



***Smith v. Delta Tau Delta*; Rules and Enforcement May Create Claims under Assumption of Duty and Agency Theories of Liability**

In the fall of 2008, Johnny Smith was a freshman at Wabash College in Crawfordsville, Indiana. Mr. Smith pledged the Beta Psi Chapter of Delta Tau Delta and began living in the Beta Psi Chapter House. During the Wabash Homecoming weekend of 2008, Mr. Smith consumed beer and hard alcohol, eventually passing out. Sometime between 11:30 pm on October 4, 2008, and 8:45 am on October 5, 2008, Mr. Smith died, apparently from alcohol poisoning.

Mr. Smith's parents filed suit against several parties including Delta Tau Delta, Wabash College, the Beta Psi Chapter, and the Beta Psi risk management officer. The complaint asserted three claims against Delta Tau Delta. Counts I and II asserted that Delta Tau Delta was liable for violations of the Indiana hazing and dram shop statutes. Specifically, the plaintiffs asserted liability on the part of Delta Tau Delta by way of an agency relationship with the Beta Psi Chapter. Count III asserted a claim for negligence on the theory that Delta Tau Delta assumed a duty to protect freshman pledges from harm caused by hazing and excessive alcohol consumption. After discovery, Delta Tau Delta moved for summary judgment on all claims. The trial court granted Delta Tau Delta's motion in all respects.

The Indiana Court of Appeals reversed (*Smith v. Delta Tau Delta*, ___ N.E.2d ___ (No. 54A01-1204-CT-169) (Ind. Ct. App. May 8, 2013)). The Court of Appeals determined that the grant of summary judgment was in error, finding that the record contained material issues of fact as to (i)

whether Delta Tau Delta assumed a duty to protect Mr. Smith, and (ii) whether an agency relationship existed between the Beta Psi Chapter and the national fraternity.

As these analyses are largely interrelated, the Court relied on the same facts in reversing summary judgment on both theories. Essentially, the *Smith* Court focused on the following facts: (i) Delta Tau Delta promulgated rules and enforcement procedures focused on hazing and alcohol abuse, (ii) Delta Tau Delta increasingly focused on regulating hazing and alcohol consumption over time and increased its involvement with the chapters through chapter consultants and chapter advisers, (iii) Delta Tau Delta promulgated specific and detailed guidelines dedicated to hazing and alcohol, (iv) Delta Tau Delta created a hierarchical enforcement program for violations of these guidelines and, (v) Delta Tau Delta created a verification program to ensure implementation of its risk management procedures. Based upon these facts, this Court found that there remained material facts in dispute as to whether Delta Tau Delta assumed a duty of care as to Mr. Smith or had an agency relationship with the Beta Psi Chapter.

This result is surprising. Courts in Indiana have been historically reluctant to find either an assumption of duty or an agency relationship in cases against national fraternities. For instance, in *Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (1999), the Indiana Supreme Court found that a fraternity did not assume a duty to protect against sexual assault merely by sending written materials to the local chap-

Editor's Note

We are pleased to present this bonus issue of *Fraternal Law* for our subscribers. We will continue to publish the newsletter four times an academic year, but the move to electronic distribution now allows for greater flexibility. We will occasionally offer bonus content, such as this issue, in addition to the regular issues. Please enjoy. And I hope to see many of you at the 2013 Fraternal Law Conference in Cincinnati on November 8th and 9th.

• Daniel J. McCarthy
Editor, *Fraternal Law*

ter highlighting the fraternity's efforts to lead the fight against date rape and alcohol abuse. Similarly, in *Foster v. Purdue University, the Beta Mu of Beta Theta Pi*, 567 N.E.2d 865 (Ind. Ct. App. 1991), the Indiana Court of Appeals affirmed summary judgment in favor of a national fraternity in a case where a pledge seriously injured himself while inebriated, specifically finding that the national fraternity had not assumed a duty to its pledges.

Finally, a different panel of the Indiana Court of Appeals recently decided *Yost v. Wabash*, 976 N.E.2d 724 (2012). In *Yost*, the Court of Appeals upheld summary judgment in favor of Phi Kappa Psi on facts very similar to the facts before the *Smith* Court. Refusing to find that Phi Kappa Psi either assumed a duty to its pledges or had any agency relationship with the chapter, the *Yost* Court noted "we recognize the untenable situation that can be created when colleges and fraternities attempt to deal with potentially dangerous activities by promulgating rules, only to have the enactment and enforcement of those rules thrown back at them as an assumption of duty." (*Yost*, p.36). Indeed.

The impact of the *Smith* case is yet to be understood. As it stands today, it appears to be an outlier. As set forth above, the *Smith* Court seemingly ignored relevant Indiana Supreme Court precedent as well as recent precedent from

panels of the Court of Appeals. In fact, the *Yost* case is not even mentioned in the *Smith* opinion despite its factual and legal similarities.

Instead of relying upon Indiana precedent, the *Smith* Court relied on a 1999 Louisiana case as support for its finding as to assumption of a duty, and a 1986 South Carolina case to support its finding on agency. The *Yost* case is currently pending before the Indiana Supreme Court. Perhaps the state's high court will resolve an apparent split among the Indiana Court of Appeals panels.

We will carefully monitor the proceedings in *Yost* and *Smith* as the outcome could significantly impact current risk management thinking for national Greek organizations. Specifically, if rules and regulations prohibiting hazing and excessive alcohol consumption become the touchstone of liability under an assumption of duty or agency theory, perhaps the very existence of such rules and regulations needs to be examined. Indeed, the *Smith* case, itself, demonstrates the untenable situation identified by the *Yost* Court; does it really make sense to allow the enactment and enforcement of rules against hazing and alcohol abuse to become the basis for an assumption of duty or agency theory of liability? We shall see, but the author, for one, hopes not.

• Sean P. Callan

National Hazing Prevention Week is 365 Days Long

National Hazing Prevention Week (NHPW) will be observed September 23-27, 2013, but organizer HazingPrevention.Org (HPO) hopes the issue is discussed 365 days a year. This year's theme for NHPW is "Know. Decide. Act. Only You Can Prevent Hazing," and the annual observance encourages campuses, communities, and organizations to raise awareness about hazing and hazing prevention.

"NHPW might be technically a week, but our committee works every month of the year," Allison Swick-Duttine, HazingPrevention.Org's NHPW Committee chairperson, said. "By the time campuses are observing the current week, we've chosen the theme and are working on planning materials for the next year."

Although campuses can observe NHPW any time during the year, annual timing of the "official" event for the last full week of September targets a crucial time, when students are becoming new members of organizations and athletic teams. But there's little time to plan an observance if you wait until the fall term begins. That's why HPO encourages planning in the spring prior to the observance, which means the NHPW Committee has to have planning tools ready by then.

This year, HPO released the 2013 NHPW Planning & Product Guide in March and conducted a planning webinar in mid-April, giving campuses and organizations ample time to prep for this September if they wanted to do it early. This is only the second time those planning materials have been

available in the spring, and Swick-Duttine predicts more and more campuses and organizations will get into the habit of not procrastinating.

"Not only will early preparation help communities create better observances," Swick-Duttine said, "but it also puts hazing prevention on their radar more days of the year, and that's really our goal."

"Our committee starts working with the official retailer of NHPW products, CampusTshirt.com, right after NHPW ends one year to produce a planning guide that offers ideas, resources, tools and products that organizers can use for their next observance," Swick-Duttine said.

As the director of fraternity/sorority life and organization development at the State University of New York at Plattsburgh, Swick-Duttine knows more than a little about the process. SUNY Plattsburgh has consistently observed NHPW for years, using the week to raise awareness and last year, to raise money for HazingPrevention.Org.

"We also know it's tough to organize a week's worth of events about hazing and prevention without some help," she stated. "That's why we develop these two key planning tools and why we offer them free of charge to anyone who wants them."

The NHPW Committee creates the content for the Planning & Product Guide. CampusTshirt.com works with the Committee on selecting a sampling of the products people can order with the NHPW logo on them, and designs the down-

loadable pdf of the publication. The Guide can be accessed at http://issuu.com/hazingprevention.org/docs/2013_pp_guide_final?mode=window&viewMode=doublePage.

NHPW Committee members Sarah Wild, a graduate intern at SUNY Plattsburgh, and Tanya Jordan, a marketing professional who works with her sorority, Gamma Phi Beta, discussed the purpose of NHPW, how you can make hazing prevention a year-around effort, and the 10 steps to planning a successful observance in the NHPW planning webinar, “Know. Decide. Act. Only You Can Prevent Hazing.” Wild and Jordan were joined by Susan West and Todd Cox from the Zeta Tau Alpha Award-winning campus hazing prevention and education program at the University of Kentucky. The recorded webinar is available at no charge through the HPO Online Store: <http://missionmade.com/hazing-prevention/know-decide-act-preparing-for-national-hazing-prevention-week-2013>.

In 2012, HPO launched a microsite, www.NationalHazingPreventionWeek.com. The site is designed to provide information, tools, resources, and planning information 365 days a year. It also promotes NHPW contests and awards, products, online anti-hazing pledge campaigns and, opportunities for campuses to raise money for HPO through the Campus FUNdraising Challenge.

“The Campus FUNdraising Challenge encourages campuses to sign up to raise money for HazingPrevention.Org as part of their National Hazing Prevention Week activities,” Charles Hall, executive director of HPO, said. “We want students to drive efforts on their campus to build hazing prevention and education programs unique to their campus environments, and the Challenge gives them that opportunity. They raise money to further the work of HPO’s mission to empower people to prevent hazing while bringing the benefits of an HPO annual Campus Membership to their campus if they raise

\$1,000 or more,” he said.

“Hazing prevention isn’t just about bringing in a speaker or raising awareness during one week of the year,” Hall said. “The NHPW microsite is one way we hope to keep prevention on the agenda every day of the year on campuses.”

The microsite is also where people will be able to access another free resource, the 2013 National Hazing Prevention Week Resource Guide. This digital publication moves past the planning for an observance and into the heart of what NHPW is all about. The Resource Guide features personal stories and articles from students, researchers, student affairs professionals and writers on the topic of hazing.

“Last year, we really streamlined the Resource Guide to make it more user-friendly,” Swick-Duttine said. “It features stories and articles that people can use to launch their own discussions about hazing and prevention. Like our other resources, we hope NHPW makes people download it, but that they use it throughout the year to address prevention in their communities.”

Besides featuring all of the tools and information generated by HazingPrevention.Org, the NHPW microsite also provides links to anti-hazing-related resources offered by other organizations, many who partner with HPO to distribute information to broader audiences.

“We hope that people will visit and revisit the HPO website and the NHPW microsite frequently to access information,” Hall said. “We can’t offer every possible resource ourselves, but we can link to many like-minded organizations so people can find what they’re searching for.”

For more information, visit www.HazingPrevention.Org and www.NationalHazingPreventionWeek.com.

• Michelle Terhune

SAE Insurance Not Required to Contribute to Settlement

Carson L. Starkey died on December 2, 2008, after participating in a “brown bag night,” sponsored by the Sigma Alpha Epsilon Chapter at Cal Poly State University. He was a pledge. Starkey and other pledges were given large amounts of alcohol. Starkey finished his in about 20 minutes. Shortly thereafter, he was unresponsive and unconscious. Initially, some chapter members concluded that he needed to go to a hospital. But because he “spit up and was slightly responsive,” a decision was made not to take him to the hospital and he was put in bed to sober up. He died that night of alcohol poisoning.

Four of the chapter members were among the defendants in the lawsuit that followed. SAE determined that those chapter members had violated the Fraternity’s policy on alcohol and hazing contained in Minerva’s Shield and the Fraternity’s Laws. While the initial lawsuit brought by the Starkey

family was settled, what followed was litigation between insurance companies over who had to contribute to those settlement payments for the individual members of the chapter who were defendants in the initial case. That dispute was recently resolved by the United States District Court for the Central District of California.¹

The Fraternity’s insurance policy includes an alcohol-use exclusion stating “no insurance coverage afforded by this policy shall apply ... for any claim arising out of, or in any way relating to, or in any way resulting from any ‘violation’ of ‘fraternity alcohol policy.’”

Initially, the court had ruled that the Fraternity’s insurance companies were obligated to defend the four members and required those insurance companies to pay the member’s insurance companies more than \$170,000 as an equitable contribution towards the defense cost. However, on the issue of

whether or not the Fraternity's insurance company was obligated to contribute towards the member's settlement, the court found otherwise.

While recognizing that there was clearly no coverage from the Fraternity's insurance for any liability of the individual members arising from the provision of alcohol to or hazing of Starkey, the court had initially found that the chapter members' negligent acts following providing the alcohol, their failure to care for Starkey after he was clearly in trouble, could theoretically have triggered coverage independently of their violation of SAE rules. However, in the dispute between the insurance companies, the court ultimately found that "while there may have been negligence in not taking Starkey to the hospital and that contributed to death, all of the events that evening were heavily tainted with alcohol." The court went on to find that "the decision not to take Starkey to the hospital for treatment was based in part on the chapter members' desire to avoid blame or reprimand for their own, as well as Starkey's, alcohol use." In essence, because, as the court noted in its

conclusion, all of the events surrounding Starkey's death arose out of, related to, and resulted from the chapter members' violation of the Fraternity's alcohol policy, the Fraternity's insurance was not obligated to indemnify the members' insurance.

It is clear that insurance companies and the fraternities that obtain coverage are increasingly providing limits on the coverage similar to those involved in this case. While the coverage may extend to protect the fraternity, it is not likely to extend to protect those members who violate the rules of the fraternity, especially in high profile violations involving alcohol and/or hazing resulting in serious injury or death.

• Timothy M. Burke

¹ *Liberty Corporate Capital, Ltd. v. California Tau Chapter of Sigma Alpha Epsilon Fraternity, et al.*, Case No. 2:11-CV-02626-ODW (FFMx), 2013 U.S. Dist. LEXIS 56697, April 19, 2013.

Kappa Alpha Order Prevails Against Break Away Group

In July 2011, most of the members of the Omicron Chapter of Kappa Alpha Order at the University of Texas (while under suspension and on involuntary alumni status) voted to break away from KAO National and form a local independent group called UT Texas Omicron. At the same time, the alumni Board of Directors of the KA House Corporation also voted to withdraw from National, cancel the Lease with the KA Chapter, and amend the Articles of Incorporation to change the purpose clause to exclude KA's from living in the house. The former members continued to live in the house, use the contents and equipment, and moved the \$159,000 in bank accounts to the new rogue group's name.

KAO, an Alumni Receivership Committee and alumni of the Omicron Chapter, filed suit in September 2011 to return the furniture and equipment, bank accounts, and occupancy of the house for the use and benefit of the Omicron Chapter of KAO. After extensive expense and discovery, and multiple Motions for Summary Judgment, a jury trial ensued in Austin, Texas. At the end of 1-1/2 weeks of trial, the jury found in favor of KAO and the Alumni Receivership Committee on all counts – conversion, unjust enrichment, damages of

\$205,000, KAO was not in breach of its own Laws, and the vote of the House Corporation Board was null and void.

The Court also found that the former chapter members and alumni House Corporation Board members had violated their membership agreements (Oaths, Charter, Constitution and Bylaws) by taking votes contrary to the best interests of KAO. The case included complex issues involving whether such agreements constitute enforceable contracts, the effect of a void vote of the members and the alumni Directors, and interpretation of governing documents that did not clearly set out reversionary language in the event a chapter or House Corporation decides to withdraw from the national organization.

KAO was vindicated in its efforts to prevent the rogue group from taking the property that rightfully belonged to the Omicron Chapter of KAO. At this time, the Court will determine if attorney's fees will be awarded against the rogue group and the House Corporation.

• Jim Ewbank
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Updates on Chico State and UCF Campus-Wide Suspensions

As reported in the January (Chico State) and March (UCF) issues of *Fraternal Law*, two public schools recently took the dramatic step of suspending nearly all Greek activities on their respective campuses. Now that the Spring semester has concluded, life at both Chico State and the University of Central Florida still does not seem to be back to normal for Greek chapters.

At Chico State, the following activities were prohibit-

ed for the entire Spring semester: all social events (including formals, socials and exchanges), all philanthropy events, and all intramural sports. It is not clear whether any of these activities will be permitted in the Fall 2013 semester. Of course, social events, philanthropy events and intramural sports form a large part of the daily activities for chapters and their members. The prohibition of these activities continues to raise due process and equal protection concerns.

At UCF, following a full week of presentations during which the chapters had to answer multiple questions and essentially prove their worth, the University reinstated 41 out of 47 chapters. Three chapters remained suspended after the reinstatement process. The reinstatement hearings each lasted 30 minutes, followed by a 10-minute case study and a 15-minute question and answer session with UCF's Reinstatement Committee. Unlike at Chico State, the chapters were able to host philanthropic events during the sus-

pension period, but all social and new member activities were prohibited.

As the 2013-14 academic year begins, be on the lookout for other schools, both public and private, following in the footsteps of Chico State and UCF. It is imperative to immediately and forcefully assert the constitutional rights of your members and chapters.

- Daniel J. McCarthy

Bogenberger Complaint Amended to Add 16 Women as Defendants

The death of David Bogenberger from alcohol poisoning with a blood content level five times the legal limit in Illinois has already garnered substantial media attention as a result of the arrest of 22 members of the Pi Kappa Alpha Eta Nu Chapter at Northern Illinois University. Five of the chapter officers face felony hazing charges, while 17 members face misdemeanor hazing charges. This is a result of what is alleged in the civil damage action filed on behalf of the Bogenberger family as "an initiation ritual ... known as 'Moms and Dads Night' ... which involved excessive and dangerous consumption of alcohol."¹

Now in a unique twist, that civil complaint is being amended to add 16 women as defendants. The women were apparently guests at the fraternity event and are alleged to have given Bogenberger excessive and dangerous amounts of alcohol, encouraged him to consume the alcohol, continued to give alcohol to him after he was dangerously intoxicated, and failed to seek medical attention for him.

The female defendants join Pi Kappa Alpha International Fraternity, Inc., its Eta Nu Chapter, seven officers of the fraternity who are named individually and in their capacity as officers, and 20 of the members of the chapter as defendants. While the Amended Complaint does not make clear the claims against the women, except in generalized statements, news

reports indicate that women were assigned as "moms" while members of the chapter were "dads." The moms and dads were in various rooms in the house and the pledges were required to find their assigned moms and dads and drink in each room while they were looking.

There can be little doubt that the alleged actions were in violation of numerous rules and regulations of the national fraternity. The suit claims the fraternity failed to enforce those rules.

The national fraternity will likely defend on the basis that it did everything that it could to enforce its rules. It is quite likely that the fraternity's insurance will attempt to avoid covering the individuals and perhaps the chapter that violated their rules. Of course, the fraternity's insurance would have no obligation to defend the women who are not members of the chapter.

This lawsuit is in its very early stages. *Fraternal Law* will continue to report on it.

- Timothy M. Burke

¹ *Bogenberger v. Pi Kappa Alpha, et al.*, Circuit Court of Cook County, Ill. County Department, Law Division, Case No. 2013 L 001616.

Bethune-Cookman and Phi Mu Alpha Sued

The mother of Marcus Thomas, a Bethune-Cookman University student who died in a car crash last year, has filed a wrongful death lawsuit against the school, the school's Greek Life Coordinator, the national fraternity, and an individual fraternity member. Thomas, a pledge of Phi Mu Alpha Sinfonia, which regards itself as "the world's oldest and largest secret national fraternal society in music," was also a member of the Bethune-Cookman marching band, known as "The Pride." Although the fraternity is not affiliated with the band, marching band hazing has been in the news since the 2011 hazing death of Florida A&M drum major Robert Champion, the first incident of a marching band hazing fatality. In 2004, another Florida A&M marching band mem-

ber, Marcus Parker, was awarded a \$1.8 million civil judgment for the kidney failure he developed from the paddling he received as a freshman.

The lawsuit filed by Thomas's mother alleges that pledges were intentionally sleep-deprived over the course of a three-week period. On the night of Thomas' death, he and other pledges stayed awake until 4:00 a.m. studying fraternity history "in fear of what would happen if they did not memorize accurately." At 4:30 a.m., Marcus Allen, also a member of the fraternity who was also named in the lawsuit, called the pledges and asked them to come to his off-campus apartment for a quiz about the fraternity's history. On the drive back from the quiz, around 8:00 a.m. that morning, the pledge that

was driving the vehicle fell asleep and crashed into a utility pole. The driver and the other passengers in the vehicle besides Mr. Thomas survived the crash.

A police investigation concluded that the driver's lack of sleep may have contributed to the crash, but also noted that Thomas was not wearing a seat belt. The University's attorney, Emmet Schwartzman, claims, "the alleged damage set forth in the complaint was caused by or contributed to by the negligence and conduct of the decedent, thus exonerating B-CC wholly or partially from liability."

The complaint also claims that the national fraternity, Bethune Cookman University, and the then Greek Life Coordinator, Lamar Bryant, "had direct knowledge of previous hazing activities occurring in student groups affiliated with BCU, including the fraternity, and did little or nothing to dis-

cipline the activity, thus sending a message to students that the anti-hazing policy was not enforced by the university."

Duane Warmack, a Bethune Cookman University Vice President, responded to this allegation, reiterating that "Bethune-Cookman University prides ourselves on having a zero tolerance on hazing and put mechanisms in place to ensure that doesn't happen and if it does we address it to the fullest." Benjamin Bedard, an attorney for Phi Mu Alpha, echoed this statement. The fraternity "strongly disagrees with the allegations. Based upon the information gathered about this accident, hazing was not involved. It is an unfortunate accident."

• Micah Kamrass

(Editor's Note: The author is a law clerk at Manley Burke. He is a member of Alpha Epsilon Pi and just completed his second year of law school at the Moritz College of Law at Ohio State University).

Registration Now Open for 2013 Fraternal Law Conference

Mark your calendars! Fraternal Law Partners, a division of Manley Burke, LPA, is pleased to announce that the Fraternal Law Conference will be held on November 8-9, 2013. The Fraternal Law Conference is the leading legal education event for fraternities, sororities and their related foundations, and will touch on a number of topics related to risk management and hazing, corporate governance and tax law. Confirmed speakers already include: Beth Stathos, Professor Laura Rothstein, Jim Ewbank, Dianne Bailey, and Professor Mark Bauer.

Once again, the Fraternal Law Conference will offer a dual-track format. One track will address the inner workings of fraternities and sororities, while the second will be targeted specifically to the unique needs of foundations. There will also be a number of shared sessions that will benefit all attendees.

Here are the essential details of the 2013 Fraternal Law Conference:

When: Friday, November 8, 2013 from 8:00 a.m. to 5:00 p.m. and Saturday, November 9, 2013 from 8:00 a.m. to Noon.

Where: Downtown Cincinnati, Ohio, in the Westin Hotel.

Who should attend: The president, treasurer/finance officer, executive director, director of business operations, director of chapter services, attorney/legal counsel and risk management leaders at fraternities, sororities and related foundations. Leaders of host institutions such as deans of student life, directors of Greek life or other student life officers would also benefit from the Conference.

Cost: Each registration is \$395 and includes the conference, all conference materials in electronic format, breakfast on Nov. 8 and 9, lunch on Nov. 8 and a cocktail reception on Nov. 8. Hard copies of conference materials are available for an additional \$150.00. Travel and accommodations are separate. For the convenience of attendees, a block of rooms has been reserved at the Westin Cincinnati. Group rates are available at the hotel until October 8, 2013, so please be sure to book ahead!

How to register: Registration is open at www.FraternalLaw.com.

For more information: Visit www.FraternalLaw.com for information on speakers, topics and additional details related to the Fraternal Law Conference. This site will be consistently updated as new information is received, so attendees are encouraged to check the site often. You may also contact Dan McCarthy at dan.mccarthy@fraternallaw.com or John Christopher at john.christopher@fraternallaw.com.

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