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Article of the week from *Lawyers Weekly USA*:



Fraternity Lawsuits Becoming More Common

What To Evaluate In Suing A Fraternity

By **Reni Gertner**

Chad Meredith was a freshman at the University of Miami when he drowned while attempting to please the leaders of a fraternity he wanted to join.

There was drinking, a pre-dawn swim across the campus lake, panic halfway across the lake and, when the fraternity president finally reached the other side - no Chad.

Rescue workers eventually found the 18-year-old's body 11 yards from shore.

The Meredith family won a \$12.6 million verdict last year against the two fraternity brothers who initiated the swim and the case settled for a confidential amount in January.

In another recent case, a fraternity pledge at the University of Maryland died after drinking so much whiskey that his blood alcohol level was five times the legal limit for driving. The boy passed out and his fraternity brothers left him for four hours before calling an ambulance. That case also settled for a confidential amount.

These incidents are two in a growing number of lawsuits concerning underage students - often a fraternity pledge or member - who engage in "binge drinking" as part of a fraternity ritual or other social gathering. These suits often focus on the fact that members of the fraternity have not taken sufficient action to protect the injured party, experts said.

"This type of claim involves seeing someone in a position of peril, where without ... assistance, they will not extricate themselves," said Douglas Fierberg, a Washington, D.C., attorney who specializes in hazing cases. "Often, the other people involved [take action] to prevent discovery of the [drunken] individual. This is not your garden variety negligence suit."

Even though fraternity chapters can lose their local charter licenses if they fail to comply with school policies and state laws, Fierberg said violations typically slip through the cracks unless there is a lawsuit.

For plaintiffs' lawyers, one of the biggest hurdles is to get the national fraternity - the entity

with the deeper pockets - on the hook for what happened at a local chapter.

Walter Latimer of Coral Gables, Fla., served as defense lawyer for one of the fraternity brothers in the University of Miami drowning case. He said the case against the national organization comes down to, "How much control does the national entity have over local chapters and how much control does that local chapter have over its local members? ... From a plaintiff's perspective, you always want to get to the larger organization, the one that has money."

Michael Seck, an attorney in Overland Park, Kan., has represented a number of fraternities in this type of case.

"If the national fraternity takes steps to operate the local chapter, including inspections and controlling what they do or do not do, those are typical agency principles that would lend themselves to saying there is a sufficient level of control to create liability," said Seck, who practices with Fisher, Patterson, Sayler & Smith, L.L.P.

However, in some other cases, "you simply [have] a national organization that ... sent an advisor over maybe once a year," and that might not create liability according to some courts, Seck said.

But Fierberg, who practices with Bode & Grenier in Washington, D.C., said that it has become increasingly possible for plaintiffs to win lawsuits against the national organization. The basic argument is that the members of a local chapter of a fraternity are really joining the national organization, which has the power to regulate the activities - alcohol-related and otherwise - of the local groups, he said.

Who Can You Sue?

One of the first things for a plaintiff's lawyer to consider in these cases is who can be sued, which varies from state to state. The possibilities are: the national fraternity, the local fraternity, and the individual parties involved in the incident.

The national fraternity is often the hardest to reach with a lawsuit, Fierberg said.

"Certain fraternities are structured in ways that help shield the national from any liability arising out of the misconduct of its membership and chapters," he said.

Theodore Lickteig, an attorney in Overland Park, Kan., agreed.

"They are [often] unincorporated associations, which is a unique legal animal that is not registered with the state," he said.

Some states have laws that protect either the national or local fraternity - or both - barring suits against them for actions by members or subsidiaries.

For example, in the Meredith case, plaintiffs' attorney David Bianchi of Miami wasn't able to sue the local fraternity because state law considers fraternities unincorporated associations that can't be sued.

That barrier was not a problem for Bianchi, however, because the fraternity members were insured by the national fraternity for \$25 million.

To win against the two fraternity brothers, Bianchi had to prove they were with Meredith as a result of the "fraternity relationship."

"We argued that the only reason Chad was spending time with them is because he was impressed that the president and former vice president of the fraternity would take an interest in him," said Bianchi, a partner with Stewart Tilghman Fox & Bianchi. He supported his case with evidence that "Chad had never voluntarily gone swimming in a lake in his lifetime and would only swim in swimming pools."

The defense argued that a fraternity and its members shouldn't be held liable for injury or death of a pledge unless it occurs at an official fraternity event, which this late-night swim was not, said Miami attorney Don Hardeman, who represented fraternity president Travis Montgomery in the case.

"The law doesn't suggest that because you are a fraternity president, you have a duty to a pledge," said Hardeman, of Hardeman & Associates. "I think the jury imposed that duty on him."

Fighting The National

Largely, the determination of whether the national fraternity organization can be sued revolves around common law agency principles, said Seck.

Latimer said the agency principles are similar to any other case involving a business.

"If you sue Burger King or a local store, it boils down to what's the degree of control they have over the subsidiary," said Latimer, who practices with Marlow Connell Valerius Abrams Adler & Newman. "Are they in a position to change the behavior?"

However, unlike a franchise operation like Burger King, or a corporation with many stores, such as Wal-Mart, which "have intent to control" their subsidiary entities, "a national fraternity has no intent to control the day-to-day activities of a local chapter," said Seck. "All they are doing is giving the local fraternity a license to use a name and a symbol and then some guidelines. The remainder of the operation is up to the local chapter."

But Fierberg said that a plaintiff can sue the national fraternity and win - especially if the drinking takes place as part of a fraternity membership activity.

"You have individuals carrying out the initiation activities on behalf of the national organization," he said. "In many of the fraternities, there is no such thing as membership solely in the local chapter. For example, you are made a Phi Kappa Sigma, not an Iota Gamma chapter member of Phi Kappa Sigma."

Lickteig agreed.

"The national entity should have some oversight over what's going on at the local level," he said. "The local even pays dues to the national so the national does provide some structural assistance in the way of book-keeping and setting up local officer structures within [the] local fraternity."

But Seck said the contact between the national and local entities can be quite minimal.

"A national may only have contact with a local chapter two times per year, and could have 300 to 400 chapters at universities nationwide," he said, and therefore some courts might say they don't have sufficient control over the local chapters to be held liable.

In an attempt to avoid litigation, the national organizations often structure their corporate documents to "affirmatively disavow any obligation to supervise or control conduct of chapter or members," Fierberg said.

In a situation like that, "the corporate documents purportedly establish the national as a clearinghouse for information and ideas, as well as a general resource for chapters, [but] the ... documents further indicate that the national will have no responsibility for certain types of misconduct by the chapter or its members, including hazing," he said.

To counter this type of structure, Fierberg gathers evidence to prove that "despite what the corporate documents say, the fraternity supervises and does have a measure of control over the local groups."

For example, he said that many of the national organizations hire "leadership consultants" who were in the fraternity and have recently graduated. These individuals are responsible for traveling to universities to make sure individual chapters are following laws and rules, and to provide training in alcohol and related matters. They often have the power to take away the chapter's charter if rules aren't being followed, Fierberg said.

Despite any waiver of responsibility, "we argue that in fact the national organization does have supervisory authority and the law shouldn't allow them to deny an obligation for what they create," he said.

Fierberg further argues that the national organization has control over the local chapters because it is responsible for obtaining insurance for the chapters and the members, and because premiums are paid by the students' membership dues, which are paid to the national fraternity.

"In general, all of the membership initiation activities conducted by the chapters are under the authority of the national and directly for its benefit. Pledges are initiated into the national fraternity, through the local chapter operating under the authority conveyed upon it by the national in the fraternity's organizational documents. ... The national has, in fact, established the membership intake process, and it has the right and authority to modify it or prevent a chapter from conducting initiations for and on its behalf," he said.

In addition, most fraternities have strong anti-hazing and anti-underage drinking policies that stem from the national organization and apply to the local chapters, Bianchi said. The policies are detailed in manuals and representatives of the national entity come to various schools to give talks about them to chapters.

But Seck argued that such a policy may not be enough to render the national fraternity liable.

"I don't see a policy statement of prohibition as anything more than a mission statement unless there is some penalty attached to a violation of the policy," he said.

In another attempt to avoid liability, some fraternities and sororities also require potential members to sign statements that include a separate agreement to waive the national organization's liability, said Fierberg.

The statements generally indicate that "hazing is wrong, that they will not participate in the conduct, and that they will report it to the national or some other official. These statements also contain waivers of liability, wherein the potential new member waives the right to file suit against the national if he or she is hazed," he said.

In a suit against a local chapter, a fraternity that owns the building where the injury occurred could be held liable as a landlord, said Amanda Farahany, a partner with Barrett and Farahany in Atlanta.

Lickteig said that, in his case, in addition to the national and local fraternity, they sued the landlord of the fraternity house where the drinking occurred.

"We struck a pretty broad brush because we felt each of these entities and individuals bore some responsibility, but the court disagreed," said Lickteig, who manages his own law office.

In that case, the Kansas Supreme Court held that the fraternity didn't have a duty to the plaintiff, Matthew Prime, because that law doesn't "impose liability on the supplier of ... alcoholic beverages for harm suffered by a minor due to intoxication." (*Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402 (2002).)

Questions or comments can be directed to the writer at: rgertner@lawyersweekly.com

What To Evaluate In Suing A Fraternity

Attorneys must weigh a number of factors when determining whether to take a case against a fraternity.

In addition to the most basic question - whether the national entity can be sued - there are several other key factors to consider, including:

- *Liability laws in the relevant state.*

Social host liability laws - which regulate when a provider of alcohol can be sued for the results of drinking - vary substantially by state, according to Douglas Fierberg, an expert in hazing cases who practices with Bode & Grenier in Washington, D.C.

On one extreme, "some state laws absolutely prohibit someone who suffers harm as a result of [his or her] own drinking from bringing any civil action against [the] provider of the alcohol or any other person related to direct consumption of alcohol," he said. This would include a bar or fraternity.

Other states have statutes that hold a "social host" liable if there is evidence that its members "plied" the person with alcohol rather than the individual consuming it voluntarily, Fierberg noted.

Some states also distinguish among what types of venue or entity will be defined as a social host and, as a result, a bar could be defined as a social host, while a fraternity might not be, he said.

Theodore Lickteig of Overland Park, Kan., said that, in some instances, a conviction under a state statute that criminalizes furnishing alcohol to a minor or hazing could be used as evidence for establishing civil liability.

"At least it could be used as evidence that the standard of care in the civil case had not been met," he said, noting, however, that Kansas law doesn't allow this cause of action.

Lickteig handled a fraternity liability case in 2002 on behalf of a student, Matthew Prime, who was hospitalized after consuming alcoholic beverages as part of a fraternity initiation event. In that case, the Kansas Supreme Court held that the fraternity didn't have a duty to the plaintiff because that law doesn't "impose liability on the supplier of ... alcoholic beverages for harm suffered by a minor due to intoxication." (*Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402 (2002).)

Lawyers considering bringing a claim must also determine whether negligence standards under state law are based on contributory or comparative negligence.

"If it's a pure contributory negligence jurisdiction, you have significant issues to deal with if you've got a drinking case," said Fierberg. In such a state, "if someone is 1 percent responsible for injury or death, there's no claim."

- *University code of conduct and other policies.*

Experts stressed that plaintiffs' lawyers must make certain they obtain university policies concerning the consumption of alcohol.

"The university code of conduct can serve as a basis for establishing a particular standard of care within the college community," Fierberg said.

How much force the regulation will have depends on whether the case involves a state university or a private college.

"If there's a student code of conduct for a state university passed by a Board of Regents, it may have the same force and effect as any state administrative regulation under many states' laws," Fierberg said. "The violation of a state regulation can constitute negligence per se, and may set a standard of care."

He used this argument successfully to reach the national organization in one of the first sorority hazing cases he handled.

"The university code for Widener [University] had a provision that said the Greek organizations would be responsible for the misconduct of their members," he said. "We argued that the national organization agreed to abide by that as a condition of getting approval for a chapter at the university, and that the organization was wrong to deny responsibility for the conduct of its membership."

Other policies that may be relevant include policies affecting student affairs or dormitories, and alcohol policies.

It is also essential to find out if the fraternity has been involved in any prior violations of those policies.

- *Details about the individual's condition.*

Fierberg said that lawyers must also consider any details they can gather about the condition of the individual who was allegedly injured or died as a result of the fraternity members not taking action to rescue him.

Those factors include:

- The volume of alcohol consumed.
- Evidence of whether the person was pressured into consuming the alcohol.
- The student's appearance according to other people who were present in comparison to what a very intoxicated person would be expected to look like.
- Medical evidence about the individual's status when he received medical attention, such as how he was breathing and his heartbeat.

In addition, Lickteig, of the Law Offices of Theodore Lickteig, recommended filing a motion to "walk through the fraternity or sorority house. That way you are going to be able to give the jury a clear picture of just what the inside of the house looked like" to help them understand

where the plaintiff was during and after he consumed the alcohol.

Questions or comments can be directed to the writer at: rgertner@lawyersweekly.com

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