



FRATERNAL LAW

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CONGRESS CONSIDERS FRATERNITY ISSUES

The Capital Fraternal Caucus, according to its web site, www.fraternalcaucus.org, is made up of Greek men and women in the Washington D.C. area with expertise in the public policy process. The goals of the Caucus include educating policymakers about the positive impact of Greek life, preserving the existing rights of fraternities and sororities, identifying opportunities for Greeks and government to work together to improve society and building a permanent Greek presence in Washington similar to the presence of other national trade organizations. In essence, the Caucus serves as a lobbying group for fraternity and sorority interests in the United States Congress. The Caucus estimates there are currently more than 160 members of the House and Senate who have a Greek background.

The work of the Caucus may be beginning to bear legislative fruit. On September 27th, the Caucus organized a national "Phone March" to urge members of Congress to support legislation which would make contributions for collegiate housing and infrastructure improvements (fraternity houses) tax deductible.

Legislation is pending in both houses of Congress. Senator Pat Roberts (R-KS) and Senator Richard Lugar (R-IN) introduced S713 on April 6, 2005. A similar measure is pending in the House (HR 1548), introduced by Representative Paul Ryan (R-WI). The House passed such a bill last in the previous session of Congress, but there was no action in the Senate. The current House bill now has over 130 co-sponsors, while the Senate measure has 18.

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The Phone March generated hundreds of calls to members in one day and secured at least eight additional co-sponsors to the legislation.

Also pending in the House is the College Fire Prevention Act (HR 128), introduced in January 2005 by Representative Stephanie Tubbs Jones (D-OH). The bill would provide federal assistance for sprinkler systems or other fire suppression or prevention techniques. Such grants would be

available to states, public and private colleges or universities and fraternities and sororities.

None of the bills appear likely to pass in the lame duck session of this Congress, which will resume after November's Election Day. But the ground work for one or both of these measures may well have been put in place, which could make adoption in the session beginning in January more likely.

The Capital Fraternal Caucus is working with three major umbrella fraternal organizations, the North-American Interfraternity Conference (NIC), the National Panhellenic Conference (NPC), and the National Pan-Hellenic Council (NPHC). The highly regarded Washington, D.C. law firm of Patton Boggs LLP is serving as pro bono counsel to the NIC, and their work is also being shared with NPC and NPHC. The Caucus has divided its work into several committees, including a policy development committee, a grass roots committee, which has as its goal developing a master database of Greeks across the country who are politically active, a member of the recruitment committee, and a social/events planning committee.

The web site of the Caucus also contains helpful information on contacting members of Congress, how legislation proceeds and news about fraternity and sorority groups.

Some national fraternal organizations have developed formal relationships with the Caucus.

Among the benefits of being involved in the political/legislative process is it helps to establish a fraternity or sorority group as an expressive association under the protection of the First Amendment. Such activity must be balanced against Internal Revenue Code requirements relating to the tax status of the organizations. Carefully limited involvement in organizations like the Fraternal Caucus and in advocating for the adoption of particular legislation or action on public policy positions should not have any negative impact on the tax status of fraternities and sororities.

Obviously, if either of the pieces of currently pending legislation are adopted by the United States Congress, the benefit for fraternities and sororities could be enormous.

• Timothy M. Burke

STATE COLLEGE MOVES TO CLOSE TWO FRATERNITY HOUSES

Two fraternities at Penn State, Tau Kappa Epsilon and Phi Kappa Tau, face the prospect of losing the right to occupy their fraternity houses for six months due to violations of the Borough of State College Rental Properties Regulations.

If that penalty is imposed, the fraternity houses would be the first fraternity houses to face such a penalty under Code provisions that were initially adopted in the mid-1990s.

The State College regulations do not appear to be aimed exclusively at fraternities and sororities. In fact, a suspension has been imposed on only one property previously. It was not a fraternity house. The State College regulations provide that if a rental property has a series of violations found against it in a one-year period, enough to rack up ten points under the provisions of the ordinance, a six-month suspension of the right to rent the property may be imposed at the end of the current lease term. For these fraternities, that would mean that at the end of this semester, their house could be closed for six months.

The ordinance, as amended in 2004, provides that one point is assigned for each offense related to Maintenance Code violations, refuse, sidewalk obstruction, grass and weeds, recycling and dogs. Two points are assigned for disorderly conduct, alcohol possession or consumption by a minor, drugs, simple assault, harassment, open lewdness, indecent exposure, Fire Code offenses resulting in a fine, occupancy limits and student home violations. Three points are assigned for each offense involving furnishing of alcohol to a minor, aggravated assault, rape, statutory sexual assault, certain other sexual misconduct and possession with the intent to deliver illegal drugs.

As we have reported in *Fraternal Law* in previous issues, chapters occupying fraternity houses, particularly those which are off-campus in residential neighborhoods, need to exercise great care to be good neighbors.

The regulations require that a property owner be given notice any time during a year when five points are accumulated. That notice must warn the property owner of the potential of suspension. The law requires the property owner to provide a correction plan that must be submitted within 30 days of the notice and provides for a meeting with the Borough Manager to discuss the issues involved and how to avoid suspension. The ordinance also contains appeal rights in the event suspension is, in fact, initiated. A property owner may defend against the suspension by demon-

strating that offending tenants have been evicted from the property.

In essence, it appears that the ordinance attempts to address the due process requirements of the Constitution. That strengthens the Borough's position when it comes to enforcing the terms of the regulations.

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Fraternal Law first reported on an earlier version of the ordinance involved in March of 1996.¹ At that time, even the Borough Solicitor, the attorney for the community, had been quoted in local press as suggesting that the ordinance may be subject to a constitutional challenge. The concern about the constitutionality of the ordinance may be why the Borough has moved slowly and only actually enforced the rental suspension against one prior property owner. It may also explain why the Borough has developed this series of due process safeguards.

According to newspaper reports, Phi Kappa Tau has been cited within the past year for violating rules related to snow removal, trash collection, excessive weeds, disorderly conduct and furnishing alcohol to minors. Tau Kappa Epsilon was cited for disorderly conduct and Fire Code violations.

Adam Smeltz, in an article for *Centre Daily*, quoted Borough Councilman Tom Daubert as saying, "Our intent wasn't to get fraternities. Primarily, it was to make rental housing owners follow the laws.... It made someone responsible for what was going on. If the owner didn't take it in hand, then we would take it in hand."

Borough officials appear to be carefully following their process and are in communication with the two fraternities. In an article in Penn State's *Daily Collegian*, Kelsey Maxin writes that Borough Planning Director Carl Hess said, "The Borough does not want to revoke permits, it just wants tenants to correct their behavior.' At the Intervention Meeting [which occurs after the five-point notice], he said they come up with ways properties can fix their behavior. He said properties that rack up five points usually take a proactive approach and change their behavior, no longer having any problems."

In a later *Centre Daily* article, Adam Smeltz reported that the Tau Kappa Epsilon Chapter had recently had, under the threat of suspension, obtained a new local Chapter Advisor. They had not had one, according to the article, for a decade. The new Chapter Advisor, a 1978 Penn State graduate, lives five doors away from the fraternity house.

Bill Knickerson, the Advisor, is quoted as saying, "We are optimistic, and we are looking forward to getting Teke back to its glory days, the way we remember." Knickerson and the Chapter Advisor for Phi Kappa Tau, as well as Phi Kappa Tau's national organization, are all working with Borough officials to ensure compliance in hopes that the Borough will not exercise the suspension option.

On November 2nd, as this issue was going to print, State College announced its intention to suspend the rental permits of both houses. Appeals, provided for in the ordinances, are planned. If those are not successful, some 45 fraternity men may be out of a house when the suspension becomes effective on December 23rd.

A legal challenge to the ordinance may attack the due process issue and the penalty being imposed on the property owner rather than on the wrong-doing tenants.

As we have reported in *Fraternal Law* in previous issues, chapters occupying fraternity houses, particularly

those which are off-campus in residential neighborhoods, need to exercise great care to be good neighbors. If they allow their yards to accumulate trash and high weeds, if they disturb the neighborhood with repeated loud parties, engage in illegal conduct disruptive to the neighborhood, the community, and ultimately local officials, will look for ways to control the problem. On occasion, the control methods used can be excessive and drastic. At best, they can lead to fines and litigation. At worst, as here, the very continued existence of the house can be jeopardized. At Penn State, these two fraternities may have the right to occupy their house jeopardized because they failed to do the simple things that responsible neighbors are expected to do – cut their grass, shovel their sidewalk, obey the law and respect their neighbors.

• Timothy M. Burke

¹ *Fraternal Law* No. 56.

FLORIDA HAZING LAW FAILS FIRST TEST

In what was apparently the first effort to enforce Florida's new tough anti-hazing law, the criminal prosecution of four fraternity members ended in a mistrial when the jury could not define "serious bodily injury."

In 2005, the State of Florida adopted amendments to its hazing law which made hazing resulting in serious bodily harm a felony of the third degree. If convicted, the defendants could have received a sentence ranging from 5 years in prison to probation. The statute specifically provides:

"A person commits hazing, a third degree felony ... when he or she intentionally or recklessly commits any act of hazing ... upon another person who is a member of or an applicant to any type of student organization and the hazing results in serious bodily injury or death of such other person."

Florida's definition of hazing is similar to the definitions of hazing used in many of the more than 40 other states which have adopted laws making hazing a crime. Florida defines hazing as:

"Any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for purposes including, but not limited to, initiation or admission into or affiliation with, any organization operating under the sanction of a post-secondary institution. 'Hazing' includes, but is not limited to, pressuring or coercing the student into violating state or federal law, any brutality of a physical nature, such as whipping, beating, branding, exposure to the elements, forced consumption of any food, liquor, drug, or other sub-

stance, or other forced physical activity that could adversely affect the physical health or safety of the student, and also includes any activity that would subject the student to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or other forced activity that could adversely affect the mental health or dignity of the student. Hazing does not include customary athletic events or other similar contests or competitions, or any activity or conduct that furthers a legal and legitimate objective."

Anyone convicted of hazing which either resulted in "serious bodily injury or death" or created "a substantial risk of physical injury or death" is also required to attend and complete a four-hour hazing education course.

The Florida law also makes it clear that it is not a defense to the charge of hazing, that the victim consented, the activity was sanctioned or approved by the organization, or that it was done as a condition of membership. The Florida law requires that public and non-public post-secondary educational institutions have an anti-hazing policy, adopt rules prohibiting hazing and have a program for enforcing those rules. The statute specifically authorizes state colleges and universities to withdraw permission for an organization that has engaged in hazing to operate on college property.

If serious bodily injury or death does not occur, hazing is a first degree misdemeanor, involving much lighter criminal penalties, if the hazing "creates a substantial risk of

physical injury or death to such other person.” What is curious about the Florida statute is that certain activities which are prohibited under other anti-hazing state statutes, university regulations and fraternity and sorority rules that do not create “a substantial risk of physical injury or death” arguably may fit within the definition of hazing but are not subject to criminal penalties.

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The defendants were members of Kappa Alpha Psi at Florida A&M University. The allegations in the trial were that the defendants had used canes, boxing gloves and bare fists to beat Marcus Jones, a 20-year old who wanted to become a member. According to Jones, the beatings lasted over four nights. He suffered a broken eardrum and needed surgery on his buttocks. According to an *Associated Press* story, a fifth defendant “was accused of assisting in the alleged hazing by encouraging Jones and other would-be fraternity members to bear up under the beatings and revive them with water when they passed out from the pain.”

The jury deliberated only three hours when they reported that they could not reach a result. Twenty minutes earlier, the jury had asked the judge for a better definition of “serious bodily injury” and how to differentiate between serious and moderate injury. The judge declined to provide any legal instruction to assist in differentiating between degrees of injury apparently since none was provided by the statute. The defendants had called upon a doctor from Palm Beach County who did testify that the injuries to Jones were not serious and that, in his opinion, surgery had not been necessary. The AP story by Bill Kaczor said “the physician told the jury he testified without a fee and paid his own expenses because he felt the injuries had been blown out of proportion by the State,” and “somebody needs to say so.”

Where a mistrial has been declared, the prosecutor could decide to try the case over again. The difficulty here is that the language of the statute itself may make another trial no more successful than the first one. Clearly, the legislature of the State of Florida could have provided a definition for the term that gave the jury trouble. That they did not may permit these individual defendants to escape a felony conviction.

• Timothy M. Burke

PRINCETON CRITICAL OF FRATERNITIES, BUT RECOGNIZES RIGHT TO JOIN

“I pledge myself, without any mental reservation, that I will have no connection whatever, with any secret society in this institution as long as I am a member of the Princeton University; it being understood that this promise has no reference to the American Wig & Cliosophic Societies. I also declare that I regard myself bound to keep this promise and on no account whatever to violate it.”

In 1855, that pledge was required to be signed by each student at Princeton University and remained required, according to the University catalog, until 1939-1940.

This summer, in recognition of the growth of fraternities and sororities among Princeton students, the University took steps to discourage membership but not to prohibit it. In July, the Vice President for campus life and the Dean of undergraduate students sent a letter to the members of the Class of 2010 and their parents and guardians, specifically addressing the role of fraternities and sororities at Princeton. University officials voiced a particular concern that students were being asked to choose a fraternity or sorority very early in their freshman year.

“Princeton does not officially recognize fraternities and sororities because we do not believe that, in general, they contribute in positive ways to the overall residential experience on campus. They can contribute to a sense of social exclusiveness, and in the cases of some fraternities, they detract from the quality of the residential experience by placing an excessive emphasis on alcohol. We are especially

concerned when students elect to participate in fall rush their freshman year, thereby restricting themselves to one set of activities and acquaintances before they have had a full opportunity to explore a variety of interests and develop a diverse set of friendships.”

While making it clear that they strongly discouraged membership in fraternities or sororities, the letter also made it equally clear that the university does not prohibit membership in fraternities or sororities.

Princeton argued that the university offers an extensive array of extra-curricular activities which they encourage their students to take part in. The letter specifically referenced the long history of independent eating clubs which have been associated with Princeton for well over a century. University officials neglected to point out that some of the eating clubs refused to accept female members until required to do so by the New Jersey Supreme Court.¹ Most juniors and seniors associate with one or another of these clubs and apply for membership at the beginning of the spring semester of their sophomore year.

Princeton’s position of discouraging fraternity membership but respecting a student’s right to choose to join a fraternity anyway contrasts sharply with the position taken by Dickinson College which has led to litigation. (See accompanying article for an update.)

• Timothy M. Burke

¹ *Frank v. Ivy Club*, 576 A.2d 241 (N.J. 1990).

ENFORCEABILITY OF LIABILITY WAIVERS

Are liability waivers used by fraternities and sororities in the context of social events, particularly recreational activities, enforceable? The answer is that, like most other things in the law, "it depends." While the enforceability of liability waivers varies by state, and tends to be unpredictable overall, there are some general consistencies in the law that anyone wishing to utilize liability waivers should take into account when drafting one.

First, keep in mind that a waiver cannot release someone from liability for injuries caused by intentional misconduct. It is well settled that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy. For example, the Supreme Court of Minnesota has stated that, "If the clause . . . purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn.1982).

Second, avoid using language that attempts to explicitly release the party requesting the waiver from liability for injuries resulting from that party's negligence. While such waivers are not always struck down, they are more likely to be troublesome than waivers releasing a party from liability for injuries resulting from risks inherent in a particular activity, particularly those risks outside of anyone's control. For example, the Supreme Court of Connecticut has stated that, "[The] law does not favor contract provisions which relieve a person from his own negligence." *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*, 829 A.2d 827 (Conn. 2003). And in *Sweeney*, the court commented that, "The law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and such agreements are subject to close judicial scrutiny." *Sweeney v. Hertz Corp.*, 740 N.Y.S.2d 19 (First Dept. 2002).

There are some general consistencies in the law that anyone wishing to utilize liability waivers should take into account when drafting one.

Third, be aware that judicial enforcement of liability waivers is unpredictable. Not only are they generally disfavored as encouraging lack of care,¹ courts often strike them down under the generic guise of being "against public policy." Unfortunately, courts have been reluctant to offer meaningful guidance as to what exactly that means. They have chosen instead to utilize a case-by-case, totality of the circumstances approach because, "No definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963).² So no matter how

careful someone is in drafting a waiver, there is always the risk that the court will refuse to enforce it.

Fourth, realize that in construing a liability waiver, courts generally give the benefit of the doubt to the party against whom the contract is to be enforced. This means that if there is any ambiguity, or if the enforceability is a close call, the courts may choose to protect the party who signed the waiver. The Minnesota Supreme Court has echoed this tendency, warning that, "Exculpatory clauses are . . . strictly construed against the benefited party." *Yang v. Voyageaire Houseboats, Inc.*, 701 N.W.2d 783 (Minn. 2005).

Liability waivers should be conspicuous so that they attract the reader's attention. They should not be buried in a long document or otherwise difficult to find.

Fifth, make sure that the language used in a liability waiver is express and comprehensive so that individuals asked to sign such waivers clearly recognize what exactly they are agreeing to. The language "must be clear, unambiguous and explicit in expressing the intent of the parties." *Sweat v. Big Time Auto Racing, Inc.*, 12 Cal.Rptr.3d 678 (Cal.App.5.Dist. 2004). Use commonly understood words, short sentences, and the active voice.

Finally, liability waivers should be conspicuous so that they attract the reader's attention. They should not be buried in a long document or otherwise difficult to find.³ The person against whom it is to operate should notice it.

While adherence to these guidelines will not guarantee that the liability waiver will be upheld if challenged, it increases the probability that the court will choose to do so.

• Elizabeth L. Hutton

¹ "Exculpatory agreements have long been disfavored in the law because they encourage a lack of care." *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006).

² See also *Hanks v. Powder Ridge Restaurant*, 885 A.2d 734 (Conn. 2005) ("The ultimate determination of what constitutes the public interest . . . must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.")

³ See *Leon v. Family Fitness Center (No. 107), Inc.*, 71 Cal.Rptr.2d 923 (Cal.App.4.Dist. 1998); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329 (Tex.App. Houston 2006); *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d 564 (Tex.App. San Antonio 2004).

SIGMA CHI SEEKS PROTECTION AGAINST DICKINSON COLLEGE

The Omicron Chapter of Sigma Chi recently sued Dickinson College seeking the ability to exist as an off-campus organization comprised of Dickinson students.¹ Dickinson, a private college, removed Sigma Chi's official recognition in 2004. The removal of recognition occurred after the Chapter had undertaken a College-mandated membership review and removed the members responsible for the Chapter's previous disciplinary violations.

After the Chapter lost its official recognition, Sigma Chi, with the full consent of the International Sigma Chi Fraternity and the Omicron Chapter's alumni, elected to remain an active chapter, off-campus, as an organization in Carlisle, Pennsylvania, comprised of Dickinson students, but not recognized by the College. Following that decision, the College's Director of Fraternities announced the College's official position concerning Sigma Chi and other unrecognized fraternities. The College's official position was that there would be no adverse consequences to any students for membership in Sigma Chi or any other off-campus organization.

The College's position was consistent with language contained in the College's official publications. The College, through its official publications, promised students many of the same constitutional rights that other citizens enjoy.² Several semesters later, without consultation with Sigma Chi and without any disciplinary violations, the College abruptly changed its policy regarding membership in Sigma Chi and unrecognized fraternities. The College informed its students in February 2006 that students would be subject to discipline, up to and including expulsion from the College, for any "membership activities" related to Sigma Chi.

This announcement was unexpected for the Chapter because of the College's previous official position, coupled with the specific constitutional guarantees in Dickinson's official publications. Additionally, while the Chapter operated off-campus, none of its members received any disciplinary violations, either on campus or off, for Chapter activities. In fact, the Chapter flourished, receiving Sigma Chi's highest honor for undergraduate chapters during the summer of 2006, the Peterson Award.

With the threats of expulsion hanging over the heads of the members of the Chapter and other Dickinson students who desire to become members of the Chapter, the Chapter chose to challenge the College's reversal of policy in court.

Because Dickinson is a private college, Sigma Chi filed suit claiming that Dickinson breached its contract with the students. The basis for the lawsuit centers on case law

that holds that the relationship between a college and its students, even private colleges, is contractual in nature. The terms of such contracts are established in the official publications, such as student handbooks, bulletins and student codes.

The Chapter claims that the College breached the terms of its contract by ignoring its promise to give students the same constitutional rights that other citizens enjoy. One such right that other citizens enjoy is the right of freedom of association. The College's threats of expulsion for chapter activities violate the freedom of association rights of all students at the College, and specifically the members of the chapter. This violation of the students' freedom of association constitutes a breach of the contract between the students and the College.

Sigma Chi subsequently filed a Motion for Preliminary Injunction, seeking a court order to allow the Chapter to continue to add new members while the case is pending. The Chapter's motion is based on the College's breach of the language in the College publications guaranteeing students the right of freedom of association, and the College's departure from its previously announced policy toward membership in the Chapter. In this motion, the Chapter is seeking the ability to add new members during the course of the litigation. Without such ability to add new members, the Chapter will be in a dire situation because most of its members will be upperclassmen. After all, rush is the lifeblood of all Greek organizations.

The Court conducted a hearing on the Chapter's motion on September 15th. Post-hearing briefing will be done near the end of November, and a decision is expected shortly thereafter. Look for future updates on this case in *Fraternal Law*.

• Daniel J. McCarthy

The Chapter and the plaintiffs are represented by Tim Burke and Dan McCarthy of Manley Burke.

¹ *Joshua R. Erhardt, et al. v. Dickinson College*, Court of Common Pleas of the Commonwealth of Pennsylvania, Cumberland County, Case No. 06-2647.

² The Constitution typically only applies to governmental entities and actors.

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