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Who Owns the Sorority House?

Alpha Omicron Pi (AOΠ) is an international women's fraternity founded in 1897. AOΠ's Tau chapter has existed at the University of Minnesota since 1912. As early as 1921, the local alumnae organized a Minnesota corporation to provide housing for the undergraduate members of the Tau chapter. The current name of that corporation is Tau, Inc. In 1931, real property in Minneapolis was donated to the corporation for use as the Tau chapter's house. It has been used for that purpose ever since. Title to the house is held in the name of Tau, Inc. Many fraternities and sororities provide undergraduate housing throughout North America using this house corporation model.

AOΠ's Plan to Control All Housing

In 2001, AOΠ created a subsidiary called "Alpha Omicron Pi Properties, Inc." The purpose was to centralize management of its affiliated sorority houses through two programs run by the subsidiary: Corporation Services, which offers property management services, and Billhighway, an Internet-based financial management system. AOΠ sought to require all chapters and affiliated house corporations to begin using these two programs.

AOΠ then went a step further and requested that all of its affiliated house corporations amend their articles of incorporation to include two new clauses:

> The corporation is a wholly owned subsidiary of Alpha Omicron Pi Fraternity, Inc., a Tennessee not-for-profit Corporation. Alpha Omicron Pi Fraternity, Inc. is the only member with voting authority.
>
> In the event that _____ Chapter is closed, after all financial obligations of the chapter and corporation have been satisfied, all remaining assets, real and personal, tangible and intangible, shall be transferred to Alpha Omicron Pi Fraternity, Inc. a Tennessee not-for-profit corporation; and unless there is a ruling to the contrary by Alpha Omicron Pi Fraternity, Inc. the corporation shall be dissolved.

Tau, Inc. Resists

The alumnae members of Tau, Inc. resisted these initiatives from AOΠ. In 2009, AOΠ demanded that Tau, Inc. transfer its corporate funds to Billhighway under threat of placing the Tau chapter on probation. Next, AOΠ demanded that Tau, Inc. start using Corporation Services, and also that it transfer title to the house to either AOΠ Properties or to AOΠ itself. Tau, Inc. refused. AOΠ threatened to remove Tau, Inc.'s board of directors if it did not agree to use Corporation Services. In 2010, Tau, Inc. acquiesced to that demand. However, Tau, Inc. continued to refuse to transfer title to the house itself, and refused to add the requested language to its articles of incorporation.

2013 Fraternal Law Conference Huge Success; Planning Begins for 2014 Conference

Fraternal Law Partners and Manley Burke proudly hosted the 15th National Fraternal Law Conference this past November in Cincinnati, Ohio. We once again had an outstanding faculty that included three distinguished law professors, many leading national attorneys, and the Honorable Nathaniel R. Jones, a retired judge from the Sixth Circuit Court of Appeals.

We are now in the planning stages for the 16th Fraternal Law Conference. We received many helpful comments at the Conference from attendees. But we are always looking for speaker and topic suggestions. We are also considering shifting the Conference from the traditional all day Friday and half day Saturday format to half day Thursday (in the afternoon) and all day Friday. We know that the Conference will take place on Friday, November 7th in Cincinnati. It is not yet determined if the second day will be Thursday, November 6th or Saturday, November 8th.

Please submit any comments or suggestions you have on the Conference to our Conference Coordinator, Kathie Thomas, at kathie.thomas@manleyburke.com.

- Daniel J. McCarthy

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During 2010 and 2011, Tau, Inc. paid Corporation Services and Billhighway thousands of dollars in fees while expressing dissatisfaction with the services provided and the lack of local control. To those objections, AOΠ replied that Tau, Inc. was now a "managed" corporation controlled by AOΠ Properties, not local alumnae.

AOΠ Ups the Ante on Property Control

In February 2012, AOΠ enacted a number of Standing Rules. Among them was the requirement that all chapters and house corporations must comply with the regulations of the Fraternity. Additionally, the Standing Rules purported to give AOΠ direct control over the various house corporations. Furthermore, the Standing Rules purported to give AOII direct *ownership* of all houses, whether or not titled in local house corporations:

> "Although chapter real estate interests may from time to time be titled in the name of a specific chapter corporation and/or Alpha Omicron Pi Properties, Inc., all such real estate interests and other assets *are assets of the Fraternity* and are subject to its control, oversight and management." (Emphasis added.)

Perhaps more ominously from the perspective of a local house corporation like Tau, Inc., AOII Properties established a collectivist International Housing Approach (IHA). Pursuant to this program, AOII announced an intention to pool its real estate assets and leverage those assets to build or refurbish chapter houses, or even require one house corporation to make a loan to another, all without local approval.

AOΠ's Takeover of Tau, Inc.

In 2011, AOΠ attempted to change Tau, Inc.'s registered agent to its own selection. Tau, Inc. changed it back. In early 2012, AOΠ notified Tau, Inc. that it was scheduling a board meeting for March. At this point, Tau retained counsel, and sent a letter to AOΠ objecting to the "unlawful assertion of control over Tau Corporation's affairs." The meeting was cancelled.

In April 2012, the dispute escalated. AOΠ sent a letter to Tau, Inc. notifying the local alumnae that it was necessary for AOΠ to assume control of the corporation. Tau, Inc.'s board members were informed that they no longer had any authority to act, and that employees of AOΠ Properties would be taking over as interim board members. Additionally, the Tau, Inc. board members were threatened with suspension of their AOΠ memberships if they continued to resist these demands.

Tau, Inc. did not back down. It replied to AOΠ's letter by asserting that AOΠ had no legal authority to take over the corporation. In October 2012, Tau, Inc. held its annual meeting and re-elected its six-member board.

The newly-elected board held a meeting at the Tau chapter house in December 2012. The AOΠ Executive Director and another employee arrived, and handed the board members letters informing them that their memberships in AOΠ were suspended. The board members were also informed that they could face criminal trespass charges if they entered the chapter facility. The two AOΠ employees then conducted a board meeting themselves. They first removed the existing directors and appointed their own choice as sole director. That director then appointed AOΠ's choices as officers. Finally, the meeting purported to amend Tau, Inc.'s articles and bylaws in the manner desired by AOΠ. None of the persons who took these actions were previously voting members of the corporation.

Tau, Inc. Files Suit

Two weeks after the December 2012 board meeting, Tau, Inc. filed suit against AOΠ and AOΠ Properties in the U.S. District Court for the District of Minnesota.[1] They alleged various theories of liability. Tau, Inc. sought a preliminary injunction against AOΠ, claiming that AOΠ had illegally taken over its corporate governance and was threatening to mortgage or sell its real property via the IHA.

Tau, Inc. and AOΠ filed multiple declarations and exhibits in support of their respective positions. Each party presented what it claimed were the operative bylaws for Tau, Inc., which were essentially the same – except AOΠ's version included the language, "Operations of the Corporation shall be in conformance with the regulations of Alpha Omicron Pi Fraternity Inc."

The Court Issues an Injunction

On September 23, 2013, District Judge John R. Tunheim issued an injunction against AOΠ in a 37-page written opinion. The court noted that the ultimate decision in the case likely depends on which version of Tau, Inc.'s bylaws controls. Assuming that the version presented by Tau, Inc. controls, then Tau, Inc. will likely prevail as AOΠ has no authority over the corporation. The court noted that AOΠ was relying on its own Standing Rules as the basis for its claim of control over Tau, Inc. and its property. The court held that a mere statement in one corporation's bylaws that it controls the property of another entity "does not make it so... for example, if AOΠ's bylaws said that it has the right to control the Walt Disney Company, that provision would have no legal effect and would not be binding upon the Walt Disney Company."

The court also noted that AOΠ's unquestioned authority over the Tau *chapter* does not give it control over an affiliated alumni corporation: A chapter is an unincorporated association of students who have come together voluntarily; a corporation, on the other hand, is a separate legal entity recognized by a state.

The court also noted that even if the version of the bylaws presented by AOΠ were found to control, Tau, Inc. would still likely prevail. The application of the Standing Rules, giving AOΠ unfettered discretion to control the corporation - including unilaterally removing its board - would likely be unreasonable as written and applied.

The court ordered the prior Tau, Inc. board members reinstated. AOΠ was enjoined from interfering with Tau, Inc's ownership and control of its real property, although Corporation Services was allowed to continue managing the property per the written agreement between the parties. These orders will remain in effect pending resolution of the case.

The injunction issued by Judge Tunheim is merely a provisional remedy; the ultimate outcome of the case is uncertain. But this battle over control of a particular chapter house, and the larger issue of international vs. local control that it represents, has implication for all fraternities and sororities who wish to impose uniform standards in regard to their housing.

- James C. Harvey

Mr. Harvey is an attorney in Orange County, California and a member of Phi Delta Theta.

[1] Civil No. 12-3141 (JRT/JSM)

North Carolina Law Removes University Recognition From Zoning Considerations

Earlier this year, the North Carolina general assembly passed a law that deals with a particular issue pertaining to the zoning of fraternity and sorority houses. This new state law was passed as a much larger piece of legislation called the Regulatory Reform Act of 2013. The new law prohibits North Carolina municipalities from differentiating between fraternity and sorority houses that are occupied by organizations recognized by a university and fraternity and sorority houses that are occupied by groups not recognized by a university. Essentially, North Carolina municipalities can no longer base zoning decisions on university recognition.

One place to examine this law's impact is the city of Greenville, which is home to Eastern Carolina University. Greenville provides fraternity and sorority houses with special use zoning permits, to allow for the large occupancy of these facilities. However, in the past, if the fraternity or sorority was disciplined by the university and lost its official recognition, then the city of Greenville would revoke the special use permit. As a result of this new change in the law, Greenville will no longer be able to revoke the special use permits in these instances.

Overall, this law seems to be a positive development for fraternities and sororities. There are at least two potential scenarios where Greek letter organizations could benefit from this legislation.

First, it is well documented that universities and inter/national organizations at times disagree over whether or not to suspend or shut down a chapter. Sometimes, this disagreement results in a situation where the chapter continues to function without university recognition. Of course there can be other causes for a fraternity or a sorority to exist at a university without official recognition. Perhaps the group may not want to comply with the university recognition requirements. The United States Supreme Court has accepted as common practice that "private groups, [such as] fraternities and sororities... commonly maintain a presence at universities without official school affiliation." *Christian Legal Society Chapter of the University of California v. Martinez,* 130 S. Ct. 2971 (2010). For whatever the reason may be, this North Carolina law provides a layer of protection for fraternities and sororities that choose to operate without university recognition.

The second scenario in which fraternities and sororities could benefit from this legislation occurs when a house corporation desires to lease a fraternity or sorority facility to another group. If, for example, a chapter at a particular university is given a two-year suspension, then this North Carolina law will enable that group's house corporation to lease the facility to a smaller organization that may be forming at a university and has not yet received official recognition. This could help ensure that a suspension does not cause a house corporation to forego several years of rent payments.

- Micah Kamrass

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IRS Announces Automatic Retroactive Reinstatement for Certain Organizations

On January 2, 2014, the Internal Revenue Service announced new procedures for reinstating the tax-exempt status of organizations that have had their tax-exempt status automatically revoked under section 6033(j) of the Internal Revenue Code ("Code") for failure to file required annual returns or notices for three consecutive years. The new procedures, to be published in Revenue Procedure 2014-11 (http://www.irs.gov/pub/irs-drop/rp-14-11.pdf) as part Internal Revenue Bulletin 2014-3 (Jan. 13, 2014), will allow small organizations to obtain retroactive reinstatement of exempt status automatically - without the burden of showing reasonable cause.

Passed as part of the Pension Protection Act of 2006, Code Section 6033(j)(1) automatically revokes the tax-exempt status of any organization that fails to file a required annual return or notice (e.g., Forms 990, 990-EZ or 990-N) for three consecutive years. Revocation under section 6033(j)(1) is effective as of the due date for the filing of the third Annual Return or notice.

Any organization that has its tax-exempt status automatically revoked in this manner must apply to the IRS in order to obtain reinstatement of its tax-exempt status, regardless of whether the organization was originally required to apply for recognition of its tax exemption. For example, if the tax-exempt status of a subordinate organization included in a group exemption letter (such as a local chapter of a national fraternity) is automatically revoked under Code section 6033(j)(1), the subordinate organization must apply for reinstatement of its tax-exempt status on its own behalf.

Under the general rule, the effective date of the organization's reinstated tax-exempt status generally will be the date on which the application was post-marked. However, Code section 6033(j)(3) further provides that if an organization "can show to the satisfaction of the Secretary evidence of reasonable cause for the failure [to file required annual returns or notices], the organization's exempt status may, in the discretion of the Secretary, be reinstated effective from the date of the revocation."

Under the newly issued procedures, an organization that was eligible to file either Form 990-EZ or Form 990-N for each of the three consecutive years that it failed to file and that has not previously had its tax-exempt status automatically revoked may qualify to use the Revenue Procedure's new streamlined retroactive reinstatement of its tax-exempt status process. In order to do so, the qualifying organization must submit an application for reinstatement (with the applicable user fee) not later than 15 months after the later of the date of the organization's revocation letter or the date on which the IRS posted the organization's name on its revocation list (see http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Select-Check.) The IRS recommends that applying organizations write "Revenue Procedure 2014-11, Streamlined Retroactive Reinstatement" on the top of the application to facilitate processing.

If an organization files an application as provided above, and its application is approved, then the organization will be deemed to have reasonable cause for its failures to file Forms 990-EZ or 990-N, as applicable, for three consecutive years and, as a result, it will be reinstated retroactively to the revocation date.

The Revenue Procedure also addresses the potential application of failure to file penalties. In essence, if the organization is retroactively reinstated and files properly completed and executed paper Forms 990-EZ for each taxable year it was required to file a Form 990-EZ, then the IRS will not impose otherwise applicable failure to file penalties. Note that for any year the organization was eligible to file a Form 990-N, the organization is not required to file a prior year Form 990-N or Form 990-EZ for such year.

We heard anecdotally from IRS representatives in the Cincinnati determinations office that a huge number of retroactive reinstatement applications are pending. These are in addition to the normal caseload of new applications for exemption. This caseload "bubble" has caused substantial delay in the IRS' ability to timely respond to both new applications for exemption and applications for reinstatement. These new procedures appear to have been issued in response to the caseload bubble. The automatic retroactive reinstatement procedures implemented under the new Revenue Procedure are a welcome development in the IRS' quest to reduce the period of time required for review and processing of applications for exemption.

- John E. Christopher

Colorado Court Compels Arbitration

As reported in the November 2012 issue of *Fraternal* Law, Scott Higuchi sued Delta Tau Delta and various other defendants after his son, Ross Higuchi, died in April 2011 when he fell from a balcony of the fraternity house. The District Court in Arapahoe County, Colorado recently granted Delta Tau Delta's

motion to compel arbitration in the case.[1]

Ross Higuchi was a student at the University of Northern Colorado. In the complaint, it is alleged that Ross was a pledge of Delta Tau Delta and that he was "hazed with dangerous and fatal quantities of alcohol" by the various defendants. The complaint further alleged that "pledges were hazed—including being compelled to consume, under circumstances constituting legal duress—dangerous quantities of alcohol." The hazing allegedly included a "champagne chug" with each pledge instructed that he "had to consume the alcohol" in his bottle, or else "he would be shirking and passing his responsibility to consume the alcohol to another brother."

The complaint alleges that late in the evening, Ross was on the balcony of the fraternity house and was prevented re-entry into the house. He then became agitated and was "visibly and heavily intoxicated." Ross fell from the balcony and hit his head. He was transported to a local hospital and died several days later.

Lawsuit Filed

Scott Higuchi filed suit in October 2012 against Delta Tau Delta Fraternity, Theta Omicron Local Chapter, Theta Omicron House Corporation, Delta Tau Delta Omicron House Found, as well as four individual defendants. The complaint included claims against the fraternity defendants for negligent and reckless misconduct, hazing, and negligence *per se*, and negligence against all defendants.

The complaint was initially filed in Boulder County District Court. Soon thereafter, the fraternity defendants moved to change venue to Arapahoe County District Court. That motion was granted. The fraternity then sought to have the case dismissed under the Colorado Dram Shop Act, but that motion was denied.

The Arbitration Clause

The fraternity defendants moved the court to dismiss the case for lack of subject matter jurisdiction and to compel arbitration based on Delta Tau Delta's "Statement of New Member" form, which contains "The Delta Tau Delta Fraternity Claim and Dispute Resolution Plan and Rules." The court cited relevant portions of the Agreement at length, including:

1. Purpose and Construction

The Plan is designed to provide for the quick, fair, accessible, and inexpensive resolution of legal dispute between the Fraternity, and between any parent, affiliate, or successor of the Fraternity, or any of their officers, directors, new members, alumni, or members, and the Fraternity's present and former members, relating to or arising out of a membership relationship with the Fraternity or participation in a Fraternity activity, expressly including, but not limited to, any legal disputes which any present or former Delta Tau Delta Fraternity member asserts a claim or dispute against the Fraternity, any parent, affiliate, or successor of the Fraternity, or any of their officers, members, and the Fraternity's present or former members. The Plan is intended to create an exclusive procedural mechanism for the final resolution of all disputes falling within its terms. It is not intended either to reduce or enlarge substantive rights available under existing law. The Plan should be interpreted in accordance with these purposes.

9. Exclusive Remedy

Proceedings under the Plan shall be the exclusive, final and binding method by which Disputes are resolved. Consequently, the institution of a proceeding under this Plan shall be a condition precedent to the initiation of any legal action (including action before an administrative tribunal with adjudicatory powers) against the Fraternity arising out of the membership or participating in Fraternity activities of a member by the Fraternity and any such legal action shall be limited to those under the Act.

HAZING IN THE NEWS

The issue of hazing just won't go away. In spite of the virtually universal efforts by national fraternities and sororities to eliminate hazing, there can be little doubt that serious instances of hazing continue. Those violations continue to draw the attention of criminal and civil authorities and of course, the media.

On January 7, 2014, the *Chronicle of Higher Education* reported that the Chancellor of the University System of Maryland urged that hazing -related penalties needed to be strengthened. A Maryland State lawmaker, Senator Jamie Raskin, announced that he planned to introduce legislation which would increase the fine for hazing from $500 to $5,000. Whether such an increase in fines would cause any decrease in hazing is far from certain. Still, the sad truth is that hazing needs continuing attention. While there may be serious questions about the accuracy of articles published in Bloomberg, the claim that there have been more than 60 fraternity-related deaths since 2005 will continue to be used as a call to action.

- Timothy M. Burke

In support of its motion to enforce the arbitration provisions in the Agreement, the fraternity defendants argued that the Agreement was valid and binding and that the provision was not waived. In response, the plaintiff argued that there was no enforceable arbitration provision because the Agreement was not signed, there was no consideration, the statement was not a contract, the parties did not intend for the Agreement to cover disputes such as the one involved in the case, and that the fraternity defendants breached the terms of the contract. The plaintiff also argued that the defendants waived the right to enforce the arbitration clause.

The Arbitration Provision is Valid/Electronic Signature Approved

The court initially noted that Colorado favors alternative dispute resolution mechanisms, and that arbitration clauses are generally enforceable. The court then examined the plaintiff's arguments. In response to the argument that the Agreement was not signed, the court noted that "Ross manifested his assent to the Agreement by appending his electronic signature." The question of electronic signatures was not addressed beyond that cursory statement in the opinion. But this is an issue that frequently is asked regarding on-line contracts and records. The Colorado Statutes include detailed requirements for electronic signatures. Though the statutes vary by state, the Colorado law, found at Section 24-71.3-101 *et seq.*, C.R.S. (2013) provides a good model electronic signature statute.

On the issue of consideration, the court noted that Ross was required to sign the Agreement in order to gain membership into the fraternity. The court further found that the Agreement clearly and unambiguously required arbitration. Finally, in response to the plaintiff's argument that the alleged hazing constituted a material breach of the Agreement, the court held this did not render the arbitration clause inapplicable. Rather, that issue should be raised during the arbitration.

Dispute Within the Scope of the Arbitration Provision

The court then looked at whether the dispute was within the scope of the arbitration clause. Noting the broad language of the Agreement, the court held that all claims arising out of fraternity activities fell within the scope of the arbitration clause, and that it also applied to all claims arising out of tort, including negligence, or statute. The court concluded, "[b]ecause of the broad and unrestricted language of the Agreement, the strong presumption favoring arbitration applies with even greater force."

After concluding that the arbitration provision was valid, and that it applied to the dispute, the court then rejected the plaintiff's argument that the fraternity defendants waived the right to arbitration. Its final order ordered arbitration. But the court denied the fraternity defendants' motion to dismiss, noting that a stay of the proceedings pending arbitration, rather than a dismissal, was the proper proceeding.

To Arbitrate or Not?

For proponents of arbitration, this is a solid victory. But should more organizations include similar arbitration clauses in membership agreements? There are certainly pros and cons of arbitration. Some of the pros also serve as cons. Arbitration is typically viewed as cheaper than litigation. But that is not always the case. There is also more finality with arbitration. That can be a good thing or a bad thing, depending on the result. It is much more difficult to appeal an arbitration award than a judge's decision or a jury verdict. Further, the right to a jury can be a good thing because it removes the potential of an emotional verdict. But arbitrators can also be unpredictable.

The bottom line is that arbitration clauses are right for certain groups and certain situations, but not all groups and not all situations. This opinion affirms the right to use arbitration clauses in agreements between a national organization and its members and potential members.

- Daniel J. McCarthy

1 *Higuchi v. Delta Tau Delta, et al.*, Arapahoe County District Court, Case No. 2012CV2380.

History Made at Alabama

Sigma Delta Tau has made history with the election of Hannah Christine Patterson, as the first black president of a Panhellenic Sorority at the University of Alabama. The November 14, 2013 issue of the Crimson White, the University of Alabama Student Newspaper, quoted Patterson as saying, "I guess I never saw color or race or ethnicity. It has never been in the front of my mind. I tried to never let it hinder anything I did or judge people on that. I guess I never really thought about, 'Oh, I am the first African American who has been President'. I am just excited for my term and to see where my Chapter has gone and where it is going to go". After the controversy earlier in the fall semester when initially no African Americans received membership bids after going through the formal Rush process, it is not surprising that Patterson's election attracted media attention.

- Timothy M. Burke

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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