charitable activities and the expenses associated with those activities and the improper filing of information returns. Careful compliance with IRS reporting requirements continues to be of paramount importance.

- John E. Christopher

Berkeley Nuisance Case Affirmed and Reversed in Part

As reported in the January and March 2010 issues of *Fraternal Law*, Paul Ghysels, a resident of the South of Campus neighborhood in Berkeley, California that is also home to nearly 35 fraternity and sorority chapter houses, filed a lawsuit against the InterFraternity Council at the University of California, as well as numerous fraternities, property owners and property management companies. Mr. Ghysels filed a putative class action case, alleging that he and the other members of the class had been "deprived of the quiet and secure enjoyment of their homes, and… have suffered diminution in the value of their property…" because they lived close to out of control fraternity-sponsored social events.

The trial court granted the combined defendants' demurrer without leave to amend and dismissed the plaintiff's complaint. The complaint included claims for negligence, nuisance, and unfair competition. The trial court's decision focused on the plaintiff's inability to explain how the defendants could be liable given California's broad social host immunity statute.

The First Appellate Court of Appeals held that it was proper to grant defendants' demurrer based upon the "broad statutory immunity against civil liability" existing for social hosts who furnish alcohol to their guests. But, the Court held that the plaintiff should be allowed "to amend his complaint to attempt to cure this deficiency as it relates to his causes of action for public and private nuisance."

The Court decision included a thorough review of the facts. In short, the plaintiff alleged that the defendants turned the South of Campus neighborhood into "a high energy party zone" with hundreds of drunken college students roaming the streets and causing trouble, including property damage.

On appeal, the plaintiff narrowed the issues by abandoning his negligence and unfair competition claims. Accordingly, the only claims at issue on appeal were the plaintiff's nuisance claims. The plaintiff also dropped his attempt at class certification and instead focused only on his individual damages.

The Court then analyzed in depth California's social host liability laws, noting at the outset that, "California has had an erratic history concerning liability for injuries incurred as a consequence of a social host furnishing alcohol to his or her guest." The Court cited a number of cases that found that the legislature eliminated liability for providers of alcohol to plaintiffs injured or killed by intoxicated consumers except in the case of licensed vendors who furnish alcohol to obviously intoxicated minors. The laws in California, the Court stated, focused on the consumption rather than the furnishing of alcohol.

Following those precedents, the California Supreme Court had previously held that a claim for nuisance was a tort specifically barred by social-host immunity statutes. The decision here concluded, "the Legislature has statutorily immun-

ized social hosts who furnish alcoholic beverages to their guests from liability for any injuries suffered by third parties due to the tortious actions of their intoxicated guests."

The plaintiff then argued, for the first time on appeal, that the statutory immunity for social hosts did not apply to injunctive relief. The Court rejected this attempt to differentiate tort and injunction claims and held that the social host immunity covered both claims.

After affirming the lower court's decision to grant the defendants' demurrer, the Court then looked at whether it was proper to grant the demurrer without leave to amend. This is a key difference. Without leave to amend effectively bars the plaintiff from re-filing. With leave to amend permits the plaintiff to file an amended complaint in an attempt to put forth new facts to escape social host immunity.

While finding that the facts, as alleged in plaintiff's complaint, could not escape social host immunity, the Court nonetheless found that there was a "reasonable possibility" that the plaintiff could amend his complaint to constitute a nuisance. The Court focused on the possibility that the plaintiff could establish a nuisance claim based not on providing alcohol, but on the overall interferences to the use and enjoyment of the nearby properties. The Court did not speculate as to the plaintiff's chances, but noted that the general rule in California is to liberally allow the amendment of complaints.

Finally, the Court noted that California amended its social host immunity statute after the complaint was filed in this case. The new statute, in Civil Code §1714, subdivision (c), states that nothing shall preclude a claim against an "adult who knowingly furnishes alcoholic beverages at his or her residence to a person under 21 years of age, in which case… the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death."

The new statute is currently under review by the California Supreme Court in the case *Ennabe v. Manosa.* Under the new statute, combined with the *Ennabe* case, the Court held that "there is a possibility that plaintiff may be able to state a new theory of liability against defendants."

- Daniel J. McCarthy

Death Leads to Charges and Civil Suit

On August 31, 2012, members of Theta Chi chapter at Fresno State allegedly locked 15 pledges in a room with eight bottles of hard liquor and told the pledges not to leave until the bottles were gone. Over the course of approximately 80 to 90 minutes, Philip Dhanens, a freshman who had just arrived on campus, drank an estimated 37 one-ounce shots of various liquors. According to a news statement from the District Attorney, Mr. Dhanens died with a blood alcohol content of .40, which is more than five times the legal limit to drive a car in California.

In response, Theta Chi revoked the chapter's charter and Fresno State withdrew the chapter's recognition. The District Attorney also announced criminal charges on March 12, 2013 against three members of the chapter. Leonard Serrato, Aaron Raymo and Daniel Woodard were charged with misdemeanor violations of hazing and providing alcohol to a person under 21 years of age proximately causing death. The charges carry a potential jail sentence of six months to one year in custody and a fine of up to $5,000.

In the news statement, the District Attorney stated, "Across the country since 2010, student deaths from binge drinking and hazing events have increased. *** Each year across the country as parents say farewell to their children as they leave home to attend college, it is society's job to raise awareness to the lethal danger of binge drinking."

Shortly after the criminal charges were announced, the family of Mr. Dhanes filed a civil suit against Theta Chi and six of its members, including the three who also face criminal charges. We will provide updates as both the criminal and civil cases proceed.

- Daniel J. McCarthy

AKA Sued

On February 28, two students at Howard University sued in an effort to become members of the Alpha Chapter of the Alpha Kappa Alpha Sorority. They claim that they have been denied membership in the organization because they refused to participate in the hazing which was a part of the membership intake process. The suit named the national Alpha Kappa Alpha Sorority and Howard University as the only two Defendants.

The suit identified the potential members as legacies of Alpha Kappa Alpha and high achievers with strong GPA's. The Plaintiffs claimed that Howard University's restrictions on the number of members that Alpha Kappa Alpha could admit in any year as well as Alpha Kappa Alpha's own policies violated Plaintiff's rights. Plaintiffs sought compensatory damages in excess of $75,000, an order of specific performance that they be admitted into the membership intake process and injunctive relief prohibiting any new members from being admitted during the pendency of the lawsuit.

Within a week of the lawsuit being filed, the Federal District Court considering the case had denied both the Plaintiff's request for a temporary restraining order and the request for injunctive relief. The suit remains pending.

- Timothy M. Burke