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# Important Decision in Delaware Case

"The sad and inescapable truth is that Ethan, and only Ethan, was responsible for his own death."[1]

Those words by Judge Ferris W. Warden summarized his decision granting summary judgment in favor of all of the remaining defendants in the case, including the Alpha Epsilon Phi sorority and its chapter at the University of Delaware. Other defendants granted summary judgment in the same decision included the University of Delaware, the venue at which the party took place, the caterer, and the owner of that property.

Ethan Connolly, 19 years old, attended an Alpha Epsilon Phi "Crush" party, arriving at the venue, as everyone else did, on one of the buses provided by the sorority. The facts described in the court's 39-page decision, with 154 footnotes, indicate that he had "pregamed," apparently consuming a large quantity of alcohol before ever getting on the bus. The sorority policed the bus to ensure no alcohol was present there. At the venue, only those of age were provided with wristbands, enabling them to obtain alcohol, and both the sorority and staff at the venue took steps to ensure that only those of age were able to drink at the event.

Sometime before the event ended, Connolly left the party. The court described what happened next this way:

> "Ethan was killed when he walked in front of a pick-up truck. It was 12:31 a.m. It was dark. Ethan was crossing northbound Delaware Rt. 896 south of Newark. He was not crossing at the crosswalk with lighted pedestrian crossing signals approximately 90 feet from where he was struck. He was not wearing any reflective clothing. Nor was he carrying a flashlight. Most significantly, Ethan was grossly impaired due to acute alcohol intoxication. At autopsy, he had blood alcohol concentrations of 0.232 g/dl (femoral blood), 0.227 g/dl (vitreous humor) and 0.304 g/dl (urine). He tested positive for marijuana."

The court began its decision, demonstrating significant sympathy for the plaintiffs, who were Ethan's parents, stating "It falls to the court to perform the unhappy task of bringing more bad news to people who have had far too much of that in recent years." But the court's sympathy did not change the outcome.

Carefully examining the claims against each of the remaining defendants, the court pointed out that there was little evidence, if any, that Ethan consumed alcohol at the event. The facts were unclear as to how long Ethan was at the party, if he drank there, and if he was visibly intoxicated at the party. As the court put it:

> "In short, the most the Connolly's arguably can be said to have established as far as a factual record is that Ethan went to the crush party on a bus provided by the sorority, went inside the banquet center, consumed an unknown amount of alcohol procured by unknown means and left some time before the party ended. In contrast, a strong argument can be made that the Connollys have not established even that much since those facts are merely lawyers' representations about what potential witnesses would say."

In short, there was no evidence provided either by sworn deposition testimony or affidavits supporting what Connollys' attorney said in their argument. The court, however, accepted as true the facts claimed by those attorneys for the purpose of deciding the motions for summary judgment.

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As to all the defendants, the court dismissed the alcohol-related claims, finding them to be barred by Delaware law regarding dram shops and social host immunity.

Specifically, with regard to the sorority, the court said it had assumed the duty of providing safe transportation to and from the event. As the court put it, "the reason the sorority provided transportation is obvious. It did not want impaired attendees (including Ethan) driving to and from the event, which was beyond reasonable walking distance from campus, there-


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by endangering themselves and others." Having recognized that the sorority had accepted a duty, however, the court was clear in saying the sorority did not breach that duty.

> "It was Ethan's premature and volitional departure from the party that prevented him from taking advantage of the transportation services that the sorority provided. No sorority member did anything that increased the risk of harm to Ethan or prevented him from taking advantage of the transportation service that defined the responsibility for Ethan's safety assumed by the sorority. The court simply does not accept, nor find any warrant for, the Connollys' contention that the duty the sorority assumed extended to preventing Ethan from leaving the banquet center, ultimately perhaps to the extent of restraining him if necessary."

The court goes on at some length to describe all of the actions for which Ethan Connolly was personally responsible, making it crystal clear that it was Ethan's own conduct that was the proximate cause of his death.

Dave Westol, a nationally known expert in fraternity conduct matters, served as an expert witness in this case for Alpha Epsilon Phi. He reviewed the facts, issued a report that was part of the record and was prepared to testify at trial had the case gone forward. He states:

> "As sad as Ethan's death was, the chapter had taken all reasonable steps to ensure the event was conducted safely.
>
> "The undergraduate women were very intentional in terms of the steps that they took, such as requiring all members and guests who attended the event to ride on one of the buses to the venue, having members sign their names as they boarded, using a guest list and checking off names of guests on each bus as they boarded, assigning officers to help on the buses and as "floaters" at the event to maintain order, confiscating any alcohol on buses that members or guests may have brought with them onto a bus and assisting the staff of the third party venue. The entire executive council of the chapter also remained behind and thoroughly checked the venue before they departed back to campus on the last bus."

The lesson here is that when a chapter does things the right way, the law will generally protect it against claims on behalf of an individual who does not.

- Timothy M. Burke

1 *Connolly v. Theta Chi Fraternity, Inc., et al.*, C.A. No. N14C-08-006FWW, Superior Court, State of Delaware. Memorandum Opinion and Order issued February 28, 2018. Note, Theta Chi was among the defendants dismissed earlier.

# New 6th Circuit Decision in Sexual Assault Case

A February 9th decision by the United States Court of Appeals for the 6th Circuit demonstrates again the challenges faced by universities in appropriately conducting sexual misconduct disciplinary actions in a fair and constitutionally acceptable manner. In the case of *Doe v. Miami University*,[1] John Doe had been accused of sexual misconduct with Jane Doe. Both had been drinking. The University hearing panel, which had found John responsible for violating student conduct regulations and suspended him for three terms, summarized their finding this way:

> "You stated that you and [Jane] were friends and had spent time together in the past. Both of you agreed to go to your residence hall room, where you engaged in consensual kissing and some consensual sexual contact. However, at some point, [Jane] indicated she did not want to have oral sex and asked you to stop, but the act continued."

John appealed the decision through the University appeal process. The finding of responsibility was upheld throughout that process, but ultimately his suspension period was reduced by four months.

Nonetheless, John filed suit in Federal District Court against the University and several of those involved in the decision. He also initially sued Jane.[2] John's Complaint made multiple claims against the University, including a Title IX hostile environment claim, a Title IX deliberate indifference claim, 42 USC 1983 substantive – and procedural due process and equal protection claims, as well as a Title IX erroneous outcome claim, and 42 USC 1983 procedural-due-process and equal protection claims against the disciplinary panel members.

The District Court dismissed all of John's claims in response to a motion to dismiss by the defendants.

As the 6th Circuit noted, that on a motion to dismiss, the Court must accept all of the factual claims

made by the plaintiff, in this case, John, as being true. That is a high bar for defendants to meet on a motion to dismiss. The 6th Circuit ultimately upheld most, but not all of the District Court's decision. Specifically, the Court reversed the District Court on several critical issues.

First, the Court found John's allegation that Miami University violated Title IX under an erroneous outcome theory of liability created at least a "plausible inference of intentional gender discrimination." That conclusion was based on several issues in the record of the case, though at this stage in a case, the record is very limited and discovery between the parties has not taken place. First, the court noted that Jane's statement to the University, which was attached to John's complaint, was "internally inconsistent with regard to her description of the oral sex; she states both that 'I said no' and 'I never said no'." The court was critical of the fact that the Hearing Panel did not explain how it resolved that inconsistency. Vaughn, a defendant and member of the Hearing Panel, had erroneously stated in a newspaper that Miami University required there to be "affirmative consent," even though that it is not required in the University's Title IX Policy and the Student Handbook. Finally, the Court noted that there was "statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University supports at the Motion-to-Dismiss stage a reasonable inference of gender discrimination."

As the 6th Circuit noted, that on a motion to dismiss, the Court must accept all of the factual claims made by the plaintiff, in this case, John, as being true. That is a high bar for defendants to meet on a motion to dismiss.

In reviewing Doe's 42 U.S.C. 1983 Equal Protection claims, the Court focused on John's claims against Vaughn who, in addition to being a member of the hearing panel, was also the Director of the University's Office of Ethics and Student Conflict Resolution. John claimed that Vaughn was the individual responsible for deciding whether or not to charge students with sexual misconduct violations, and she decided to charge him and not Jane, though both, according to John, had violated Miami policies. John argued that the difference in treatment was based on his gender, and the Court noted that:

> "This case is before us at the motion-to-dismiss stage and discovery may disprove John's allegation that the reason he was treated differently than Jane was because of his gender and not because of other legitimate reasons. But given the procedural posture, in which the case currently rests, however, we must presume John's allegations to be true."

The court also found that John's claims of violation of his procedural due process rights should not have been dismissed by the trial court. Relying on prior decisions, the court noted that higher education disciplinary decisions implicate constitutionally-protected due process rights. In doing so, it referred to prior court decisions which had stated:

> "Suspension 'clearly implicated' a protected property interest, and allegations of sexual assault may 'impugh [a student's] reputation and integrity, thus implicating a protected liberty interest."[3]

The court agreed that John was entitled to an unbiased decision maker, and reviewed John's criticism of Vaughn who, according to John, had served as investigator, prosecutor and judge. The court agreed that the allegation of her dominance on the three-person hearing panel "raises legitimate concerns, as she was the only one of the three with conflicting roles." According to John, Vaughn had also announced during the hearing that "I'll bet you do this [sexually assault woman] all the time." While the court is clear in saying that fulfilling multiple roles in the process does not always create a due process problem, here there were sufficient allegations that the claim should have survived a motion to dismiss.

The court was also critical of the fact that Miami University did not provide John with his complete disciplinary file prior to the hearing. The Court made it clear that the Constitution does require that a student be provided with the evidence against him prior to the hearing. Thus, John had "alleged a cognizable due-process violation."

Finally, the court overturned the finding by the District Court that Vaughn was entitled to qualified immunity since John's "right to freedom from invidious [gender] discrimination under the Equal Protection Clause was certainly clearly established at all times pertinent to this action." The qualified immunity granted to the other members of the University administration who have been named as defendants was upheld.

The Court of Appeals decision sends the case back to the Federal District Court for consideration of the issues on which the court reversed the Motion to Dismiss.

- Timothy M. Burke

1 *Doe v. Miami University*, 2018 U.S. App. LEXIS 3075.

2 John and Jane reached a settlement and the claims against her were dismissed by agreement between the parties.

3 *University of Cincinnati*, 872 F.3rd at 399 (quoting Cummins, 662 F. App'x at 455).

# Pi Delta Psi Appeals Criminal Conviction

Pi Delta Psi, Inc., which was convicted in a Pennsylvania trial court of crimes involved in the death of Michael Deng,[1] has appealed its conviction to the Pennsylvania Superior Court, the first appellate level in Pennsylvania.

The statement announcing the appeal includes:

> While appealing, they continue to nonetheless express deepest condolences to Michael Deng's family. No family should suffer such a loss.
>
> The decision to appeal the verdict was not taken lightly. The injustice in the prosecution of this particular case, and the violation of important constitutional principles or fraternities and similar voluntary associations requires this action.
>
> The national fraternity and every fraternity brother is shaken to the core that a gross, inhumane and depraved departure from the fraternity's initiation rituals and practices caused the death of Michael Deng.

*Fraternal Law* will report on the results of the appeal.

- Timothy M. Burke

1 See *Fraternal Law*, Number 152, November 2017, Special Edition.

# Losing University Recognition Could Mean Losing Your House

When a university strips a fraternity of its recognition status and right to be on campus, problems for the fraternity do not always end there. The fraternity's house can also be shut down by the municipality. This is because an increasing number of municipalities are looking to local universities to determine which groups should get a house.

Fraternal Law Partners researched this issue and conducted a zoning survey of over 50 select universities and their local zoning codes. From the Big Ten to the Pac 12, we found that approximately 59% of our selected municipalities have defined "fraternity/sorority" in a way that requires university recognition. The language in the zoning codes requiring university recognition are not identical but have striking similarities.

Take the City of Oxford, Ohio as an example. Oxford is home to Miami University of Ohio ("Miami University"). The text of Oxford's zoning code defines "Fraternity/Sorority House" as follows:

> **FRATERNITY/SORORITY HOUSE** - A building that is occupied by a group of enrolled Miami University students *who are active members of a fraternal organization recognized by Miami University*. These organizations shall be limited to fraternities, sororities, and like groups approved by Miami University for communal off-campus living on that site. . . .

Codified Ordinances of the City of Oxford, Ohio, Section 1159.07(10). (emphasis added). Under Oxford's definition, a fraternity must be officially recognized by Miami University if it wishes to operate as a fraternity house as a permitted use in Oxford. The language here is broad enough that it completely defers the task of defining a fraternity/sorority house to Miami University. Miami University is thus able to create whatever recognition procedures it sees fit to control which fraternities and sororities may operate a house as a permitted use in the City of Oxford. In cases such as this, a fraternity will be unable to operate any building for student residential purposes in the City of Oxford without first obtaining the University's official recognition status.

Zoning codes adopting fraternity definitions requiring university recognition is trending. An increasing number of municipalities are deferring to their local universities to determine whether fraternities owning private property have any rights to use that property as a fraternity house. Municipal governments are now passing the buck to universities. As a result, we have seen a significant number of municipalities incorporating the phrase "university recognition" into their definitions.

By delegating this power of regulating fraternities to universities, municipalities have given a substantial amount of power to their local university. Procedurally, when a fraternity is punished and stripped of their recognition status, they will now not only lose their ability to operate on campus, but they also lose their right to live in, socialize, conduct meetings or otherwise use their house because of a municipality's university recognition requirement.

A fraternity house that is used by a fraternity not officially recognized by the local university will, in Oxford and similar areas, be an illegal use of the property. Without a permitted use, the fraternity house can be closed by

the municipality and the fraternity members will not be permitted to occupy or otherwise use their house even if they have an otherwise valid lease. As a result, fraternities are either renting their house to other Greek organizations or looking for meaningful alternatives to make use of the property while still complying with their local zoning ordinance.[1]

This is a hot button issue in the Borough of State College, Pennsylvania. In State College, if a group of fraternity members wishes to establish a fraternity house, Penn State can quite literally keep you from getting your foot inside the door. Without university recognition status, a fraternity house can also be shut down and student members forced to seek alternative housing.

During the Fall of 2017 at Penn State, the Alpha Upsilon Chapter of the Fraternity of Beta Theta Phi challenged the authority of the Borough of State College by renting their rooms out to alumni visiting campus to attend football games.[2] Since Beta Thea Pi did not acquire a permit or establish a change in use, the Borough called this an illegal new use of the property. The fraternity said this was not a new use, but merely a "tradition" of welcoming alumni back for tailgating events.[3] Centre County Court of Common Pleas Judge Katherine Oliver has suggested that she would order the fraternity to "comply with the law" and cease their rental activity but has yet to issue such an order.[4]

No organization has yet to challenge any municipality for its delegation of zoning authority to a university. Fraternal Law Partners will continue to monitor this issue. In the meantime, fraternities and sororities should make themselves aware of their local zoning codes and determine what may happen to their houses if their organization finds itself without university recognition status.

• Timothy J. Lynch

1 Codified Ordinances of the City of Oxford, Ohio, Section 1159.07 (10); http://miamistudent.net/beta-rents-out-house-to-other-frat/

2 http://www.centredaily.com/news/local/education/penn-state/article181307506.html

3 *Id.*

4 *Id. see also Abbey v. The Alpha Upsilon Chapter of the Fraternity of Beta Theta Pi, Inc.*, Docket No. 2017-0838, (C.P. Centre County 2017).

# Court Finds National Not Responsible in Hazing Death

Fraternities have been in the news as hazing deaths continue to grow. This has led Fraternities to reevaluate their policies and procedures with a focus specifically towards liability. When an incident occurs, the chain of blame can sometimes go all the way up to the national organization. Typically, when a fraternity is involved in any type of liability issue, the members, local chapter, and national organization are sought to be held responsible. However, in a recent case the Court found that a national organization could not be held responsible for the tragic death of a Northern Illinois University student.

At a "mandatory" pledge event, David Bogenberger, a freshman, consumed more than five times the legal limit of alcohol.[1] The event was designed so that the pledges would have to answer a series of questions posed to them by one member of the fraternity and a member of a sorority. If the pledge answered the question incorrectly, he was required to drink a certain amount of vodka. Moreover, "A day or two prior to the event, a plan for the night was approved and adopted by certain unknown NIU Chapter officers, pledge board members, and active members."[2]

Quickly, this question and answer routine morphed into the pledges being forced to drink the vodka regardless of the accuracy of their answers.[3] In fact, the goal of the event was to have almost all of the pledges become unconscious, even designating areas for pledges to pass out in.[4] Furthermore, "Pledges would be checked periodically, and their heads and bodies would be positioned in such a way so that if they vomited, they would not choke. Officers kept Breathalyzers and would use them to measure the pledges' blood alcohol level."[5] David died during the night after losing consciousness from the amount of alcohol that he had been forced to consume from the event.[6]

A suit for negligence was brought against the national fraternity, the local chapter, the local chapter's officers, pledge board members and active members, and sorority women who participated in the event with the fraternity members.[7]

Regarding the national organization, Plaintiff brought claims against the national organization both for vicarious liability between the national and the Chapter and direct liability of the national organization. Regarding vicarious liability, the Court rejected Plaintiff's claims of actual agency, which was required for vicarious liability in this case. The Court found that the members were not acting as the national's agents.[8] First, there was no evidence presented that the national organization authorized the Chapter to act on their behalf or act as their agents. The Court rejected Plaintiff's claim that an agency relationship existed because the national encouraged these pledge events because it was good for pledge and membership retention which would increase the revenue.[9]

Second, the Court found that the Plaintiff did not establish that the national organization had sufficient control over the chapter and the chapter members for an agency relationship to exist.[10] Even though the national organization established rules and guidelines for the chapter to follow, such as the National Constitution, chapter codes, and risk assessment manuals, the chapter had discretion on how they would implement and enforce those rules. Moreover, even though national could expel or discipline members after the fact, the Court found "The power to take remedial action 'after the fact' does not amount to the right to direct or control a local chapter or members actions."[11]

Finally, the Court found that even if the first two factors were satisfied, hazing fell outside the scope of any agency relationship that possibly existed.[12] Hazing was against the national's rules and thus the hazing conduct would fall outside any agency relationship that existed between the Chapter and national.

The Plaintiff also brought a claim of negligence under direct liability. "Essentially, what plaintiff's complaint alleges is that the Nationals should have taken certain affirmative action to protect the pledges from hazing and to control the criminal conduct of those who participated in the hazing."[13] In Illinois a duty arises in this situation only if there is a "special relationship."[14] This special relationship has arisen in a variety of different contexts including innkeeper and guest, parent-child and employer-employee. However, "If no special relationship exists that would impose an affirmative duty upon the Nationals to protect the pledges or to control the conduct of those who hazed the pledges, then the Nationals owe no affirmative duty to the pledges."[15] The Court concluded that no special relationship existed and thus the national organization did not have a duty. However, the Court did note that some courts in other states have held a national fraternity liable for the actions of its local chapters, but did not elaborate on that point.

Therefore, the Court dismissed the claim against the national fraternity. However, the Court refused to dismiss the case against the Chapter, its officers, Pledge Board Members, active members, and non-member sorority women.[16]

- Amy M. Hebbeler

1 Bogenberger v. Pi Kappa Alpha Corp., 2018 IL 120951 (2018).
2 Id. at P5.
3 Matthew Walberg and William Lee, "Parents of NIU student who died in 2012 fraternity hazing can proceed with lawsuit, court rules." Chicago Tribune (January 19, 2018) http://www.chicagotribune.com/g00/suburbs/ct-met-niu-hazing-death-supreme-court-20180119-story.html?i10c.encReferrer=&i10c.ua=1&i10c.dv=13.
4 Bogenberger v. Pi Kappa Alpha Corp., 2018 IL 120951, P5.
5 Id.
6 Id. at P7.
7 Id. at P2
8 Id. at P30.
9 Id. at P29-30.
10 Id. at P30.
11 Id.
12 Id.
13 Id. at P32.
14 Id. at P33.
15 Id. at P35.
16 Id. at P50, P54.

# The Latest From Harvard

On March 1st, the *Harvard Crimson*[1] reported that Harvard College's Administrative Board will enforce the College's single gender social policy and the penalties to be imposed under it. According to the article, the sanctions to be imposed are "not yet fully finalized ... the College will formally request that the sanctions be incorporated in the Harvard College Student Handbook. This means the Faculty of Arts and Sciences will need to formally vote to accept or reject the penalties as part of the Handbook."

The article goes on to report that there have been several reversals from prior positions taken by administrators of the College. From statements by the Dean of Students and the Assistant Dean of Student Life, the *Crimson* article reports that "contradicting previous proposals – the college will not require students to sign a pledge affirming their compliance with the policies; will not mandate the social group's publish demographic breakdowns of their memberships; and will not offer a transitional program for all-female social groups."

So, the controversy and uncertainty among Harvard's plans to restrict single-sex finals clubs or Greek organizations, by prohibiting their members from being captains on athletic teams or leading student organizations, or from receiving necessary support for major scholarships like Fulbright, remains an active controversy and uncertainty continues.

- Timothy M. Burke

1 *Harvard Crimson*, Ad Board will enforce sanction under college's final plan, by Caroline S. Engelmayer and Michael E. Xie.

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