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Death of Stone Foltz Results in Severe Criminal Consequences

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Stone Foltz died on March 7, 2021 of alcohol poisoning. He had a blood alcohol content reported to be four times over the legal limit.

Two months later, the criminal consequences of the conduct alleged to have caused his death have begun to become clear. Eight individuals involved in what is alleged to have been a fraternity hazing incident now face criminal charges. Some may end up in prison for more than a decade. The charges range from multiple counts against each individual of failure to comply with underage alcohol laws, hazing and obstruction of justice, all of which are misdemeanors, to far more serious felony charges of first- and third-degree involuntary manslaughter, felonious assault, reckless homicide, and tampering with evidence. All but one of the eight individuals charged face at least one felony charge.

The individuals charged no doubt did not set out to kill Stone Foltz, but if it is true that some or all of them provided Foltz with a fifth of alcohol and required him to drink all or most of it as part of a made-up big brother/little brother event, those actions could have caused his death. If true, the individuals violated not only the criminal laws of the state of Ohio, but the rules and policies of both Bowling Green State University, where Foltz was a student, and the rules and

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policies of Pi Kappa Alpha ("Pike"). Pike's chapter at Bowling Green has been closed by the University and by Pi Kappa Alpha.

Law enforcement and elected officials will not stand for this kind of conduct, even if the injury or death it causes was unintentional. States are tightening their hazing laws and making consequences for their violation more severe. It is likely that Ohio will now do the same.

Two other deaths this spring, Adam Oakes, a student at Virginia Commonwealth and Eli Weinstock, of American University, remain under investigation as potential hazing-related deaths. As a result, there may well be other students facing similar criminal charges. It is perhaps the only way that some will finally get the message that this kind of conduct must not continue. As Stone Foltz' death highlights, some haven't yet accepted the rules of either their University or their fraternity or the laws of the state. Stone Foltz' life should not have been put in danger; his parents should not have lost their son. There will be consequences. And they will likely be severe.

Public University Attempts to Ban All Fraternities and Sororities

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On May 13, 2021 Bloomsburg University's President sent a two-sentence email to the student body. The email stated: "Effective immediately, Bloomsburg University is terminating its fraternity and sorority life (FSL) program and severing ties with all national and local FSL organizations currently affiliated with the University. All students are reminded that their conduct remains subject to all applicable University policies."[1]

The University did not provide any type of justification for this decision, but it was announced shortly after a member of a sorority on campus died, after what a University spokesman described as an incident "not related to Greek life."

As a public university, Bloomsburg is a state actor for purposes of constitutional law. With this, there are numerous legal issues that arise from Bloomsburg's actions. The first issue is whether Bloomsburg denied its fraternities and sororities of their 14th amendment due process rights. There is well-established federal law that when a public school considers severe punishment like suspension or expulsion, it must provide the accused with notice and the opportunity to be heard.[2] Certainly, that was not provided to any group that was effectively expelled from campus by the two-sentence email.

There is also a question of whether or not the school's actions violate the First Amendment freedom of association rights of the students who are members of the fraternities and sororities. Now, it will be interesting to see if any of the groups that were operating in affiliation with Bloomsburg University choose to continue to operate without Bloomsburg University affiliation

[1] See Anderson, G. *The Last Straw.* Inside Higher Ed. May 17, 2021.
[2] *Goss v. Lopez,* 419 U.S. 565 (1975)

and without Bloomsburg University resources. As the Supreme Court of the United States has stated, "[p]rivate groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation."[3]

We will continue to monitor if Bloomsburg's actions are challenged and if groups continue to operate without Bloomsburg University's affiliation.

Judge Blows the Whistle On The Implicit Bias Against Greek Organizations by University Administration

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At early ages, we are taught the importance of being mindful of the company that we keep. It is commonly understood that your friends are an extension or representation of you. The question now becomes, to what extent is this true, and to what extent can we be held liable for the actions of our friends? Is it fair to hold an organization accountable for actions of its acquaintances even if members of the organization are not present when the action takes place?

We can look to actions on the campus of Syracuse University ("SU") to see how this concept played out with Alpha Chi Rho ("AXP") and SU officials. In November of 2020, AXP was suspended for allegations that members yelled a racial slur at an African American woman in College Place, a parking lot area on campus down the road from AXP's house. The woman was standing outside of her mother's car when the incident took place.

The SU Conduct Board was unable to determine what directly was said to the woman, but it did determine that it was a guest of AXP that engaged in the alleged conduct. The guest "startled

[3] *Christian Legal Society v. Martinez*, 561 U.S. 661, 691 (2010).

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or offended" the woman by his alleged attempt to look up her dress and also made commentary about her legs. It is also alleged that the guest used the "N word" a few times. The SU Conduct Board reviewed footage of the incident in late December 2020 and decided that members of AXP were not responsible for any violations. However, Syracuse continued to investigate the fraternity. An email was sent in error to AXP from a Student Conduct Coordinator on January 28, 2021 that was a draft version of the decision stating that AXP did not violate any regulations in the SU Code of Student Conduct. However, the SU Conduct Board was still in deliberation and did not reach their final decision.

The SU Conduct Board later released another decision in February of 2021, finding that AXP was responsible for violating SU's Code of Student Conduct. As a result, AXP was suspended for one year. University administration argued that there should be accountability by hosts of guests when the actions of the guest jeopardize the safety of members of SU.

AXP appealed the SU Conduct Board's decision to the SU Appeals Board. The SU Appeals Board reversed the SU Conduct Board's decision and removed the suspension from AXP. The SU Appeals Board could not find a university policy that held an organization responsible for the actions of its guests. While this seems like a relatively straightforward decision, Syracuse University administration did not see it as such. Dolan Evanovich, former senior vice president for enrollment and the student experience at SU rejected the SU Appeals Board's decision. Evanovich found AXP responsible for violating SU's Code of Student Conduct stating "it was more likely than not that the guest used a racial slur" although the conduct board could not determine exactly what was said.[2]

[2] Michael Sessa, 'No rational basis': Court Annuls Alpha Chi Rho Suspension, The Daily Orange (2021), http://dailyorange.com/2021/03/annulled-alpha-chi-rho-suspension/

AXP believes that factors outside of the merits led to AXP's suspension and Evanovich's overturning of the SU Appeals Board's decision because of prior decisions of SU's administration regarding AXP without proper representation. For example, AXP was not allowed to have a lawyer at the hearing in front of the SU Conduct Board which involved allegations of sexual harassment. These allegations involved sexual harassment as well as the racial bias allegations. Their view was that the University did not operate in a fair, unbiased manner when reaching its conclusions about AXP.

AXP sued SU and Evanovich in June 2021. Judge DelConte denied a petition by SU and Evanovich to dismiss the suit. In the ruling, Judge DelConte stated, "The record is clear: Alpha Chi Rho did nothing wrong," and that Evanovich's decision to reverse the SU Appeals Board's decision had "no rational basis."[3] Judge DelConte argued that it was unreasonable to hold Greek organizations, or any other student organization, on campus responsible for conduct they cannot control. The Court reversed AXP's suspension and SU released a statement respectfully disagreeing with the ruling.[4]

In the same instance where it is irrational to hold students liable for actions not restricted in student policy, it is irrational to hold student organizations liable for unpredictable actions of guests. This case shines a light on implicit bias that may be prevalent among university administrators and adversely impacts fraternities and sororities.

[3] Douglass Dowty, Judge Rules Syracuse University Frat Accused of Racism Did Nothing Wrong; Trashes SU's Suspension, Syracuse.com (2021), https://www.syracuse.com/schools/2021/03/judge-rules-syracuse-university-frat-accused-of-racism-did-nothing-wrong-trashes-sus-suspension.html.
[4] The Fraternity Of Alpha Chi Rho, Inc. v. Syracuse University "et al." WL0003261/2020.

Mandatory Arbitration Provision in Fraternity/ Sorority Membership Agreements

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Mandatory arbitration clauses are relatively standard in many industries, and the practice has been adopted by quite a few Greek letter organizations. Arbitration is different from mediation because the neutral arbitrator has the authority to make a decision about the dispute, including the *arbitration award*. Generally, arbitration clauses are enforced when a party who changes their mind tries to get a judge to rule that the party can have their day in court. Although binding in many instances, arbitration provisions with language that is too broad or ambiguous may not be enforceable.

Arbitration is a private out-of-court process where the parties avoid lengthy and more expensive litigation by agreeing that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments. In an arbitration, the parties typically give up the right to an appeal on substantive grounds to a court. Once settled upon, an arbitrated award is confirmed by a court, and is sometimes optimized to an enforceable remedy.

Whether or not mandatory arbitration is a relevant issue often arises when one party, usually a member suing the fraternity or sorority, has changed its mind about using the arbitration process. Quite often member candidates find themselves surprised that they entered into agreements mandating arbitration, and then question the enforceability of mandatory arbitration provisions.

The climate and attitudes toward forced arbitration seems to have changed since 2009 when courts were "mostly deaf to the arguments of critics that mandatory arbitration is 'do-it-yourself

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tort reform,' systematically favoring corporate defendants."[2] The typical strategy to defeating an arbitration clause is to seek a court ruling that the arbitration clause is unconscionable.

An unconscionable provision in a contract is one that is so one-sided that it is unfair to one party and therefore unenforceable under law. It is a provision that leaves one party with no real, meaningful choice, usually due to major differences in bargaining power between the parties. To help comprehend why unconscionability is a popular strategy, consider the analogous realm of unilateral agreements in the consumer world where consumer advocates argue that, "by drafting their contracts so as to require arbitration of future disputes, business enterprises with the economic power to impose terms on their customers or employees could obtain a variety of practical advantages, and could even use arbitration provisions to effectively deprive consumers and employees of any means of dispute resolution."[3]

Like business enterprises, parties seeking to avoid arbitration take the position that the organization is making a systematic effort to impose arbitration on a disadvantaged party. Despite its popularity, claims leveraging unconscionability to invalidate arbitration clauses are difficult to win.[4] There are no hard and fast rules governing what makes an agreement unconscionable, but it is ultimately in a court's discretion when making the determination.

That does not mean that arbitration clauses are impenetrable if a party takes a different approach. This past April, a federal court for the Middle District of Pennsylvania denied a motion to enforce an arbitration clause for a fraternity, because the language in the agreement was overly broad and ambiguous. Mandating that arbitrability be determined by arbitration should be expressly in the language of the agreement, otherwise the court will determine if a plaintiff's claims

[2] Mandatory arbitration and fairness. Notre Dame Law Review, March 2009, Pg. 1247; Vol. 84; No. 3.
[3] Knapp, C. L., Crystal, N. M., and Prince, H. G., Problems in Contract Law, Case and Materials, 9th Edition, Wolters, Kluwer, copyright 2019 p.662
[4] Id. p. 663.

should be arbitrated or have their day in court.[5] "Because it is presumed that courts will decide questions of arbitrability, a delegation provision stating to the contrary must do so 'clearly and unmistakably.'"[6] In the motion to compel arbitration filed by the fraternity defendant in that case, the court stressed in its ruling that in order for an arbitration clause to be enforceable, the language in the agreement must be unambiguously delegating the question of arbitrability to the arbitrator. The burden of overcoming the presumption that the arbitrator can decide what should be arbitrated, as the court stated, is "onerous, as it requires express contractual language unambiguously delegating the question."[7] Clearly expressed and unambiguous language is the key to enforceable arbitration provisions in membership agreements.

The Middle District of Pennsylvania court further stated that a broadly worded arbitration clause standing alone is insufficient. As the court reviewed the provision and found the language to be overly broad, the court explained, "the court cannot construe these terms more broadly than what is provided for by the plain language…"[8] When the language is too broad, the enforcing party is unlikely to get any court, to enforce anything beyond what the agreement simply states. This is why the court stressed that specificity in the terms expressed in the language avoids a broad interpretation and favors enforceable provisions.

People often want their day in court, and when it comes to entering into contractual agreements, people often want to be protected from the fine print buried deep within the contract's language. Forced arbitration can be viewed by some as a deprivation of their right to hold wrongdoers accountable through their day in court. College students are no different. However, the trend of many fraternities and sororities to include arbitration clauses in their membership and

[5] Jean v. Bucknell Univ., No. 4:20-CV-01722, 2021 U.S. Dist. LEXIS 73384 (M.D. Pa. Apr. 16, 2021)
[6] Id.
[7] Id.
[8] Id.

candidate agreements might lead some organizations to feel confident that pre-agreed upon arbitration will keep the organization out of lengthy and expensive court battles.

Fraternities and sororities with mandatory arbitration provisions included in membership agreements would be well advised to review the language of those provisions to reduce ambiguities and minimize broad covering language to increase the likelihood of enforceability.

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