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The Litigation Landscape of Fraternity and Sorority Hazing: Criminal and Civil Liability

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TABLE OF CONTENTS

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I. INTRODUCTION

Hazing—"the act of placing another person in a ridiculous, humiliating, or disconcerting position as part of an initiation process"—has caused injury and death.[1] Some of the benefits asserted by those who participate in hazing are that the practice "creates deep and long-lasting bonds among those who endure it, instills the values of the group in new members, builds character, demonstrates commitment to the group, forges a connection with all members who had previously endured the experience, and inspires the respect of one's peers."[2] Yet numerous lawsuits against individuals, fraternal organizations, and educational institutions have prompted legislatures to pass hazing laws that augment and enhance general criminal laws.[3] The argument for these laws emphasizes that the "benefits of specialized hazing laws purportedly include the removal of procedural hurdles that have impeded prosecuting hazing injuries and increased awareness of the dangers of hazing."[4] However, the first hazing statute in America was not crafted with the goal of punishing hazing conduct of Greek-letter organization members. Rather, "[t]he first hazing statute in America appeared in 1874 in response to hazing in the military" and the "perceived attitude toward hazing by midshipmen."[5] It was long believed that the best way to eradicate conceit or "freshness" among new military initiates was through personal humiliation, leading to "plebe bedevilment" and torment.[6] In response, Congress enacted a federal law in 1874 criminalizing this type of hazing in military units, whether or not the acts resulted in actual harm.[7] In this Article, we offer an overview of the current hazing litigation landscape and what the future might look like in this area.

II. CRIMINAL LIABILITY

Many states have recognized the dangers and have codified statutes which punish hazing on the state level.[8] Although hazing offenses apply to the initiation or affiliation rites of any organization,

1. Frank J. Wozniak, Annotation, *Validity, Construction, and Application of "Hazing" Statutes*, 30 A.L.R. 5th 683, 2a (1995).
2. Brandon W. Chamberlin, *"Am I My Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925, 934 (2014).
3. Wozniak, *supra* note 1.
4. Chamberlin, *supra* note 2, at 945.
5. Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 117 (1991).
6. *Id.*
7. *Id.*
8. Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 383 (2002); *see also* Shashi Marlon Gayadeen, Ritualizing Social Problems: Claimsmakers in the Institutionalization of Anti-Hazing Legislation 6 (Oct. 26, 2011) (unpublished

state legislatures recognized the need to protect pledging youths who can, all too easily, be bullied or humiliated into engaging in risky or life-threatening conduct in return for social acceptance.[9] As such, many state and local courts now have mechanisms to impose criminal liability on the individual fraternity and sorority members as well as fraternal organizations. In this section, we investigate these mechanisms as well as the development of anti-hazing criminal statutes.

A. Member Liability

Considering the consequences of hazing and the potential for individual member liability in fraternal organizations, it is surprising in some respects that a substantial number of anti-hazing statutes have historically been based in education codes; some carry only educational penalties, such as suspension or expulsion of members involved in the incident.[10] The legislatures in Kentucky and Maine, for example, "require[ ] schools and universities to adopt regulations on hazing but have yet to criminalize it."[11] The consequence of this, of course, is that these statutes do not punish non-students who subject others to hazing.[12]

Early problems with addressing hazing involved the difficulty of defining hazing in the *criminal* context, particularly regarding the evolving hazing practices and psychosocial dynamics of fraternal organizations.[13] By 1990, only twenty-five states had enacted statutes making hazing a separate criminal offense.[14] Even then, there were challenges over issues concerning overbreadth, vagueness, and equal protection, among others.[15] A main issue with the criminalization of hazing and the applicability of other criminal charges is proving the intent of the crime committed.[16] When fraternity or sorority members

Ph.D. dissertation, University at Buffalo, State University of New York) (on file with author).

9. *See* Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997).
10. Pelletier, *supra* note 8, at 383.
11. *Id.*
12. *Id.*
13. *See id.* at 381–82.
14. *Id.* at 377.
15. Wozniak, *supra* note 1. In many cases, state hazing statutes survived these challenges, such as in *People v. Anderson*, 591 N.E.2d 461 (Ill. 1992). In that case, the Supreme Court of Illinois adjudicated over hazing charges brought against two college students for their part in activities that resulted in the death of another student. *Id.* at 464. The court held that the particular hazing statute at issue was valid despite challenges claiming the language was vague and overbroad, and additionally held that it did not violate equal protection. *Id.* at 468–69.
16. Christopher Keith Ellis, The Examination of Hazing Case Law as Applied Between 1980–2013 at 34 (Apr. 23, 2018) (unpublished Ph.D. dissertation, University of Kentucky) (on file with University of Kentucky).

intentionally haze, even when there is no intent to injure, they may still be charged with assault and battery.[17]

Incidents of hazing may involve assault, battery, kidnapping, sexual assault, manslaughter, false imprisonment, and other like crimes.[18] The benefit of charging participants under non-hazing criminal statutes is that they can reach even those participants who are not actually members of the fraternity as well as non-students that participate in the wrongful acts. These types of charges target members individually based on their conduct in the incident at issue. For example, five members of the Kappa Alpha Psi chapter at Fort Valley State College were charged with battery for their participation in a brutal hazing incident. Earl McKenzie and five other Kappa Alpha Psi pledges were beaten with canes and paddles as part of a "pledge line."[19] The incident began when one of the active members said he was going to "put somebody in the hospital tonight," and the pledges fled to McKenzie's parents' house, which led to an even worse punishment the following evening. That next night, the pledges were locked inside the fraternity house and pummeled with canes, kicks, and fists.[20] The beatings took place "over a period of five hours."[21] When McKenzie was hospitalized, his kidneys were on the verge of failure, while another pledge, Brian Beeler, was treated for a "sprained back, bruised buttocks and sore kidneys."[22]

In another hazing incident, "Chun Hsien Deng, a pledge from the City University of New York's Baruch College, . . . died during a hazing ritual called the 'glass ceiling,'" during which his fraternity brothers tied a heavy backpack full of sand to him and blindfolded him in freezing temperatures before assaulting him.[23] During the "ritual," Deng fell unconscious, and he passed away the next day.[24] The other fraternity members failed to seek medical attention for Deng; instead, they moved his body inside and attempted to resuscitate him without ever calling an ambulance.[25] Thirty-seven individuals were initially charged in the Deng case. Ultimately, five Pi Delta Psi members were charged with third-degree murder, and four of the five "later pleaded guilty to lesser charges in a deal with prosecutors."[26] When they were

17. *Id.* at 156.
18. *See id.* at 157.
19. David Goldberg, *5 in Fort Valley Frat Charged as Hazing Injures Pledges*, ATLANTA J.-CONST., Nov. 22, 1989, at A1.
20. *Id.*
21. *Id.*
22. *Id.*
23. Jeremy Bauer-Wolf, *Statewide Ban on a Fraternity*, INSIDE HIGHER ED (Jan. 9, 2018), https://www.insidehighered.com/news/2018/01/09/after-hazing-death-fraternity-banned-pennsylvania-10-years [https://perma.unl.edu/5FRY-WR7B].
24. *Id.*
25. *Id.*
26. *Id.*

sentenced in January 2018, "three of the men received up to 24 months in jail, and the fourth, who could not previously make bail, was sentenced to time served after spending 342 days in jail."[27]

Perhaps one of the most severe recent cases in which individual members of a fraternity were criminally charged occurred at Louisiana State University in February 2019. Nine members of the Delta Kappa Epsilon chapter faced criminal charges relating to multiple hazing incidents involving several pledges.[28] One pledge reported that he was forced to stay in an ice machine filled with ice and water for more than thirty minutes before being instructed to lay down on a basketball court covered in broken glass.[29] He and another pledge also alleged that they were sprayed with a hose, had milk cartons thrown at them, and were urinated upon.[30] Several other pledges also reported that they were forced to stand in painful positions, sometimes for hours at a time.[31] The students were directed to assume positions such as the "'gargoyle', a handstand with an ice bucket below their heads, or the 'rack,' in which initiates would have to stand on their toes with fingers touching an inclined ceiling."[32] A pledge who reported that he was told to assume the "table" position said he was forced on his hands and knees while other fraternity members "used his back to play a game of dice."[33] In an affidavit, a pledge recalled that he feared he would be beaten if he did not comply with the fraternity members' directions, while another pledge fled an initiation ritual when it appeared the fraternity members were going to burn him with lighted cigarettes.[34]

The charges against the individual perpetrators ranged from criminal hazing to felony battery.[35] All of the perpetrators involved were members of Delta Kappa Epsilon, including Cade Rain Duckworth, who faced the most severe charges out of the nine members—felony

27. *Id.* The national organization of Pi Delta Psi was charged with aggravated assault and involuntary manslaughter and was ordered to pay more than $112,000 in fines. *Id.* Additionally, and never before done in the State of Pennsylvania, it was ordered that the fraternity could no longer operate in the state where Deng died for 10 years. *Id.* Pi Delta Psi had "two chapters in the state—one is inactive at Carnegie Mellon University, the other is at Pennsylvania State University. Neither chapter was involved in the hazing that killed Deng." *Id.*

28. Chris Woodyard, *Police: DKE Frat Members Arrested for Hazing, Urinating upon LSU Pledges*, USA TODAY (Feb. 14, 2019, 4:57 PM), https://www.usatoday.com/story/news/nation/2019/02/14/9-lsu-fraternity-members-arrested-hazing-charges/2872824002/ [https://perma.unl.edu/8TTA-3AUX].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

charges of second-degree battery, attempted second-degree battery, and false imprisonment as well as three counts of criminal hazing.[36] Three other members also faced felony battery charges, while several other members were taken into custody for misdemeanor hazing charges.[37] The fraternity's Executive Director, Doug Lanpher, later issued a statement where he referred to the victims' claims as "extremely disturbing hazing allegations."[38]

B. Organizational Liability: High Managerial Agents

If individual members of a fraternity chapter are employed as High Managerial Agents (HMAs)—those who make basic corporate policies—vicarious liability may be imposed on the national organization. Fraternal organization national chapters "often are incorporated in the states where local campus chapters exist."[39] In large part, fraternal organizations incorporate so they can own property and conduct other business activities.[40] Under the common law doctrine of vicarious liability, corporations can be held criminally liable for the illegal acts of their employees or agents.[41] This was true in the case of Chun Hsien Deng, the Pi Delta Psi pledge who died as a result of the "glass ceiling" hazing ritual. Those conducting the hazing were HMAs of the fraternity, and the national organization was successfully prosecuted on a theory of vicarious liability—a rarely successful strategy.[42] However, a statute may limit vicarious liability by imputing criminal liability to high managerial personnel only.[43] HMAs "are those who make basic corporate policies."[44] There are two main approaches used

36. *Id.*
37. *Id.*
38. *Id.*
39. Nicholas Smith, *Why Are Black Fraternities Incorporated?*, CLASSROOM, https://classroom.synonym.com/black-fraternities-incorporated-10068160.html [https://perma.unl.edu/WJ4H-ZYZG] (last visited Jan. 9, 2019).
40. *Id.*
41. *See, e.g.*, Commonwealth v. Penn Valley Resorts, Inc., 494 A.2d 1139, 1142–43 (Pa. Super. Ct. 1985) (interpreting and applying 18 PA. CONS. STAT. ANN. § 307) ("Corporations are criminally accountable for the actions of a 'high managerial agent' who commits a wrongdoing in the scope of his office. This corporate accountability is based upon a simple principal/agency relationship and not upon a corporation affirming the officer's act."); *see also* Sean Bajkowski & Kimberly R. Thompson, *Corporate Criminal Liability*, 34 AM. CRIM. L. REV. 445, 446–51 (1997) (explaining the legal standards applicable to a corporation's criminal liability for the acts of its agent).
42. Bauer-Wolf, *supra* note 23.
43. 10 FLETCHER CYC. CORP., APPLICATION OF CRIMINAL LAW TO CORPORATIONS § 4942 (2017); *see also* Morris v. Ameritech Ill., 785 N.E.2d 62, 66 (Ill. App. Ct. 2003) ("A corporation can commit a misdemeanor through the acts of its agents, but it can commit a felony only through the acts of high managerial agents.").
44. FLETCHER, *supra* note 43, (citing State v. CECOS Int'l, Inc., 526 N.E.2d 807 (Ohio 1988)).

by states to determine which actors qualify as agents who can impute liability to a corporation: (1) the common law, and (2) the Model Penal Code (MPC).

Employment status holds considerably greater significance under the MPC than under the common law approach. Under common law, an agent's employment status is not determinative for purposes of imputing liability to the corporation.[45] The only requirements to find vicarious liability are that the act must have been (1) for the benefit of the corporation, and (2) within the actor's scope of employment.[46] Under this rule, the acts of the following types of employees have been imputed to the corporation: a CEO and president,[47] a comptroller,[48] a low-level salesmen,[49] a local branch manager,[50] a clerical worker,[51] and a truck driver.[52]

By comparison, vicarious liability under the MPC is more limited due to certain additional requirements.[53] Similar to common law, under most circumstances a corporation can only be held criminally liable for the acts of an agent if the act was "authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent."[54] Therefore, in most cases, the

45. Bajkowskit & Thompson, *supra* note 41, at 449; *see, e.g.*, United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983) (rejecting contention that corporation should only be liable for acts of high managerial agents); United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir. 1981) (same); United States v. Hanger One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977) (same); Standard Oil Co. of Texas v. United States, 307 F.2d 120, 127 (5th Cir. 1962) (same); C.I.T Corp. v. United States, 150 F.2d 85, 89 (9th Cir. 1945) (same); *see also* Samuel R. Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits*, 38 FED. B.J. 49, 53–54 (1979) (explaining that general rule of corporate criminal liability does not distinguish between high- and low-level employees). *But cf.* KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 3:02, at 41 (2d ed. 1992) (suggesting that actions of corporate directors will be easiest acts to impute to corporation because they have the greatest degree of control over corporate matters).

46. Bajkowski & Thompson, *supra* note 41, at 449 (citing *Hanger One, Inc.*, 563 F.2d at 1158).

47. *Id.* at 450 (citing United States v. Carter, 311 F.2d 934 (6th Cir. 1963)).

48. *Id.* (citing United States v. Am. Stevedores, Inc., 310 F.2d 47 (2d Cir. 1962)).

49. *Id.* (citing United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946)).

50. *Id.* (citing *C.I.T. Corp.*, 150 F.2d 85).

51. *Id.* (citing Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955)).

52. *Id.* (citing United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972); Texas-Oklahoma Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1970); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963)).

53. *See* Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 626 (1988) (discussing how large corporations may be able to escape all liability because high-ranking officers and executives usually have little involvement in day-to-day operations); Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1254 (1979) (same).

54. MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. 1962).

MPC distinguishes between the acts of agents at different corporate levels and conditions liability accordingly.[55] However, the significance of an actor's employment status is immaterial to liability in two limited areas: (1) "where the legislature clearly intended to impose liability upon corporations irrespective of employment status,"[56] or (2) "when the corporation omits to perform an affirmative duty."[57]

"Although many states have codified criminal liability rules patterned off the MPC, few have incorporated it without significantly limiting the 'high managerial agent' requirement."[58] Only eight out of the twenty-one states which have recognized a high managerial agent distinction define the term as restrictively as the MPC.[59] "The majority of the other states which condition liability on the employment status of the actor allow liability for lower level supervisors and managers."[60] There is an affirmative defense available for HMAs found in case law and the MPC.[61] This defense takes place when the HMA who has the responsibility "over the subject matter of the offense" exercised due diligence in his efforts to prevent its commission.[62] If the HMA exercised due diligence in an effort to prevent the commission of the crime, there will be no finding of criminal liability of the HMA which can impute the national organization.[63]

C. Development of Criminal Statutes on Hazing

Courts and lawmakers nationwide have now started to develop more extensive criminal statutes on hazing. For example, New York enacted statutes criminalizing hazing by categorizing the acts involved into separate degrees. "Hazing in the first degree, a class A misdemeanor under N.Y. Penal Law § 120.16, is identical to second degree hazing except that it requires that the defendant's conduct ac-

55. Bajkowski & Thompson, *supra* note 41, at 451.
56. *Id.* at 450; *see* MODEL PENAL CODE § 2.07(1)(a) (AM. LAW INST. 1962).
57. Bajkowski & Thompson, *supra* note 41, at 450; *see* MODEL PENAL CODE § 2.07(1)(b) (AM. LAW INST. 1962).
58. Bajkowski & Thompson, *supra* note 41, at 451.
59. *Id.* at 451 n.49 (explaining that these states are Arizona, Arkansas, Hawaii, Kentucky, New Jersey, Pennsylvania, Texas, and Utah).
60. *Id.* at 451 n.50 (explaining that these states include Colorado, Delaware, Illinois, Iowa, Missouri, Montana, New York, North Dakota, Oregon, Washington, and Georgia).
61. Vaughan & Sons, Inc. v. State, 737 S.W.2d 805 (Tex. Crim. App. 1987); MODEL PENAL CODE § 2.07(5) (AM. LAW INST. 1962).
62. MODEL PENAL CODE § 2.07(5) (AM. LAW INST. 1962).
63. *Id.* Whether a nonprofit corporation is treated the same way seems to be a state issue. In the cases I read, there was always a state statute that stated corporations include not-for-profit organizations. *See, e.g.*, State v. Black on Black Crime, Inc., 736 N.E.2d 962, 968 (Ohio Ct. App. 1999) (citing OHIO REV. CODE ANN. § 2901.23 (West 2012) in holding that an organization includes a not-for-profit corporation).

tually cause physical injury."[64] The hazing statute draws upon assault doctrines, but, "[u]nlike most of the law of assault, hazing punishes the same conduct equally, whether it is engaged in intentionally or recklessly."[65] Additionally, "first degree hazing appears to be broader than misdemeanor assault in that intent to injure is not required; intent to engage in the risk-creating conduct is sufficient."[66] The law also draws from reckless endangerment concepts; however, unlike reckless endangerment, "either degree of hazing requires only the creation of a risk of 'physical injury,' rather than 'serious physical injury.'"[67]

In some states, such as Florida, existing laws criminalizing hazing have been expanded or revised to broaden the scope of criminal liability for individuals who witness or plan an act of hazing.[68] Florida recently elaborated on its definition of "hazing" in a 2019 revision of its criminal hazing statute. The prior language of the statute defined 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 postsecondary institution."[69] The revisions provide a more comprehensive definition by separating the categories of actions covered under the definition into four subsections, (a) – (d), and via the inclusion of an additional category—actions done for "*(d) The perpetuation or furtherance of a tradition or ritual*" of the covered organization.[70]

The revisions also included the addition of "Andrew's Law," which both creates liability and provides protection for those who witness a hazing incident that results in a person appearing to need medical assistance.[71] The law was named to honor Andrew Coffey, a fraternity pledge from Florida State University who passed away from alcohol poisoning after falling unconscious at a "big brother night."[72] He reportedly drank an entire bottle of whiskey, as was the practice at these types of events, and after falling unconscious, was moved to a couch and ignored until the next morning.[73] To avoid prosecution under Andrew's Law, a witness to a hazing-related injury must be the

64. ROBERT G. BOGLE ET AL., VILLAGE, TOWN AND DISTRICT COURTS IN NEW YORK § 6:296 (2019).
65. *Id.*
66. *Id.*
67. *Id.*
68. *See* Jeremy Bauer-Wolf, *Tough New Law Against Hazing*, INSIDE HIGHER ED (July 18, 2019), https://www.insidehighered.com/news/2019/07/18/florida-governor-signs-tough-new-hazing-law [https://perma.unl.edu/72XR-CJJH].
69. FLA. STAT. § 1006.63(1) (2011) (emphasis added).
70. FLA. STAT. § 1006.63(1)(a)–(d) (2019) (emphasis added).
71. *Id.* § 1006.63(11).
72. Bauer-Wolf, *supra* note 68.
73. *Id.*

first to call 911 or campus security and remain at the scene with the person needing assistance.[74] Andrew's Law also provides protection for witnesses who, before medical assistance arrives, "render aid to the hazing victim" via standard first aid procedure (chest compressions, clearing the victim's airways, etc.) or "render[ ] any other assistance to the victim which the person intended in good faith to stabilize or improve the victim's condition while waiting for medical assistance, law enforcement, or campus security to arrive."[75]

Likewise, Pennsylvania passed the Timothy J. Piazza Antihazing Law in October 2018.[76] Similar to Andrew's Law in Florida, Pennsylvania's new law honors the death of Penn State University student Timothy Piazza, who died at age nineteen from injuries to his head and abdomen "after falling several times at the Beta Theta Pi fraternity house following the acceptance of his bid into the fraternity."[77] Criminal investigations into his death fueled scrutiny of the activities associated with the Beta Theta Pi fraternity.[78] These investigations "resulted in fraternity members [being] charged with involuntary manslaughter, reckless endangerment, and hazing."[79] The Timothy J. Piazza Antihazing Law allows the State to prosecute perpetrators of hazing for *aggravated hazing* when a perpetrator is found to have acted with "reckless indifference to the health and safety of the minor or student; or [ ] the person causes, coerces or forces the consumption of an alcoholic liquid or drug by the minor or student" if such actions resulted in serious bodily injury or death.[80] A person charged under this statute may be convicted of a third-degree felony.[81]

To date, forty-four states have anti-hazing statutes, some criminalizing the conduct.[82] Some states have also criminalized the failure to

74. FLA. STAT. § 1006.63(11).
75. *Id.* § 1006.63(12).
76. *Timothy J. Piazza Antihazing Legislation Signed into Pennsylvania Law*, PENN STATE NEWS (Oct. 19, 2018), https://news.psu.edu/story/542868/2018/10/19/administration/timothy-j-piazza-antihazing-legislation-signed-pennsylvania [https://perma.unl.edu/W26Y-292N]; *see also* Ellis, *supra* note 16, at 166–67.
77. Ellis, *supra* note 16, at 166–67 (citation omitted).
78. *Id.*
79. *Id.*
80. 18 PA. CONS. STAT. ANN. § 2803(a) (2020).
81. *Id.* § 2803(b).
82. Gregory S. Parks, Shayne E. Jones & Matthew W. Hughey, *Belief, Truth, and Positive Organizational Deviance*, 56 HOW. L.J. 399, 409 (2013) [hereinafter Parks et al., *Organizational Deviance*]; *see* ALA. CODE § 16-1-23 (2020); ARK. CODE ANN. § 6-5-201 (2020); CAL. PENAL CODE § 245.6 (West 2020); COLO. REV. STAT. § 18-9-124 (2020); CONN. GEN. STAT. § 53-23a (2020); DEL. CODE ANN. tit. 14, § 9301 (2020); FLA. STAT. ANN. § 1006.63 (2019); GA. CODE ANN. § 16-5-61 (2020); IDAHO CODE ANN. § 18-917 (West 2020); 720 ILL. COMP. STAT. § 5/12C-50 (2020); IND. CODE § 34-30-2-150 (2020); IOWA CODE § 708.10 (2020); KAN. STAT. ANN. § 21-5418 (2020); KY. REV. STAT. ANN. § 164.375 (West 2020); LA. STAT. ANN. § 17:1801 (2020); ME. REV. STAT. ANN. tit. 20-A, § 10004 (2020); MD. CODE

report hazing incidents to address concerns about the potential lack of reporting due to pledge loyalty to the pledged organization.[83] The goal of these statutes, as is the case with most criminal punishments, is to deter future incidents of hazing.[84]

III. CIVIL LIABILITY

It is much more common for hazing cases to be filed civilly than criminally—potentially resulting in compensation for the victims of such practices. In general, the theory relied upon most broadly is that the victims' injuries resulted from the negligence of members, chapters, the national organization, or the host college or university.[85] "[N]egligence is applied broadly and is the 'basis for imposing liability in the overwhelming majority of cases involving accidental bodily injury . . . .'"[86] "The establishment of negligence as 'injury to another caused by a failure to maintain a standard of care'" further broadens the umbrella of liability for negligence.[87] The standard of care aspect of negligence is broadly applied to corporations and organizations.[88] In this section, we investigate the civil liability of fraternity and sorority members, their chapters, national organizations, and host institutions.

A. Member Liability

In some instances, individual actors may be held civilly liable for hazing. In jurisdictions that do not have criminal hazing statutes, or

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ANN., CRIM. LAW § 3-607 (West 2020); MASS. GEN. LAWS ch. 269, § 17 (2020); MINN. STAT. § 121A.69 (2020); MISS. CODE ANN. § 97-3-105 (2020); MO. ANN. STAT. § 578.365 (West 2020); NEB. REV. STAT. § 28-311.06 (2020); NEV. REV. STAT. § 200.605 (2020); N.H. REV. STAT. ANN. § 631:7 (2020); N.J. STAT. ANN. § 2C:40-3 (West 2020); N.Y. PENAL LAW § 120.16 (McKinney 2020); N.C. GEN. STAT. § 14-35 (2020); N.D. CENT. CODE § 12.1-17-10 (2020); OHIO REV. CODE ANN. § 2903.31 (West 2020); OKLA. STAT. tit. 21, § 1190 (2020); OR. REV. STAT. § 163.197 (2020); 18 PA. CONS. STAT. ANN. § 2808 (2020); 11 R.I. GEN. LAWS § 11-21-1 (2020); S.C. CODE ANN. § 16-3-510 (2020); TENN. CODE ANN. § 49-7-123 (2020); TEX. EDUC. CODE ANN. § 37.153 (West 2020); UTAH CODE ANN. § 76-5-107.5 (West 2020); VT. STAT. ANN. tit. 16, § 570j (2020); VA. CODE ANN. § 18.2-56 (2020); WASH. REV. CODE § 28B.10.901 (2020); W. VA. CODE R. § 18-16-3 (2020); WIS. STAT. § 948.51 (2020).

83. Chamberlin, *supra* note 2, at 944 n.127.
84. *See* Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey's Anti-Hazing Act*, 26 QUINNIPIAC L. REV. 305, 331 (2008) (discussing the intended effects of strengthening anti-hazing statutes).
85. *See* Ellis, *supra* note 16, at 42–43.
86. *Id.* at 39 (quoting KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 171 (2009)).
87. *Id.* (quoting Nicholas J. Hennessy & Lisa M. Huson, *Legal Issues and Greek Letter Organizations*, 81 NEW DIRECTIONS STUDENT SERVS. 61, 63 (1998)).
88. *Id.*

that leave prosecution of fraternal hazing offenses to educational institutions, there are other legal doctrines that may apply in situations beyond criminal prosecution to hold individual members of fraternal organizations liable for hazing incidents. A victim of hazing could prevail in a civil lawsuit under principles of negligence or intentional infliction of emotional distress (IIED), for example.[89] In addition, multiple states have recognized that violations of criminal hazing statutes, which are designed to protect human life, are prima facie evidence of negligence. Thus, a member of a fraternal organization may, under certain circumstances, be held civilly liable for their participation in hazing activities. However, mere membership is insufficient to impose liability; members may be liable only if the member participates in, has knowledge of, or assents to the tortious act (especially in jurisdictions that recognize failure to report as prima facie negligence).[90]

Even where individual members avoid civil liability for their actions based on respondeat superior or an agency relationship with the national organization, it is possible that individual actors could be brought in as third-party defendants by the fraternity or sorority through impleader. For example, *Federal Rule of Civil Procedure* 14(a) instructs that "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it." Indemnification is possible because parties can be held responsible for conduct, and that party may also recover against responsible parties even if they were not initially

89. Chamberlin, *supra* note 2, at 972.

90. *See, e.g.*, Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 180 (Pa. Super. Ct. 2002). Kenner, a pledge for the Beta Epsilon chapter of the Kappa Alpha Psi Fraternity at the University of Pittsburgh, was beaten with paddles causing numbness in his buttocks and genitals, swelling in his genitals, and blood in his urine. *Id.* "As a result of the beating, Kenner suffered renal failure, seizures, and hypertension requiring three weeks of hospitalization and kidney dialysis." *Id.* The lower court found that the members owed no legal duty to Kenner absent a special relationship between he and the perpetrators of the hazing. *Id.* at 182. The lower court reasoned that without participating in, having knowledge of, or assenting to the tortious acts, the court could not hold the chapter members civilly liable. *Id.* On appeal, the court used foreseeability of the possibility of injury as the underlying legal theory, holding that the individuals did, in fact, owe a duty to Kenner. *Id.* at 182–83. Kenner established a prima facie case against one of the individual defendants by setting forth facts alleging that the defendant knew of the hazing practices, failed to address the issue at interest meetings, had inadequate understanding of the organization's new intake process, and did not take steps to find out what hazing practices were happening in informal settings. *Id.* at 184. These failures were deemed by the court as being causes of Kenner's injuries and allowed Kenner's claim to survive the defendant's summary judgment motion. *Id.*

brought into the litigation.[91] "The most common situations giving rise to indemnification are agency type relationships, which include master and servant, principal and agent, and independent contractors."[92] In the context of indemnification, liability "is imposed upon one of the parties because of his legal relationship (employment) to the person who has committed the tortious act."[93]

In early 2017, Timothy Piazza was given a bid to pledge the Alpha Upsilon Chapter of the Beta Theta Pi fraternity at Penn State.[94] On February 2, 2017, Timothy and thirteen other pledges attended a "Bid Acceptance Night" party.[95] When the pledges arrived, they were led to the basement where they were handed a large bottle of vodka and told to "pass [it] amongst themselves until it was empty."[96] The pledges were then escorted outside and directed to "reenter the house one-by-one to participate in a series of drinking events called 'the Gauntlet,'" which was intended to get the pledges "quickly intoxicated."[97] The Gauntlet involved several stations where pledges were forced to perform various challenges and drink.[98] Piazza was "visibly intoxicated" after completing the Gauntlet, but fraternity members continued to provide him with alcohol.[99] In total, Piazza consumed eighteen alcoholic drinks over ninety minutes.[100] Piazza's BAC was between 0.28 and 0.36, and he was later assisted to a couch.[101] "At 11:20pm, [Piazza] fell down the basement stairs, 'suffer[ed] serious injuries,'" and was rendered unconscious.[102] Piazza was found and fraternity members carried him back to the couch despite seeing a bruise on his abdomen and noticing that he was unconscious and non-responsive.[103] Throughout the night, Piazza vomited, thrashed around, made odd movements and sounds, and eventually fell several more times, hitting his head and face on the floor, an iron railing, and the house's front door.[104] Fraternity members took measures to prevent Piazza from asphyxiating, including putting a weighted backpack on him to prevent him from rolling onto his back, but eventually the backpack

91. Marvin E. Wright, *Procedure—Third Party Practice—Non-Contractual Indemnification*, 28 MO. L. REV. 307, 309 (1963) (citing City of Springfield v. Clement, 225 S.W. 120, 125 (Mo. Ct. App. 1920), *rev'd*, 246 S.W. 175 (1922)).
92. *Id.* at 315.
93. *Id.*
94. Piazza v. Young, 403 F. Supp. 3d 421, 427 (M.D. Pa. 2019).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 427–28.
99. *Id.* at 428.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 428–29.
104. *Id.* at 428–31.

came off.[105] Fraternity members denied requests from others to call for medical help and discouraged others from calling for medical help.[106] During the evening, some fraternity members attempted to forcefully rouse Piazza into consciousness by slapping him, but Piazza remained unconscious.[107] Despite these interactions, Piazza was largely unattended during the evening and left by himself.[108] More than eleven hours after Piazza's initial fall, a fraternity member called 911.[109] The fraternity members tried to cover up their conduct and any record of alcohol or the events. Piazza died in the hospital two days later from his injuries.[110]

Piazza's parents filed a fourteen-count complaint, portions of which the defendants sought to dismiss for failure to state a claim.[111] Counts I and II of the complaint were negligence claims based on (I) all defendants' "role[s] as planners of the Bid Acceptance Night" and (II) the defendants "who allegedly furnished alcohol to the pledges at some point during the party."[112]

The defendants argued that the complaint failed to allege a duty between them and Piazza.[113] However, in Pennsylvania, "members of a fraternity owe[ ] a duty to protect pledges from harm while the pledges are being initiated into the fraternity."[114] The court read *Kenner* to extend the duty to all fraternity members, not just officers.[115] Here, the defendants were also bound by Beta Theta Pi's Code of Regulations and Risk Management Policy, which forbids hazing and alcohol at pledge activities.[116] Further, criminal hazing statutes prohibit the "forced consumption of any [alcohol or drugs] . . . which could adversely affect the physical health and safety of the individual."[117] Thus, the defendants had a duty not to cause harm to Piazza through hazing, especially with alcohol. The defendants also argued that the complaint failed to show breach of their duty or that their breach caused Piazza's injuries.[118] The court found that the defendants breached their duty by either organizing or participating in the event, which was enough to infer that each defendant "made an important

105. *Id.*
106. *Id.* at 429.
107. *Id.*
108. *Id.*
109. *Id.* at 430.
110. *Id.* at 430–31.
111. *Id.* at 431.
112. *Id.*
113. *Id.*
114. *Id.* (citing Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 181 (Pa. Super. Ct. 2002)).
115. *Id.* at 432–33.
116. *Id.* at 432.
117. *Id.* at 434.
118. *Id.*

contribution to either the design or the execution of the events that evening" that plausibly breached the duty of care they owed Piazza.[119] While discovery could uncover facts showing individual defendants were blameless, at the pleading stage, involvement was enough for a plausible inference that they breached their duty of care.[120] The court also found that it must infer the events of the Bid Acceptance Night were the actual, but-for cause and proximate cause of Piazza's death.[121] If Piazza were not invited to the party, he would not have been so intoxicated that he fell down the stairs and suffered his injury.[122] The court again left the question of each defendant's culpability as being a proximate cause of the injury to discovery and inferred that each defendant's participation played an "important contributory role" in Piazza's injury at the pleading stage.[123]

The third count in the complaint was that the defendants were negligent after the fall in providing aid to Piazza.[124] The defendants argued that the complaint failed to allege they provided aid to Piazza that evening establishing a duty of care.[125] Under Pennsylvania law, "while an individual may 'pass by on the other side' of an injured party without facing tort liability, a 'Good Samaritan' who stops to help incurs a duty to exercise reasonable care when doing so."[126] The complaint showed that several fraternity members stopped to help Piazza when he was staggering, vomiting, thrashing, and when he fell, and so they incurred such a duty.[127] Their duty was plausibly breached when they failed to seek medical help, which could have been a substantial factor in Piazza's death.[128] Other defendants, however, did nothing to assist with the injuries and the court dismissed the Count III claims against them.[129] The defendants also argued that the plaintiffs' claim that they were negligent per se for hazing should fail. However, the court disagreed, finding, based on the alleged facts, that a jury could find Piazza's fraternity membership was conditioned on his participation in the hazing in direct violation of a Pennsylvania statute designed to prevent public harm.[130] The court dismissed Count V, which alleged the defendants were negligent per se for furnishing alcohol to Piazza, reasoning that the Pennsylvania Supreme Court had declined

119. *Id.* at 434–35.
120. *Id.*
121. *Id.* at 435–36.
122. *Id.*
123. *Id.* at 436.
124. *Id.*
125. *Id.*
126. *Id.* at 436–37 (quoting Filter v. McCabe, 733 A.2d 1274, 1277 (Pa. Super. Ct. 1999)).
127. *Id.* at 437–38.
128. *Id.*
129. *Id.*
130. *Id.* at 438–39.

to extend liability based on the social host doctrine to instances where the defendant is under 21 years of age.[131] However, the court dismissed Count V without prejudice, and left the Piazzas to amend their complaint to allege that the defendants named were at least 21 years old on the date of the Bid Acceptance Night.[132] Defendants raised several arguments for why the court should dismiss Count VI, Civil Conspiracy, all but one of which failed.[133] The only successful argument that the defendants raised was that Count VI should be dismissed to the extent it alleged a conspiracy to violate the Pennsylvania law prohibiting the furnishing of alcohol to minors.[134] For the same reason the court dismissed Count V, it dismissed Count VI without prejudice to the extent that it relied on that theory.[135] The court declined to dismiss any counts of battery because when Piazza was touched he was "in distress" and unconscious, and a jury could find the contacts to be offensive.[136] The court dismissed a count of IIED with prejudice because the family of a decedent is not entitled to relief unless there was an intentional mishandling of the decedent's body.[137] The defendants were not alleged to have done anything outrageous with Piazza's body, and the erasure of the house surveillance video was not enough to establish the requisite state of mind for the IIED count.[138] The court declined to dismiss a demand for punitive damages and motions to strike certain portions of the complaint.[139] The court did grant a limited stay for several defendants who were also facing criminal liability.[140]

B. Chapter Liability

Often times, suing an individual member of a Greek-letter organization can limit the amount of damages one can receive simply because of the inability to collect a judgement from an individual. Thus, many victims of hazing choose to sue both the local chapter and the national organization—both of which likely have deeper pockets with which to satisfy a judgment awarding damages to the victim. Local chapters of national organizations, as opposed to the national organi-

131. *Id.* at 439.
132. *Id.*
133. *Id.* at 439–41; *see id.* at 439–40 ("Under Pennsylvania law, a civil conspiracy exists, where, inter alia, 'two or more persons combine[ ]or agree[ ] . . . to do an unlawful act . . . [with] an intent to injure.'" (quoting Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979))).
134. *Id.* at 441.
135. *Id.*
136. *Id.* at 441–42.
137. *Id.* at 442–43.
138. *Id.* at 443.
139. *Id.* at 443–44.
140. *Id.* at 444–46.

zation itself, are exposed to more liability by virtue of their direct and continuous contact with members and pledges.[141] Further, because the local chapter is often directly involved with creating rules and guidelines for member acquisition, it is easier for putative plaintiffs to establish a duty giving rise to chapter liability.[142] Additionally, a chapter can be found liable for the injuries sustained by a member or fraternity pledge if a putative plaintiff can show that the chapter has knowledge of a pattern of harmful behavior by the chapter's members, if it is foreseeable that a member or practice poses a threat to the safety of others, or if the chapter is involved in the supervision of local events during which hazing incidents do or may occur.[143]

In *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*,[144] for example, the Illinois Appellate Court found that the local chapter owed a duty of care to a pledge who suffered an injury during an initiation ceremony. The ceremony required pledges to drink 40 ounces of beer from a pitcher, whiskey, and additional liquor supplied by members of the local chapter, after which a pledge suffered neurological damage due to excessive alcohol consumption.[145] The fraternity members left the plaintiff-pledge on the floor of the fraternity house after he lost consciousness, and, upon waking, the pledge had difficulty using his arms and hands.[146] The court found that because the local chapter required the consumption of excessive amounts of alcohol as part of the initiation ceremony, the foreseeability of a likely injury created a legal duty.[147] The court stated:

> A fraternal organization, held in high esteem, is to be liable for injuries sustained when requiring those seeking membership to engage in illegal and very dangerous activities.
>
> . . . The social pressure that exists once a college or university student has pledged into a fraternal organization is so great that compliance with initiation requirements places him or her in a position of acting in a coerced manner.[148]

The foreseeability of injury, and thus, the finding of a duty, does not only arise in the context of member initiation or with pledges to the fraternity. For example, in *Nisbet v. Bucher*, a member of a fraternity was told that to become a member of the board in charge of or-

141. *Liberty, Fraternity, Liability: An Assessment of Fraternity Liability for the Acts of Its Members*, McCarthy, Lebit, Crystal & Liffman (Aug. 9, 2017), https://.mccarthylebit.com/2017/08/09/liberty-fraternity-liability-assessment-fraternity-liability-acts-members/ [https://perma.unl.edu/8DNL-3Q5Z].

142. *Cf.* Furek v. Univ. of Del., 594 A.2d 506, 519–20 (Del. 1991).

143. *Liberty, Fraternity, Liability: An Assessment of Fraternity Liability for the Acts of Its Members*, *supra* note 141.

144. 507 N.E.2d 1193, 1198 (Ill. App. Ct. 1987).

145. *Id.* at 1195.

146. *Id*.

147. *Id.* at 1197–98.

148. *Id*. at 1198.

ganizing a St. Patrick's Day event, he had to consume a drink containing grain alcohol and green peas.[149] The drink was heated and served to the member at a chapter-owned building on the university campus.[150] According to the plaintiffs in the suit (the member's parents), the victim was forced to drink by members through "pushing, restraint, assault . . . verbal taunting, ridicule and challenge."[151] The member subsequently died, and his parents brought suit against the local chapter, among other campus organizations, for his wrongful death.[152] The court found that the member's "will to drink or not drink may have been overborne" because the initiation ceremony was a prerequisite for invitation on the board.[153] Further, the court determined that the local chapter could not rely on the social host doctrine to shield itself from liability because the chapter did not simply supply alcohol to the members—it made drinking a sort of "qualification" for membership to the board.[154] Thus, the drinking requirement was so intertwined with the requirements for membership to the board that it essentially "blinded [the student] to the danger he was facing."[155] Ultimately, the court concluded that "[i]f great social pressure was applied to [a student] to comply with the membership 'qualifications' of [a campus organization, the student] may have been blinded to the danger he was facing."[156]

C. Housing Corporation Issues

In October 1928, an original organizer of the Alpha Upsilon Chapter (the Chapter) of the Fraternity of Beta Theta Pi, Inc. (House Corp.) and Penn State executed a deed transferring property rights to House Corp.[157] The Beta Theta Pi chapter house was constructed on the property, and fraternity members have lived in the house since that time.[158] Penn State students are governed by the Office of Student Conduct, and fraternities are further governed by the Inter Fraternity Council (IFC).[159] Penn State essentially acted as House Corp.'s landlord by exercising control over the fraternity members and the house, and collecting rent and fees as a condition to the fraternity members

149. 949 S.W.2d 111, 113 (Mo. Ct. App. 1997).
150. *Id*.
151. *Id*.
152. *Id*.
153. *Id*. at 116.
154. *Id.*
155. *Id.*
156. *Id.*
157. Alpha Upsilon Chapter of the Fraternity of Beta Theta Pi, Inc. v. Pa. State Univ., No. 4:19-CV-01061, 2020 WL 1320702, at *3 (M.D. Pa. Mar. 20, 2020).
158. *Id.*
159. *Id.* at *3–4.

registering for classes.[160] Penn State and IFC also "conducted monitoring and approval of social events hosted by the Chapter to confirm compliance with the IFC Code of Conduct."[161] This suit also involved the death of Timothy Piazza, a pledge who died at the Chapter's house. "After Piazza's death, Penn State officials . . . commenced an investigation without regard to the published procedures of the IFC and/or Office of Student Affairs."[162] House Corp. was denied access to a video recording confiscated from the house that showed the events of the night Piazza died.[163]

On February 16, 2017, Penn State issued a press release regarding its investigation and stated that it would withdraw recognition of the Beta Theta Pi for a minimum of five years, with the withdrawal having the potential to become permanent pending the completion of criminal and university investigations.[164] On March 30, 2017, Penn State issued another press release stating its decision to permanently ban the Chapter without a right to appeal the decision.[165] Penn State did not follow any of the published procedures or guidelines of IFC or the Office of Student Affairs in making its decision to permanently ban the Chapter.[166] "House Corp. was forced to vacate the Beta house" and neither House Corp. nor the Chapter was not given an opportunity to review the information upon which Penn State based its decision.[167] Penn State's own policies required a "detailed report by the Office of Student Conduct and a hearing with the leadership of a fraternity charged with a violation."[168] According to the court, Penn State's permanent ban of the Chapter was an attempt to trigger a deed provision granting Penn State the option to purchase the real estate owned by House Corp.[169]

160. *Id.* at *4 ("Penn State also acted as House Corp's landlord by collecting, administering and processing payment of rents and other fees for members of the Chapter; withholding registration for Penn State classes if such rent and fees were not paid, and charging a fee on behalf of Penn State for such services provided.").
161. *Id.*
162. *Id.* ("Penn State, among other things, conducted interviews directly with the local police department, reviewed grand jury information and interviewed grand jury witnesses without notice to House Corp. or the Chapter.").
163. *Id.*
164. *Id.*
165. *Id.* at *5. ("Penn State stated that as its 'student conduct investigation of the Beta Theta Pi fraternity continues, more disturbing facts have emerged, including a persistent pattern of serious alcohol abuse, hazing, and the use and sale of illicit drugs. The University has decided to permanently revoke recognition of Beta Theta Pi banning it from ever returning as a chapter at Penn State. This extraordinary action occurs in the context of a continuing criminal investigation into the death of Penn State sophomore Timothy Piazza.'").
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

Three claims were at issue before the court: (1) House Corp.'s due process claim, (2) House Corp.'s third-party beneficiary claim, and (3) House Corp.'s breach of the covenant of good faith and fair dealing claim.[170] The defendants moved to dismiss all three claims and moved for a more definite statement of the third claim.[171] The court first found that House Corp.'s amended complaint did not make out a due process claim; the only deprivation of process House Corp. alleged was a "conclusory allegation[ ] that Penn State's exercising of the Deed right constituted an arbitrary or capricious government action."[172] House Corp. previously, and again in their amended complaint, also failed to make out a third-party beneficiary claim.[173] House Corp.'s third-party beneficiary claim was based on the contracts between the Chapter and Penn State, "including the agreements to follow the IFC rules and procedures in disciplining the Chapter."[174] The court held that House Corp.'s third-party beneficiary claim failed to raise compelling circumstances for the recognition of its right as a third-party beneficiary, lacked meaningful evidence of Penn State's intent to benefit House Corp., and that the individual parties named (Sims, Shaha, and Barron) were not parties to the original contract and could not be held liable.[175] The court left House Corp. to amend its claim for a breach of the implied covenant of good faith and fair dealing.[176] Under *Federal Rule of Civil Procedure* 10(b), claims for relief must be made in separate counts such that the defendant can "discern what the plaintiff is claiming and [ ] frame a responsive pleading."[177] House Corp.'s Count V was in practice two counts, and one of them (the "civil conspiracy" count) was dismissed with prejudice. Therefore, House Corp. was in violation of Rule 10.[178] The defendants properly sought a more definite statement of the breach of the covenant of good faith and fair dealing claim as a remedy to House Corp.'s deficiencies under Rule 10. In sum, both the due process and third-party beneficiary claims were dismissed, and the claim that defendants breached the covenant of

170. *Id.* at *1.

171. *Id.*

172. *Id.* at *5; *see id.* at *2 ("When disposing of a motion to dismiss, the Court 'accept[s] as true all factual allegations in the complaint and draw[s] all inferences from the facts alleged in the light most favorable to [the plaintiff].' However, 'the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.' 'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" (citations omitted)).

173. *Id.* at *5.

174. *Id.*

175. *Id.* at *5–6.

176. *Id.* at *6.

177. *Id.* at *7.

178. *Id.*

good faith and fair dealing was not dismissed, but the defendants' motion for a more definite statement on that claim was granted.[179]

D. National Organization Liability

1. Agency and Respondeat Superior

Agency theory is a method of determining if a relationship exists between two parties and thus one should be held responsible for the actions of the other.[180] This is apparent in the context of corporations, where a corporation can act through its agents just as a national fraternity can act through its local chapter.[181] In the fraternity context, courts determine whether a national fraternal organization has a special relationship with the local chapter and thus can be held liable for the actions committed by the local chapter within the scope of business through the liability theory of respondeat superior.[182] Many times, courts have held that because a national fraternity sets rules for how members are to be inducted into chapters, they are responsible for the implementation and enforcement of these rules—creating an agency relationship between the national organization and its chapter.[183] In order for a court to extend liability from a local chapter to the national organization under an agency theory, the court must find that there was a special relationship between the two entities.[184] If the local chapter is found to be an agent of the national organization, the court then asks whether the actions taken by the chapter were done within the scope of that relationship.[185] If it is established that the chapter is an agent and that the actions were done within the scope of the agency relationship, the national organization can be held liable for those actions committed by its chapter.[186]

Organizational liability under the agency theory first arose in the 1904 case, *Mitchell v. Leech*.[187] In *Mitchell*, the plaintiff was injured after seeking membership in a local organization known as the Woodmen of the World (WoW).[188] The court was confronted with an issue of

179. *Id.*
180. Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities' Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 87 (2014).
181. *Id.* The national organization can be held liable for the actions of its individual members under agency theory as well. *See* Bauer-Wolf, *supra* note 23; *supra* note 27.
182. Sunshine, *supra* note 180, at 87.
183. *Id.* at 131–32.
184. *Id.* at 114–15.
185. *See, e.g.*, Ballou v. Sigma Nu Gen. Fraternity, 352 S.E.2d 488, 495–96 (S.C. Ct. App. 1986).
186. *See, e.g.*, *id.*
187. 48 S.E. 290 (S.C. 1904).
188. *Id.* at 290.

first impression of whether the national officials of a camp would be liable for the actions of employees of a local chapter.[189] The Supreme Court of South Carolina affirmed that the national WoW organization could be held liable on the basis that the local WoW chapter had the responsibility of an agent in order to conduct "the affairs of the order in various localities" and that, as such, all acts of the "local camps" were "binding" on the national organization.[190] This conduct, having been done for the benefit of the national organization, fell under the scope of the agency relationship, even if it was not specifically prescribed by the national organization.[191] This holding analogized the national organization to a corporation, with the local chapters acting as the business's agents.[192] Thus, a national organization was liable under respondeat superior for any torts committed by the local, even if they were unknown to the national.[193] The *Mitchell* court determined that the agent was entrusted by the principal to make decisions and thus the principal was liable to a third party for any negligence of the agent.[194]

Several decades later, Ballou, a Sigma Nu pledge, was left unconscious inside the fraternity house after a night of heavy drinking and died.[195] The lower court found that the national organization was liable, and the organization appealed.[196] It admitted that the members of its chapters were agents but argued that the actions of these members were outside the scope of the agency relationship.[197] The Court of Appeals of South Carolina rejected the national organization's argument, stating that the scope of agency includes both actual authority and apparent authority.[198] The court further noted that the national organization had set the guidelines for new fraternity member initiation and also allowed supplementation of that initiation process by the local chapter.[199] In light of this, the court found that the chapter exercised its apparent authority when it created "hell night" as part of its initiation process.[200] In other words, doing so was in furtherance of their goal to admit new members and these actions were under the

189. *Id.*
190. *Id.* at 292.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*; *see generally* Reynolds v. Witte, 13 S.C. 5, 5 (1880).
195. Ballou v. Sigma Nu Gen. Fraternity, 352 S.E.2d 488, 491–92 (S.C. Ct. App. 1986).
196. *Id*. at 492.
197. *Id.* at 495–96.
198. *Id.* at 496. Actual authority refers to specific powers granted to a third party by a principal to act on its behalf, while apparent authority exists where a reasonable third party would understand that an agent had authority to act.
199. *Id.*
200. *Id.*

scope of the agency relationship.[201] Therefore, liability could be imposed on the national fraternity because the "hell night" activities fell within the scope of the local chapter's agency relationship with the national fraternity.[202] The reasoning in *Ballou* has been used as the basis for holding organizations liable for the acts of their chapters.[203]

Some courts, however, are reluctant to hold national fraternities liable for the actions of chapters.[204] They recognize that it is difficult for national fraternities to monitor the daily actions of every chapter and hold that a chapter involved in hazing is not enough to place liability on the national fraternity outright.[205] This concern was first largely articulated in *NAACP v. Claiborne Hardware Co.*, in which the United States Supreme Court articulated the standard for holding a national organization liable for the acts of one of its chapters.[206] "This case originated after a boycott of white merchants in Claiborne County, Mississippi in 1966, at a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP) attended by several hundred Black persons."[207] "[T]he Supreme Court found that a national organization such as the NAACP could not be liable for the actions of a branch in the absence of any proof that the national organization authorized or ratified the misconduct in question."[208] The Court ended its analysis by quoting *NAACP v. Overstreet*: "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or

201. *Id.*

202. *Id.* at 495–96.

203. For example, the Superior Court of Massachusetts considered an argument by the plaintiff in *Krueger v. Fraternity of Phi Gamma Delta, Inc.*, that there was a special relationship between the national organization and local chapter of the Phi Gamma Delta Fraternity sufficient to impose a duty on the national organization. No. 004292G, 2001 WL 1334996, at *3 (Mass. May 18, 2001). The Massachusetts court considered the *Ballou* court's reasoning that the national organization of Sigma Nu could be held liable for the hazing death of a pledge of one of its local chapters because it had created a "hazardous situation" and thus had a duty to investigate and take preventative steps toward addressing the situation. *Id.* at *4. The court ultimately held that the national organization of Phi Gamma Delta could not prevail on its argument that it owed no duty to the plaintiff to protect him from excessive drinking. *Id.*

204. *See* Gregory S. Parks et al., *White Boys Drink, Black Girls Yell . . . : A Racialized and Gendered Analysis of Violent Hazing and the Law,* 18 J. GENDER, RACE & JUST. 93, 117 (2015).

205. *Id.*; *see also* Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 413 (Kan. 2002) (holding that the national fraternity was not liable for a local chapter's hazing injuries because the national organization served as a "support organization" and was not in control of the local chapter's day-to-day activities).

206. 458 U.S. 886 (1982).

207. Parks, *supra* note 204, at 114.

208. *Id.*

ratified the misconduct in question could ultimately destroy it."[209] In sum, the high standard established in *NAACP v. Claiborne Hardware Co.* requires that there be proof that the national organization "authorized—either actually or apparently—or ratified unlawful conduct" in order to hold it liable.[210]

In a recent case, David Bogenberger "became a prospective pledge of the Eta Nu chapter of Pi Kappa Alpha fraternity" at Northern Illinois University (NIU) in the fall of 2012.[211] Bogenberger was required to attend a pledge event called "Mom and Dad's Night" in which pledges were each assigned a fraternity "Dad" and a sorority "Mom" and then forced to drink to the point of unconsciousness.[212] Parts of the house were designated to be spots where pledges could "pass out," and they would be checked on "periodically" and positioned in such a way "that if they vomited, they would not choke."[213] The pledges were told about the event, were told that they would be required to drink, and "believed that attending and participating in the event was a required condition to gaining membership in the fraternity."[214] The pledges were given three to five vodka drinks in each room, and each pledge reached the point where they could not walk without assistance.[215] When this occurred, the pledges were rewarded with "vomit buckets," t-shirts, and pledge paddles, and were brought to the "pass out" rooms.[216] The chapter president sent a text message which instructed fraternity members and sorority women to delete any pictures or videos of unconscious pledges.[217] Some members discussed obtaining medical attention for the pledges but decided against it and instructed others not to as well.[218] During the night, Bogenberger died with a BAC of 0.43.[219] "[T]he NIU Chapter's charter was suspended and ultimately revoked" as a result of the pledge event.[220]

Bogenberger's father brought a 12-count complaint for negligence against the defendants ("Pi Kappa Alpha national organizations, the NIU chapter, the officers and pledge board members individually and in their official capacities, the active members, and the nonmember sorority women").[221] The circuit court dismissed the complaint with

209. *Claiborne Hardware Co*., 458 U.S. at 931 (quoting NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting)).
210. *Id*.
211. Bogenberger v. Pi Kappa Alpha Corp., 104 N.E.3d 1110, 1114–15 (Ill. 2018).
212. *Id.* at 1115.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 1116.
219. *Id.*
220. *Id.*
221. *Id.*

prejudice because (1) there is no form of social host liability regarding alcohol consumption,[222] and (2) plaintiff's complaint was insufficient because it failed to plead specific facts and the allegations in the complaint were conclusory.[223] The appellate court affirmed as to the dismissal of the complaint against the Pi Kappa Alpha national organizations and the nonmember sorority women, but reversed as to the NIU Chapter, its officers and pledge board members, and the active members.[224] The Illinois Supreme Court recognized and reinforced the Illinois rule against social host liability.[225] However, the court noted that there is a difference between a social host situation and an alcohol-related hazing event.[226] A hazing event requires consumption of alcohol for admission into a fraternity organization, which cannot be characterized "as involving the sale or gift of alcohol."[227] The court found that hazing does not fit within the social host situation and that the required consumption of alcohol is not too remote to serve as the proximate cause of intoxication and resulting injury.[228]

The Illinois Supreme Court then went on to assess whether the plaintiff's complaint alleged a cause of action for negligence for each defendant. With specific regard to the national organizations, the plaintiff argued: (1) "that the Pi Kappa Alpha national organizations (Nationals) [were] vicariously liable for the misconduct of the NIU Chapter and its members because the NIU Chapter and the members were their agents"; and (2) "that the Nationals [were] directly liable since they owed a duty to the pledges to refrain from encouraging and directing local chapters to engage in hazing."[229] For vicarious liability, the court found that "plaintiff's complaint did not allege facts that the Nationals authorized the NIU Chapter to act on their behalf" or otherwise held out NIU as their agent.[230] Further, the plaintiff failed to establish that the Nationals controlled the NIU Chapter.[231] Finally,

222. *Id.* (citing Charles v. Seigfried, 651 N.E.2d 154 (1995); Wakulich v. Mraz, 785 N.E.2d 843 (2003)).
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 1117.
227. *Id.* at 1117–18.
228. *Id.* at 1118 ("We caution, though, that our determination here is quite narrow. To reiterate our words from *Wakulich*, our above finding only applies in the limited situation in which the consumption of alcohol is required to gain admission into a school organization in violation of the hazing statute. Nothing more is intended.").
229. *Id.* at 1119.
230. *Id.* at 1120.
231. *Id.* ("The Nationals have promulgated rules that the local chapters are to follow, yet the complaint does not allege that the Nationals dictate how the local chapters implement these rules. The complaint did not allege that the Nationals had any control over which pledging events chapters actually held or that the Nationals could control how chapters planned or carried out the events. It only alleged

the hazing conduct fell outside the scope of any alleged agency relationship.[232] For direct liability, the court noted that "[a]bsent a special relationship, there can be no affirmative duty imposed on one for the benefit of another to warn or protect against the criminal conduct of a third party."[233] The court found no facts that came within a legally recognized special relationship.[234] Plaintiff could not establish a claim for negligence against the national organization without a special relationship, so the appellate court's dismissal to those counts was affirmed.[235]

An Illinois federal court had to interpret *Bogenberger* in light of an alleged hazing incident at Northwestern University. Jordan Hankins attended Northwestern University where she rushed and was granted membership into the Gamma Chi undergraduate chapter of Alpha Kappa Alpha Sorority (AKA).[236] After rushing AKA, Jordan "spent the next month going through the membership-intake process along with ten other women who were also 'pledging' to join the sorority."[237] The membership-intake process "culminated in a performance in a 'campus introduction' show," after which Jordan was initiated into the sorority.[238] Jordan was then told by members that she would have to go through an additional "*post*-initiation pledge process." During this post-initiation process, "Jordan was allegedly subjected to 'several instances' of 'physical abuse including paddling, verbal abuse, mental abuse, financial exploitation, sleep deprivation, items being thrown and dumped on her, and other forms of hazing intended to humiliate and demean her.'"[239] Jordan's mental health suffered because of the hazing, and she eventually told members of the sorority "that the hazing was triggering her PTSD" and causing anxiety, depression, and suicidal thoughts.[240] Jordan ultimately committed suicide in her dorm room.[241] Felicia Hankins brought claims against AKA at several levels, as well as against individual sorority members who partici-

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that the Nationals 'encouraged' pledging events 'similar' to 'Mom and Dad's Night.' Also, the Nationals' power to expel or discipline local chapters or members was remedial only. The power to take remedial action 'after the fact' does not amount to the right to direct or control a local chapter or member's actions.").

232. *Id.* at 1120–21.

233. *Id.* at 1121.

234. *Id.* at 1122.

235. *Id.* at 1124.

236. Hankins v. Alpha Kappa Alpha Sorority, Inc., 447 F. Supp. 3d 672, 678 (N.D. Ill. 2020).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 679.

241. *Id.*

pated in the hazing.[242] Hankins brought a total of sixteen wrongful-death and survival claims all rooted in the same general theory "that the defendants were negligent because they knew that Jordan was suicidal, yet still hazed her or (failed to protect her from hazing, in the case of the sorority entities), which ultimately caused her to commit suicide."[243] The defendants all filed motions to dismiss.[244]

The court found that AKA's national organization could not be found vicariously liable for Jordan's death because (a) Hankins failed to make a sufficient showing that there was a principal-agent relationship between AKA nationally and the members of the Gamma Chi chapter, and (b) hazing fell outside the scope of any agency relationship because it was prohibited by AKA nationally.[245] Further, AKA could not be held directly liable for Jordan's death.[246] Absent a legally recognized special relationship, AKA did not have a duty as a national organization to protect pledges from hazing at the hands of individual members.[247] Hankins argued that the special-relationship requirement did not apply in this case because "there [wa]s no meaningful distinction between the local chapters and the national AKA organization."[248] However, even as an unincorporated association, the court characterized the individual chapters as legally distinct entities that have independent powers and directly raise money from members.[249] Hankins's claim against AKA's Central Regional Director similarly failed since the Regional Director carried out no hazing herself and there was no special relationship between her and Jordan to support a duty.[250] However, the court found that Delta Chi Omega, the graduate chapter of AKA, could be held liable because members in its super-

242. *Id.* at 677–78 ("Specifically, Felicia Hankins asserts claims against Alpha Kappa Alpha Sorority, Inc. (the national sorority organization, which this Opinion will call 'AKA National'); the undergraduate Gamma Chi Chapter of Alpha Kappa Alpha Sorority, Inc.; the alumnae Delta Chi Omega Chapter of Alpha Kappa Alpha Sorority, Inc.; and Kathy Walker-Steele, the Central Regional Director of Alpha Kappa Alpha Sorority, Inc. Hankins also sues individual sorority members Alexandria Anderson, Jalon Brown, Alexandria Clemons, Cariana Chambers, Raven Smith, Bianca Valdez, Ava Thompson Greenwell, and Ashanti Madlock-Henderson.").

243. *Id.* at 679.

244. *Id.*

245. *Id.* at 685–86.

246. *Id.* at 687–89.

247. *Id.* at 687. The four categories of special relationships recognized in Illinois are: "(1) common carrier and passenger; (2) innkeeper and guest; (3) custodian and ward; and (4) landholder and member of the public who enters the land." *Id.*

248. *Id.* The court notes that while *Bogenberger* made it easy for local chapters of fraternities or sororities to be held liable for hazing, this argument is different—Hankins is arguing that AKA nationally should be treated like the local chapter in *Bogenberger*. *Id.*

249. *Id.* at 689.

250. *Id.*

visory and officer-like positions plausibly had "a direct hand" in promoting or ratifying the hazing events.[251] The undergraduate Gamma Chi chapter had not yet been served so the court did not address it.[252] Also, Allstate represented one of the defendant sorority members in the case, but the court denied its motion to intervene.[253]

Despite this history of barring recovery from national fraternal organizations directly, the current trend in this litigation area is increasingly directed toward allowing plaintiffs injured in fraternal hazing incidents to recover damages from their national affiliates through respondeat superior, in addition to traditional agency theories. Respondeat superior is a theory of liability that holds a master vicariously liable for the servant's actions.[254] This theory of liability arose as a source of liability for corporations and their agents, but, over time, it has extended to include national organizations and the local members as their agents; resulting in liability of the national due to the actions of the local.[255]

Twentieth century case law regarding respondeat superior and hazing saw a trend toward holding a national fraternity liable when the local chapter had been exercising actual authority—where the national fraternity specifically tasked the local chapter with induction of new members.[256] It is in the nationals' best interest that the local chapter obtain new members to further the goals of the organization.[257] As noted in *Derrick v. Sovereign Camp, W.O.W.*, the "introduction [of new members] is the life blood of all such organizations."[258] By holding initiation practices, which may include hazing, the national organization benefits from the members that are acquired through these exercises.[259] In other words, a local chapter is accomplishing the purpose of the national organization by recruiting new members; thus, the chapter is acting within the scope of its agency.[260] However, once

251. *Id.* at 690–91. Following *Bogenberger*, "even if a national fraternity organization does not have an affirmative duty to protect pledges from hazing, the local chapter whose members carried out the hazing can certainly be held liable for hazing." *Id.* at 690.
252. *Id.*
253. *Id.* at 692.
254. Sunshine, *supra* note 180, at 87.
255. *Id.* at 87–88.
256. *Id.* Whereas apparent authority is "the reasonableness of the candidate's belief that local was acting for the national." *Id.* at 101. National organizations are bound by the actions of their local members through apparent authority which further distinguishes the theory of agency. *Id.* at 100.
257. *Id.*
258. 106 S.E. 222, 224 (S.C. 1921) (Cothran, J., concurring).
259. *Id.*
260. *See id.* at 222–23. In the 1921 case, *Derrick v. Sovereign Camp*, Sovereign Camp argued that it was not liable for the actions of their local camp that caused injuries to the new members because they did not authorize the actions of the camp. *Id.* at 223. The Supreme Court of South Carolina rejected this argument by rea-

hazing has been established as a product of a master/servant relationship, even an agent acting under only apparent authority can impute liability to the national fraternity under respondeat superior.[261] Accordingly, through establishing a special relationship between a local chapter and its national organization, a national organization is liable for the local chapter's actions in regards to hazing under the liability theory of respondeat superior.

2. Alter Ego Theory

Generally, separately incorporated organizations are legally distinct from one another and are treated as individual defendants when establishing tort liability.[262] Thus, the wrongs committed by one entity are typically not found to hold the other liable for its independent torts. This is true even if the organizations are related or part of the same enterprise in a parent-subsidiary context.[263] However, courts may allow a plaintiff to pierce the corporate veil of related entities in an enterprise if the two (or more) entities are found to be mere "alter egos" of one another—otherwise, liability remains with the separate entity that committed the wrong.[264] If a separate organization or entity is legally found to be an alter ego of another, neither will be insulated from tort liability arising from the actions of the other.[265] Courts look to numerous factors in determining whether arguably "separate"

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soning that the torts of an agent are not limited to the actions that are expressed or authorized but can also include the actions that are apparent in the course of business of the agent. *Id.* Thus, national organizations are held liable by agency theory and respondeat superior because of the apparent authority of their actions. *Id.* at 223–24; *see also* Edwards v. Kappa Alpha Psi Fraternity, Inc., No. 98 C 1755, 1999 WL 1069100, at *1, *4 (N.D. Ill. Nov. 18, 1999) (adjudicating a case where a pledge seeking initiation to a local chapter of the Kappa Alpha Psi national fraternity alleged that the national organization allowed "an aura of violence to exist," and that he was hazed as a result). Overall, in *Edwards*, the court held that where a national organization has control over its individual members and chapters, it may be liable for the torts of the members and chapters committed within the members' or chapter's activities, and denied the national organization's motion for summary judgment. *Id.* at *6. The court reasoned that the national fraternity had "control" because it set the method for new member intake and monitored each chapter's compliance. *Id.* at *5–6.

261. Sunshine, *supra* note 180, at 101.

262. Daimler AG v. Bauman, 571 U.S. 117, 135 n.13 (2014) ("A corporation is a distinct legal entity that can act only through its agents." (citing 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 30, p. 30 (Supp. 2012–2013))).

263. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

264. *See generally* Gardemal v. Westin Hotel Co., 186 F.3d 588, 595 (5th Cir. 1999) (finding Westin Inc. is not the mere alter ego of Westin Mexico Inc. and not subject to tort liability in claim by plaintiff).

265. *E.g.*, *Int'l Shoe*, 326 U.S. at 318 (holding that "the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims).

entities, in fact, comprise but a single business enterprise.[266] However, there is far from a uniform or general standard by which courts assess entities under an alter ego theory, and typically this evaluation is reached only in cases where courts first determine whether it is proper to pierce the corporate veil in the first place.[267]

National fraternities and other national Greek-letter organizations are typically incorporated as a separate legal entity from subsidiary chapters. Thus, the national organization is, for the most part, shielded from liability based on the wrongs committed by its related or subsidiary organizations, including local chapters.[268] When the corporate veil is pierced as a result of this alter ego structure, the assets of both organizations can potentially be reached by a tort plaintiff. As such, alter ego theory provides potential litigants with a mechanism for reaching more than just the individual members, or their local chapter. Through alter ego theory, it is possible that a hazing victim pursuing a civil cause of action for hazing-related injuries could reach

266. *See, e.g.*, Andretti Sports Mktg. La., LLC v. Nola Motorsports Host Comm., Inc., 147 F. Supp. 3d 537, 545 (E.D. La. 2015) (listing 18 common factors that may support a finding of a single business enterprise including "(1) corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control; (2) common directors or officers; (3) unified administrative control of corporations whose business functions are similar or supplementary; (4) directors and officers of one corporation act in the interest of the corporation; (5) corporation financing another corporation; (6) inadequate capitalization; (7) corporation causing the incorporation of another affiliated corporation; (8) corporation paying the salaries and other expenses or losses of another corporation; (9) receiving no business other than that given to it by its affiliated corporations; (10) corporation using the property of another corporation as its own; (11) noncompliance with corporate formalities; (12) common employees; (13) services rendered by the employees of one corporation on behalf of another corporation; (14) common offices; (15) centralized accounting; (16) undocumented transfers of funds between corporations; (17) unclear allocation of profits and losses between corporations; and (18) excessive fragmentation of a single enterprise into separate corporations." (internal citations omitted)).

267. There is no general legal standard for when piercing the corporate veil is allowed under an alter ego theory. Piercing the corporate veil is a common law doctrine that has developed separately in each jurisdiction. The two-pronged test used by courts in the District of Columbia appears to be representative: "(1) [I]s there such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist?; and (2) if the acts are treated as those of the corporation alone, will an inequitable result follow?" United States v. Emor, 850 F. Supp. 2d 176, 206 (D.C. Cir. 2012) (quoting Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982)). The relevant factors for determining whether two organizations are mere alter egos of each other include whether the organizations maintain separate corporate minutes, whether they compile separate corporate records, whether funds and other assets are commingled between the organizations, and whether corporate funds or assets are diverted from one organization to the other for non-corporate use by a dominant, controlling person or organization. *Id*. at 207.

268. Parks, *supra* note 204, at 120.

the deeper pockets of the national organization or local chapter if they could establish evidence of the factors iterated in this section.

André v. Sigma Alpha Epsilon was filed in 2012 in the Kings County Court in New York.[269] Marie Lourdes André filed a wrongful death lawsuit against Sigma Alpha Epsilon (SAE) members, chapter officers, and the national organization alleging that the defendants were responsible for the hazing death of her son, Cornell University student George Desdunes.[270] The events leading up to Desdunes's death "were part of a long-standing fraternity ritual that was taught, authorized, and encouraged by SAE chapter officers and members."[271] The pledges bound George and drove him to a townhouse, quizzed him about the chapter's history, and forced him to consume alcohol to the point of unconscious; he ultimately died from alcohol poisoning.[272]

The plaintiff alleged that these SAE entities were not legally distinct from each other, rather they were alter egos of one another.[273] The *Cornell Daily Sun* reported that in June 2012, a judge acquitted three former SAE pledges of criminal charges, finding that the fraternity members were not responsible for Desdunes's death.[274] In October of the same year, the court held SAE's Cornell chapter was guilty of Desdunes's death "on the three misdemeanor counts."[275] Additionally, the fraternity chapter "was fined the maximum $5,000 fine for unlawfully dealing with a child in the first degree, the maximum $5,000 fine for criminal nuisance in the second degree and the maximum $2,000 for hazing in the first degree."[276] The national fraternity and remaining defendants filed a defense brief "in which they denied all charges and argued that only Desdunes himself was responsible for the conduct that led to his death."[277]

3. Duty to Innovate?: Liability for Artificially Low Standards

Within the area of tort law (a noncriminal harm), there may be both legal and practical instruction to Greek-letter organizations on what is expected of them in terms of hazing prevention efforts.[278]

269. Complaint at 1, André v. Sigma Alpha Epsilon, No. 500986/2012 (N.Y. 2012), 2012 WL 5269953.
270. *Id.*
271. *Id.* at 2.
272. *Id.*
273. *Id.* at 9–14.
274. Harrison Okin, *Court Sentences SAE Fraternity; Former Cornell Chapter to Pay $12,000*, CORNELL DAILY SUN (Oct. 25, 2012), https://cornellsun.com/2012/10/25/court-sentences-sae-fraternity-former-cornell-chapter-to-pay-12000/ [https://perma.unl.edu/KYB9-K6KB].
275. *Id.*
276. *Id.*
277. *Id.*
278. Gregory S. Parks, *100 Days of Hazing: Day 12—What More Do Fraternities (and Sororities) Owe?*, HUFFPOST (Nov. 25, 2017, 9:39 PM), https://

Through this body of law, "[t]here may be some indicia as to the next steps in the effort to meaningfully address hazing" concerns.[279] "For example, a fraternity or sorority may argue that they have made their best effort to reduce hazing within their ranks."[280] "They may indicate that their approach has been consistent and on par with other similarly-situated organizations in their industry. In essence, fraternities and sororities may defend their risk management and hazing reduction practices by noting that they have employed the 'state of the art' practices,"[281] which could mean anything from industry custom[282] to technological feasibility.[283] This argument is not unlike many made by manufacturers in product liability cases. However, for fraternities and sororities, this argument may be unavailing.

A party that has a tort claim brought against it for products liability may defend itself by providing evidence as to the state-of-the-art practice in its industry and its conformity to such practices. Courts have held that:

> [Such] evidence is properly admissible to establish that a product is not defective and unreasonably dangerous because of a failure-to-warn . . . . of dangers that were not known to [the manufacturer] or knowable in light of the generally recognized and prevailing scientific and technical knowledge available at the time of the manufacture and distribution.[284]

However, in light of the technologically feasible framework, "state-of-the-art" can be more than just compliance with industry custom; instead, it can depend on "what feasibly could have been done."[285] Industry custom might lag behind technological developments.[286] Courts are mindful that industry standards "may sometimes merely reflect an industry's laxness, inefficiency, or inattention to innovation."[287] In other words, to allow a manufacturer to rely solely on industry custom would allow the industry to set its own standard of care.[288] Therefore, courts have agreed that customary practice and

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www.huffpost.com/entry/100-days-of-hazing-day-12-what-more-do-fraternities_b_5a1a28a3e4b0bf1467a8471d [https://perma.unl.edu/CXP5-NJ5Y].

279. *Id*.
280. *Id*.
281. *Id*.
282. *See* Frank J. Vandall, *State-of-the-art, Custom, and Reasonable Alternative Design*, 28 SUFFOLK U. L. REV. 1193, 1200–03 (1994) (noting varying definitions of state-of-the-art); Garey B. Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability*, 67 MINN. L. REV. 343, 344–47 (1982) (summarizing common usages of state-of-the-art); *see also* Parks, *supra* note 278 (urging fraternities and sororities to innovate hazing reduction practices).
283. Parks, *supra* note 278; *see* Vandall, *supra* note 282, at 1200–03; Spradley, *supra* note 282, at 344–47.
284. Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1172 (Colo. 1993).
285. Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294, 295 (Iowa 1994).
286. *Id.*
287. Elliott v. Brunswick Corp., 903 F.2d 1505, 1508 (11th Cir. 1990).
288. Witt v. Chrysler Corp., 167 N.W.2d 100, 104 (Mich. Ct. App. 1969).

"state-of-the-art" in an industry may be an artificially low bar when determining these cases.[289] As such, the focus in state-of-the-art is "whether the evidence disclosed that anything more could reasonably and economically be done."[290]

In some jurisdictions, "evidence of industry custom or standard procedure is admissible proof in a negligence case."[291] "[T]hat the evidence is admissible," however, "does not terminate the inquiry, nor does evidence of conformance to such standards require a conclusion that a defendant did not breach its duty to the plaintiff . . . ."[292] Further, a "person charged with negligence cannot excuse his misconduct by proving the same misconduct in others—custom furnishes no excuse if the custom itself is negligent."[293]

Organizations that have the resources to reduce hazing but fail to do so may be held liable when harm results from a hazing incident that could have been prevented.[294] By ignoring the risk-reducing solutions, these organizations are accepting an unnecessary, increased risk of harm, and thus, should be held liable for their failure to reduce the risk of harm from hazing. Given the fact that there is a limited body of scholarly research on hazing, fraternities and sororities should arguably be responsible for generating the kinds of research, data, best practices, and innovation that would lead to hazing reduction.

4. Negligent Hiring, Supervision, Training, and Retention

Negligent employment actions allow a third party to recover from an employer for an injury sustained as a result of a tortious action by an employee.[295] The four main types of negligent employment actions include negligent hiring, negligent supervision, negligent training, and negligent retention.[296] While these types of negligence are similar, the particular point in time at which the employer would be responsible for the negligence of the employee differs among the

289. *See, e.g.*, Townsend v. Kiracoff, 545 F. Supp. 465, 468 (D. Colo. 1982) (finding that even if hospital acted in accordance with community standard of care, plaintiff still entitled to prove at trial that entire community standard is negligent); Favalora v. Aetna Cas. & Sur. Co., 144 So. 2d 544, 551 (La. Ct. App. 1962) (holding that medical practitioner may not avoid liability simply by adhering to the custom or procedure of similar practitioners when such practice is found to be negligent).

290. *Hughes*, 522 N.W.2d at 295.

291. Rodrick v. Wal–Mart Stores E., LP, No. 07-0768-CV-W-REL, 2010 WL 11509266, at *1 (W.D. Mo. May 20, 2010).

292. *Id.* (quoting Pierce v. Platte–Clay Elec. Coop., 769 S.W.2d 769, 772 (Mo. 1989)).

293. *Id.* (quoting *Pierce*, 769 S.W.2d at 772).

294. Parks, *supra* note 204, at 117 (discussing the *Morrison v. Kappa Alpha Psi Fraternity* case).

295. KRISTINE CORDIER KARNEZIS, 25 CAUSES OF ACTION 2D 99, at § 1 (2004).

296. *Id.*

types.[297] In the case of Greek organizations, these theories could be used to argue liability of the national organization for negligence in the hiring (appointment), retention, training, and supervision of a Chapter's president and other leadership.

In order for an employer to be liable for negligent hiring, there has to be sufficient evidence to "establish that the employer reasonably knew or should have known of an employee's tendencies to engage in certain behavior relevant to the injuries allegedly incurred by the plaintiff, such that it is reasonably foreseeable that the employee could cause the type of harm sustained by the plaintiff."[298] Under such circumstances, the employer's negligent hiring practice creates indirect liability through respondeat superior for the negligently-hired employee's actions. In other words, in negligent employment actions, the employer may still be liable even if the employee acts without the scope of authority if the employer failed to exercise due care in the selection of the employee.[299]

In the typical negligent hiring situation, this indirect liability arises from an employer's duty to third parties to "exercise ordinary care in the selection of employees, [and] . . . not retain them after knowledge of incompetency[.]"[300] There is no common-law duty to require specific procedures or processes for hiring employees "unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee."[301] Furthermore, an employer does not have a duty to inquire whether an employee has been previously convicted of crimes[302] or about any past violence or misconduct. As the court noted, "[l]iability will attach on such a claim only when the employer knew or should have known of the employee's vio-

297. *Id.*

298. Allen v. Zion Baptist Church of Braselton, 761 S.E.2d 605, 610–11 (Ga. Ct. App. 2014) (citing Munroe v. Universal Health Servs., 596 S.E.2d 604, 606 (Ga. 2004)).

299. *Id.* at 610 (citing TGM Ashley Lakes v. Jennings, 590 S.E.2d 807, 814 (Ga. Ct. App. 2003)).

300. *Id.* (citing Piney Grove Baptist Church v. Goss, 565 S.E.2d 569, 572 (Ga. Ct. App. 2002)) (alterations in original).

301. Estevez-Yalcin v. Children's Vill., 331 F. Supp. 2d 170, 174–75 (S.D.N.Y. 2004) (citing Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159, 163 (N.Y. App. Div. 1997)); *see also* Doe v. Whitney, 8 A.D.3d 610, 612 (N.Y. App. Div. 2004) (reversing denial of summary judgment where "the plaintiffs failed to raise a triable issue of fact showing that the School was aware of facts that would have led a reasonably prudent person to further investigate [the defendant]"); *Allen*, 761 S.E.2d. at 611 (stating that it has been held that an employer cannot be held to be required "'to independently verify each area of possible error' on a volunteer application because such a responsibility 'would render employment decisions in even the most basic settings untenably fraught with potential liability.'" (quoting Drury v. Harris Ventures, 691 S.E.2d 356, 359 (Ga. Ct. App. 2010))).

302. *Estevez-Yalcin,* 331 F. Supp. 2d at 175 (citing Yeboah v. Snapple, Inc., 286 A.D.2d 204, 205 (N.Y. App. Div. 2001)).

lent propensities."[303] "Therefore, 'recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee.'"[304]

The notice requirement supports a finding of liability in that it offers a basis for foreseeability of injuries inflicted by individuals who were or should have been suspected of committing such acts based on known past misconduct. Under this notion, an employer is liable where, "given the employee's dangerous propensities, the victim's injuries should have been foreseen as the natural and probable consequence of hiring the employee."[305] The actual finding of causation between the hiring practice and the injury, however, is typically a question for the jury except in "plain, palpable and undisputable cases."[306] In evaluating this, jurors consider "[w]hether the employment-related contact and the later event in which the injuries occur are so separated by time or other circumstances that the former cannot reasonably be said to be a substantial factor in producing the result complained of."[307] Overall, negligent hiring seems to be a difficult claim for plaintiffs to prove. If the employer is not on notice that extra, or any, investigation needs to take place, or if the causation element is missing, the plaintiff will likely lose on this type of claim.

In contrast to negligent hiring, negligent training is different in that it focuses on the duty an employer has to train their employees in a reasonable way that will allow them to perform their job responsibilities without causing harm to themselves or others.[308] In negligent training cases, the employer is directly liable for the injury caused by an employee's inadequate training and the resulting consequences. Jurisdictions tend to take two separate approaches for dealing with claims of direct negligence—negligent training—and vicarious liability under respondeat superior.[309] Some states have adopted the preemption rule in regard to claims for negligent hiring, training, supervision, and retention.[310] This rule holds that if an employer admits to liability under respondeat superior, then a plaintiff cannot also bring a claim for direct negligence.[311] The main reasoning for this rule

303. *Id.*
304. *Id.* (quoting Gomez v. City of New York, 304 A.D.2d 374, 374 (N.Y. App. Div. 2003)).
305. *Allen*, 761 S.E.2d. at 610 (citing Underberg v. S. Alarm, 643 S.E.2d 374, 378–79 (Ga. Ct. App. 2007)).
306. *Id.*
307. *Id.* (citing *Underberg*, 643 S.E.2d at 379).
308. Garry G. Mathiason & Mark A. de Bernardo, *The Emerging Law of Training*, 45 FED. L., May 1998, at 24, 28–29.
309. MV Transp., Inc. v. Allgeier, 433 S.W.3d 324, 334 (Ky. 2014).
310. *Id.*
311. *Id.* "[I]t has been held that the rule that negligent hiring and respondeat superior are mutually exclusive theories of recovery does not apply where gross negligence in hiring is alleged; an action for gross negligence in hiring, for which punitive

is that having both a respondeat superior claim and a direct negligence claim is "redundant" and "unduly prejudicial to the employer, and could lead to duplicative damage awards."[312] Proponents of the preemption rule also argue that "evidence needed to prove a direct negligence claim is inadmissible with respect to the negligence of the employee, regardless of whether the employee is a named party or not."[313]

On the other hand, other jurisdictions have adopted the non-preemption rule, stating that direct negligence claims, such as negligent training, are distinct from respondeat superior and that an employer may well be liable both vicariously and directly for an employee's tortious conduct.[314] This issue was considered by the Supreme Court of Kentucky in *MV Transportation, Inc. v. Allgeier*, in which the court adopted the non-preemption rule, relying heavily on the reasoning set forth in *James v. Kelly Trucking Co*.[315] The argument that the court found most persuasive in adopting the non-preemption rule is that it is fundamental that our justice system allows plaintiffs to assert as many claims as they think plausible in a single lawsuit and that limiting what alternative claims plaintiffs can make goes against the notion of judicial efficiency.[316]

The plaintiff bears the burden of proof to establish that the general elements of negligent training are met by showing that: (1) the employer owed a duty to prevent harm to the plaintiff resulting from the tortious acts of an employee; (2) that this duty was breached by the employer; (3) that the breach of this duty was a proximate cause of the plaintiff's injuries; and (4) that the act of the employee would be considered a tort.[317] The employer is not necessarily required to antici-

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damages may be awarded, has been viewed as an independent and separate ground of recovery." 7 AM. JUR. *Proof of Facts* 3d 345, § 2 (1990) (citing Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Civ. App. 1979)); *see* Durben v. Am. Materials, Inc., 503 S.E.2d 618 (Ga. Ct. App. 1998); Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 667 N.Y.S.2d 650 (N.Y. Sup. Ct. 1997).

312. *MV Transp., Inc.*, 433 S.W.3d at 334. In jurisdictions that agree with this theory of mutual exclusivity of the two legal theories, "courts may refuse to permit the plaintiff to proceed with a negligent hiring theory where it is established that the [employee] was acting within the scope of his employment, since the employer would be liable whether or not the [employee] was fit for employment." 7 AM. JUR., *supra* note 311 (citing Tindall v. Enderle, 320 N.E.2d 764 (Ind. Ct. App. 1974)).

313. Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 WYO. L. REV. 229, 264 (2010).

314. *MV Transp., Inc.*, 433 S.W.3d at 335; *see Durben*, 503 S.E.2d 618.

315. *MV Transp., Inc.*, 433 S.W.3d at 335–36 (citing James v. Kelley Trucking Co., 661 S.E.2d 628 (SC 2008)).

316. *Id.*

317. *See, e.g.*, Okeke v. Biomat USA, Inc., 927 F. Supp. 2d 1021, 1028 (D. Nev. 2013) (stating that in order to state a claim for negligent training in Nevada, the plain-

pate the specific injuries that a third-party could sustain as a result of their insufficient training; however, the injury must have been a foreseeable result of their failure to train their employee properly, and there must be a direct relationship between the improper training and the injuries sustained.[318] Still, it is not enough for a plaintiff to point out the flaws in the employer's training program; the plaintiff must establish a breach of duty in training its employee that is causally linked to the plaintiff's harm.[319]

In its recent decision in *Alcala v. Marriot International, Inc.*, the Supreme Court of Iowa held that the plaintiff needed to show proof of the standard of care or of breach of the standard of care in regard to the defendant's training in order to establish a claim for negligent training.[320] The court based its reasoning on decisions of other jurisdictions that have held that negligent training claims fail if there is not testimony to demonstrate the training standard for the employment that is in dispute.[321] Additionally, some states require the plaintiff to demonstrate more than the prima facie elements of negligence,[322] with some requiring the plaintiff to take the extra step

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tiff must show "(1) a general duty on the employer to use reasonable care in the training and/or supervision of employees to ensure that they are fit for their positions; (2) breach; (3) injury; and (4) causation"); Brijall v. Harrah's Atl. City, 905 F. Supp. 2d 617, 621 (D.N.J. 2012) (stating that the tort of negligent training has four elements in New Jersey: "that (1) the defendant owed a duty of care to the plaintiff to properly train its employees, (2) defendant breached that duty of care, (3) defendant's breach was the proximate cause of plaintiff's injury, and (4) defendant's breach caused actual damages to plaintiff" (citing Stroby v. Egg Harbor Twp., 754 F. Supp. 2d 716, 721 (D.N.J 2010))).

318. *See* 30 C.J.S. *Employer—Employee* § 205 (2017); *see also* Clark v. Knochenhauer, No. MMXCV146011914, 2015 WL 7941283, at *3 (Conn. Super. Ct. Nov. 12, 2015) (holding that a claim for negligent training and supervision must be plead with particularity and that failure to establish facts that vehicle required specific training barred plaintiff's negligent training claim).

319. Wozniak, *supra* note 1, at § 4; *see also* Nelson v. Salem State Coll., 845 N.E.2d 338 (Mass. 2006) (holding that an employer was not negligent in training employees regarding the set-up of video tapes because the law regarding video tapes had not been clearly established and the plaintiff had no reasonable expectation of privacy).

320. 880 N.W.2d 699 (Iowa 2016).

321. *Id.*; *see also* Burke v. Air Serv. Int'l, Inc., 685 F.3d 1102, 1106–07, n.2 (D.C. Cir. 2012) (affirming summary judgment dismissing negligent training claim because expert testimony was not provided to demonstrate standard of care); Carter v. Nat'l R.R. Passenger Corp., 63 F. Supp. 3d 1118, 1156–57 (N.D. Cal. 2014) (granting summary judgment dismissing negligent training claim because plaintiffs did not offer evidence regarding federal standard of care for training or evidence demonstrating a breach of care).

322. For example, in New York, in order for a plaintiff to state a claim for direct negligence, the plaintiff:

> [M]ust show: (1) that the tort-feasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the

of demonstrating that the employer has negligently trained the employee that performed the action at issue.[323] At a minimum, the plaintiff must provide testimony on the proper standard of care for the specific training that the employer is providing.[324]

E. University Liability

Unlike the 1960s, where universities were considered *in loco parentis*,[325] the general rule today is that universities do not owe a duty to students to protect them—they are adults that can make their own decisions. Because of this, it is difficult for a hazing plaintiff to recover damages from a university.[326] Plaintiffs have attempted to assert a duty against educational institutions via: (1) landowner liability, (2) custodial liability, (3) assumption of a duty, and (4) vicarious liability.[327]

1. Landowner Liability

When a plaintiff sustains a hazing-related injury at a property used as fraternity housing, several outcomes may arise depending on the ownership of the property and where it is located. It is important because, for such injuries, one way to establish the liability of the local chapter, national organization, or even the university hosting the fraternity, is through the concept of landowner liability. This is accomplished, in part, by establishing the necessary element of duty in negligence actions. Who owns such property becomes of critical importance as a result.[328] Landowner liability, thus, can be used to reach the assets of parties that may not have been directly involved in the events creating the plaintiff's injuries. The results of this have been mixed, however, in practice.

The typical fraternity house is owned by the national fraternity organization or an affiliated housing corporation.[329] It is noteworthy that Black Greek-letter organizations, in particular, rarely have their own campus housing. This was the case in *Yost v. Wabash College*, for example.[330] In that case, a pledge was forcibly picked up and put into

injury prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels.

Tsesarskaya v. City of New York, 843 F. Supp. 2d 446, 463–64 (S.D.N.Y. 2012) (applying New York law).

323. Alcala v. Marriot Int'l, Inc., 880 N.W.2d 699, 708–09 (Iowa 2016).
324. *Id.*
325. Bradshaw v. Rawlings, 612 F.2d 135, 139–40 (3d Cir. 1979).
326. Parks, *supra* note 204, at 123.
327. *See* Brueckner v. Norwich Univ., 730 A.2d 1086 (Vt. 1999).
328. *See* RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW. INST. 1965).
329. *See* AM. ASS'N FOR JUSTICE, STUDENT VICTIMS: STRATEGIES AND ISSUES FOR SUCCESSFUL CIVIL LITIGATION (2007).
330. *See generally* Yost v. Wabash Coll., 976 N.E.2d 724 (Ind. Ct. App. 2012).

a shower at the local fraternity house he lived in.[331] Landowner liability was asserted against the university (which owned the property upon which a fraternity house was situated), the national fraternity organization, and the local chapter.[332] The Indiana Court of Appeals held that an owner is not liable to prevent actions voluntarily taken on their property by those "engaging in conduct that creates a risk of harm to themselves."[333] Thus, the court dismissed the pledge's claims against the university. When *Yost* was appealed to the Indiana Supreme Court, it affirmed this rationale, ruling that the owner of a fraternity house does not ordinarily have a legal duty to affirmatively supervise those present in the house.[334]

As previously mentioned, local chapter and national fraternities do not always own the properties housing fraternity members or pledges, nor do universities. Sometimes it is the case that a separate housing organization—often affiliated with the national fraternity—owns the property and leases it to fraternity members. The benefit of going through a separate housing organization, rather than the national organization or local chapter retaining ownership of a fraternity house, is that those entities often own the property and merely lease the house to the fraternity.[335] At the Indiana Supreme Court level in *Yost*, the issue of whether the property was leased or owned by the fraternity had important implications for liability.[336] The court determined that because the fraternity house where the injury occurred was leased to the local fraternity chapter and the members were thus "in full control of the leased premises," the college could not be liable as landowners.[337] While the *Yost* pledge's claim against the university, as well as the national fraternity organization, were ultimately dismissed, the pledge's claim against the local fraternity chapter was allowed to proceed past summary judgment.[338] In the court's reasoning, this was based on findings of fact that the pledge not only lived at the local fraternity's leased house, but also that he was "subject to the mentorship" from the local fraternity's hierarchy, participated in the pledge program and fraternity traditions, and was "at least partially under the control and direction of the local fraternity."[339]

Another case applying the doctrine of landowner liability to a university is *Knoll v. Board of Regents of University of Nebraska*. Unlike the Indiana Supreme Court's holding in *Yost*, the Supreme Court of

331. *Id.* at 728–29.
332. *Id*.
333. *Id.* at 737–38.
334. Yost v. Wabash Coll., 3 N.E.3d 509, 520 (Ind. 2014).
335. *See* AM. ASS'N FOR JUSTICE, *supra* note 329.
336. *See Yost*, 3 N.E.3d at 515.
337. *Id.* (quoting Dutchmen Mfg., Inc. v. Reynolds, 849 N.E.2d 516, 525 (Ind. 2006)).
338. *Id.* at 524.
339. *Id.* at 523.

Nebraska found that a university could be liable for certain condcut on this theory in *Knoll*.[340] In that case, a fraternity pledge was abducted from a university building by members of the fraternity and taken to the fraternity house. After becoming severely intoxicated, the pledge attempted to slide down a drainpipe to escape and fell from the third floor of the building, sustaining severe injuries.[341] The student filed suit against the university, alleging that the university failed to enforce prohibitions against hazing despite having notice that such activities had occurred in the past. Thus, the court said the university could have foreseen various forms of student hazing on its property and concluded that the university owed a landowner-invitee duty to students. Under this duty, the university was found to have been negligent because it failed to take "reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property" and the resulting harm.[342]

2. Custodial Liability

Second, plaintiffs may rely on proving custodial liability. Generally, courts decline to apply custodial liability to universities in hazing cases unless the plaintiff can establish that the university had a special relationship with the student.[343] A special relationship must be more than simple authority to create the campus rules; it must involve a level of control.[344] One way a university might have a special relationship sufficient to establish custodial liability for harm to hazing victims is by the negligent hiring and retention of an incompetent employee. The required showings in a negligent hiring case varies slightly from state to state, though the general principles focus around two main inquiries. The first element in proving a claim for negligent hiring is that the employer, in this case the university, has knowledge of a particular employee's "unfitness, incompetence or dangerous attributes" such that the employer "could reasonably have foreseen that such qualities created a risk of harm" to third persons.[345] Under this element, it is not required that any torts committed be done within the

340. Knoll v. Bd. of Regents, 258 Neb. 1, 601 N.W.2d 757 (1999), *abrogated on other grounds by*, A.W. v. Lancaster Cty. Sch. Dist., 280 Neb. 205, 784 N.W.2d 907 (2010).

341. *Id.*

342. *Id.*

343. *See generally* Byron L. LeFlore, Jr., Note, *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 216–17 (1988).

344. *Id.*

345. Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982) (citing Thompson v. Havard, 235 So. 2d 853, 858 (Ala. 1970); Eagle Motor Lines, Inc. v. Mitchell, 78 So. 2d 482, 486–87 (Miss. 1955); F & T Co. v. Woods, 594 P.2d 745, 747 (N.M. 1979)).

scope of the employee's employment.[346] The second element involves proving that the employee's incompetence proximately caused the injury by way of the employer's negligence in hiring the employee.[347]

For the purpose of establishing foreseeability, this requires that an employer reasonably should have known that both the employee was incompetent and that the employee would come into contact with the injured plaintiff.[348] Foreseeability is one of the main inquiries in establishing causation as an element of any tort. Note, however, that this section will not go into specific detail regarding the establishment of the other elements of negligent hiring—rather, the focus here is on the creation of a duty upon the university-employer based on the special relationship formed via the employer's creation of a risk by way of its incompetent employee.

In addition to negligent hiring, plaintiffs may argue custodial liability of a university by virtue of the institution's creation of specific policies against certain activities, specifically where such policies lead to injury of a student. However, the showing of a link between the university's enforcement of the policies and the student's injury may be difficult to establish.[349] Something more than merely asserting the existence of policies aimed at preventing a certain kind of harm is required to establish a special relationship to create custodial liability.[350] For example, in *Morrison v. Kappa Alpha Psi Fraternity*, the court found that a fraternity was a "student organization" falling under the university's Division of Student Affairs and Office of Student Life, and therefore, subject to the university's disciplinary boards.[351] In that case, the president of the fraternity beat a potential pledge in his dorm room causing severe injury.[352] When the student sued the university, in addition to the fraternity, it argued that the university was subject to custodial liability. In response, the university argued that "a university has no duty to shield a student from his own activities which may result in harm to himself."[353] However, the

346. *Id.*
347. *Id.* (citing Hathcock v. Mitchell, 173 So. 2d 576, 584 (Ala. 1965)); *see, e.g.*, Long *ex rel.* Cotten v. Brookside Manor, 885 S.W.2d 70, 74 (Tenn. Ct. App. 1994) (holding that an employer's failure to conduct a background check which would have revealed employee's negative history was not the proximate cause of the plaintiff's injuries).
348. *See, e.g.*, Evans v. Ohio State Univ., 680 N.E.2d 161, 172 (Ohio Ct. App. 1996).
349. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 141 (3d Cir. 1979) (refusing to find a custodial relationship between the university and its students when the university had a policy against student consumption of alcohol on school property and a student was injured in a car accident by a drunk driver who was another student).
350. *Id.*
351. 738 So. 2d 1105, 1115 (La. Ct. App. 1999).
352. *Id.* at 1110.
353. *Id.* at 1114.

court's determination that the fraternity constituted a student organization of the university, along with the fact that the university had received numerous complaints about alleged hazing incidents perpetrated by the fraternity,[354] led it to conclude that:

> [T]he pledging process to join a fraternal organization is not an activity which an adult college student would regard as hazardous. Furthermore, the administration assigned to oversee the student organizations had knowledge of prior hazing and that incoming freshman (sic) participating in the Kappa organization may also be victim to that same conduct. . . . The Court finds that because of the prior knowledge and serious nature of hazing, social policy justifies a special relationship between the University and its students in this particular instance.
>
> . . . [A] university with known and documented history of hazing by a fraternal organization does in fact obligate the university to monitor such further behavior by the fraternity.[355]

The latter finding regarding the prior complaints, from both anonymous and named students, strengthened the argument of custodial liability by establishing the foreseeability of harm—the university should have known about the risk of injury to students belonging to the fraternity.

3. Assumption of a Duty

Third, and closely tied with custodial liability, is the assumption of a duty. While rejecting custodial liability, courts have found liability when the university has assumed the duty of care by becoming involved in actively preventing hazing acts. For example, in *Coghlan v. Beta Theta Pi Fraternity*, the court found that by sending two of its employees to supervise one of the fraternity parties, the university voluntarily accepted the duty of care.[356] A court in Delaware went even further, though, in finding that a university had assumed the duty of care when it repeatedly communicated with fraternities to emphasize rules and discipline for hazing infractions.[357]

Jeffrey Furek, a pledge of Sigma Phi Epsilon, was accidentally burned by oven cleaner during a fraternity initiation.[358] Furek sued the university alleging that it was negligent in failing to control the dangerous acts of its members.[359] The Delaware Supreme Court found it reasonable to conclude that "university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties' relationship, particularly if such supervision ad-

354. *Id.*
355. *Id.* at 1115.
356. 987 P.2d 300, 312 (Idaho 1999).
357. Furek v. Univ. of Del., 594 A.2d 506, 519–20 (Del. 1991).
358. Kerri Mumford, Comment, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL'Y 737, 747 (2001) (citing *Furek*, 594 A.2d at 510).
359. *Id.*

vances the health and safety of at least some students."[360] The court went on to state, "[w]here there is direct university involvement in, and knowledge, of certain dangerous practices of its students, the university cannot abandon its residual duty of control."[361] In other words, the court determined that the university had taken active measures to prevent hazing, including making statements in the Student Guide advising students that they could be expelled for hazing and issuing a warning to fraternities from the Dean of Students about the repercussions of hazing.[362] Despite these public pronouncements and warnings concerning hazing, hazing still occurred and the court found that the university was aware of it.[363]

Even after concluding that a jury might find that the university was chargeable with notice of hazing activities on its campus, the court noted that the university's response to the circumstances, even if ineffectual, was "well-intentioned and not characterized by conscious disregard of known risk." Still, the university's actions were a step further than the simple act of rulemaking and established the university's knowledge and efforts to prevent the hazing activities.[364] So, *Furek* was the "first major case to hold a university liable for an injury to a student caused by a third party."[365] Through this holding, the Delaware Supreme Court recognized a legal duty for the university to use reasonable care to protect students against the dangerous acts of third parties when such a duty is assumed.[366]

4. Vicarious Liability

Finally, the fourth theory plaintiffs may rely on in attempts to hold a university liable for injuries sustained in relation to fraternities is that of vicarious liability. Vicarious liability is one of the more difficult means for a plaintiff to recover from a university because the plaintiff must demonstrate that the student who hazed them was acting within the university's scope of employment. Despite this difficulty, however,

360. *Furek*, 594 A.2d at 518.

361. *Id.* at 519–20.

362. *Id.*

363. *Id.* at 516.

364. *Id.* at 520; *see also* Mumford, *supra* note 358 (noting the university took active steps to prevent hazing).

365. Mumford, *supra* note 358, at 747 ("*Furek* is the first major case to hold a university liable for an injury to a student caused by a third party.").

366. *Id.* The court in *Furek* focused on the liability theories found in the RESTATEMENT (SECOND) OF TORTS § 324(A), titled "Liability to Third Person for Negligent Performance of Undertaking," and on common law. The Restatement addresses the duty owed by "one who assumes direct responsibility for the safety of another through the rendering of services in the area of protection." *Furek*, 594 A.2d at 520; RESTATEMENT (SECOND) OF TORTS § 324(A) (AM. LAW. INST. 1964).

this claim has been successful in some courts.[367] Other courts have rejected the argument for vicarious liability of universities because the college's governance over the fraternity was not analogous to an agency relationship, and thus, the college could not be held liable for the fraternity's acts under agency theory.[368]

More recently, in 2017, an attorney in Louisiana made an unprecedented argument for university liability claiming violations of Title IX of the Education Amendments of 1972. The case *Gruver v. Louisiana State University et al.*, centers around Max Gruver, who died in 2017 following a hazing ritual conducted by the Phi Delta Theta Fraternity chapter at Louisiana State University (LSU).[369] "Gruver had been made to recite the Greek alphabet as part of a hazing episode . . . [and] was forced to drink swigs of 190-proof liquor each time he erred. An autopsy revealed Gruver died from alcohol poisoning."[370] Matthew Naquin, who allegedly led the hazing against Gruver, was found guilty of negligent homicide.[371] Gruver's parents filed suit against the university alleging violations of Title IX of the Education Amendments of 1972—"the federal law barring sex discrimination at public and private educational institutions that receive federal funds."[372]

On July 19, 2019, the Middle District of Louisiana denied LSU's Motion to Dismiss as to the Title IX claims.[373] The court summarized the plaintiff's argument, which was that:

> LSU misinformed potential male students about the risk of hazing in fraternities, had actual notice of numerous hazing violations, and failed to address or correct the hazing issue for Greek males while aggressively and appropriately addressing and correcting hazing issues in sororities, thereby providing protection to female Greek students that was not equally provided to Greek male students.[374]

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367. *See, e.g.*, Yost v. Wabash Coll., 3 N.E.3d 509, 519 (Ind. 2014) (holding that the "essential element of [an] agency relationship" is that the agent's actions are "on the principal's behalf"; furthermore, the "consent to governance does not equate to agency[,]"and thus simply because the college had some oversight into the fraternity's actions did not mean that an agency relationship was created); Brueckner v. Norwich Univ., 730 A.2d 1086 (Vt. 1999) (holding that the ROTC cadre, who had hazed the plaintiff, had been instructed to "indoctrinate and orient the incoming rooks" by the university, and, since the university conceded that these cadres were their agents by carrying out these instructions, the cadre was held to be acting under the university's scope of employment allowing the university to be held vicariously liable).
368. Parks*, supra* note 204, at 126–27.
369. Jeremy Bauer-Wolf, *Do Title IX Protections Discriminate Against Fraternity Members?*, INSIDE HIGHER ED (July 25, 2019), https://www.insidehighered.com/news/2019/07/25/title-ix-lawsuit-alleges-louisiana-state-ignores-fraternity-hazing [https://perma.unl.edu/8Y2Y-UHCJ].
370. *Id.*
371. *Id.*
372. *Id.*
373. Gruver v. Louisiana, 401 F. Supp. 3d 742 (M.D. La. 2019).
374. *Id.*

The parents further claim that "LSU had knowledge of the hazing problem within Greek fraternities and was deliberately indifferent to the risk this posed to male Greek students by a policy of general inaction to fraternity violations as opposed to strong corrective action taken in response to sorority violations."[375] Accordingly, the plaintiffs argue "that LSU's purposeful disregard of Greek male hazing complaints created a greater risk of danger for males in fraternities as compared to females in sororities."[376] The result, the parents allege, is that fraternity members and pledges at the state's flagship institution are far more at risk than their sorority counterparts because the university disregarded the dangerous and sometimes fatal hazing activities that occur among men in Greek life and cracked down on the women more severely.[377] The case is currently on-going.[378]

5. University Staff Liability

Few cases explore civil liability vis-à-vis university leadership, especially in the context of hazing.[379] One case, however, *Cerra v. Fex Fraternity*,[380] offers some insight into this issue. The court in *Cerra* held that the trial court did not err by granting a directed verdict in favor of university administrators.[381] The plaintiffs' son died after having participated in a fraternity's annual initiation ceremony at a university.[382] The plaintiffs sued the fraternity, five individual members of the fraternity, two university administrators, and the fraternity's faculty advisor for negligence in causing their son's death.[383]

375. *Id.*
376. *Id.*
377. Bauer-Wolf, *supra* note 369.
378. *See supra* section II.C.
379. *E.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331, 334 (Mass. 1983). Plaintiff sued the college and its Vice President for Operations, alleging that they breached their duty to protect her against the criminal acts of third parties. At trial, "the jury returned verdicts against the college and [the vice president] in the amount of $175,000." *Id.* at 333. Both the college and vice president moved for judgment notwithstanding the verdicts. The trial court denied both motions and both defendants appealed. On appeal, the college relied on Section 314 of the Restatement of Torts for the "general proposition that there is no duty to protect others from the criminal . . . act[s] of third [parties]." *Id.* at 334. The court rejected this argument because of the steps that the College took to provide adequate security for its students. The court stated, "[t]he fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety." *Id.* at 335–36. The court went on to say, "[t]he concentration of young people . . . on a college campus, creates favorable opportunities for criminal behavior." *Id.* at 335. In doing so, the court explicitly recognized a duty arising from the "existing social values and customs." *Id.*
380. 393 N.W.2d 547 (Wis. Ct. App. 1986).
381. *Id.*
382. *Id.*
383. *Id.*

The trial court granted a directed verdict in favor of the university administrators, concluding that the university administrators were immune from liability; the court on appeal agreed.[384]

It was undisputed that the faculty advisor "asked members of the fraternity to inform him when their initiation was going to occur, but that this information was never relayed to him."[385] It was also noted that the faculty advisor "became faculty advisor for the fraternity approximately five months before [the initiate's] death, and he was not advised of any complaints regarding previous [fraternity] initiations."[386] Additionally, the court of appeals noted that "supervision of campus organizations, including investigations and follow-up of complaints about organizations, [wa]s a highly discretionary duty."[387] Based on these circumstances, the court concluded this evidence supported the jury's finding that the faculty advisor was not negligent.[388]

For guidance, the *Restatement (Second) of Torts*, Section 323 states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.[389]

Arguably, depending on what types of policies a university has instituted, a university president may have a duty. What is peculiar is that university presidents are rarely sued.[390] Accordingly, this may be the weakest liability argument.

Another case, *Halmon v. Lane College*,[391] offers additional insight. As part of his pledgeship for Phi Beta Sigma fraternity at Lane College, plaintiff DeAudric Halmon allegedly suffered hazing that included "being regularly blindfolded, beaten, paddled, burned by candles, deprived of sleep, dragged on all fours by a dog collar placed around his neck, paddled in a dog position, and compelled to drink numerous concoctions, including one containing a live fish and another possibly containing lighter fluid."[392] After suffering severe injuries and withdrawing from school, Halmon filed this suit against Lane

384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW. INST. 1965); *see* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 331, 336 (Mass. 1983).
390. Finding no instances of university presidents as defendants.
391. No. W2019-01224-COA-R3-CV, 2020 WL 2790455, at *1 (Tenn. Ct. App. May 29, 2020).
392. *Id.*

College in Tennessee state court (specifically the Circuit Court for Madison County).[393] Halmon claimed negligence and vicarious liability based on the actions and inactions of Calvin Walker, a Lane College employee who was the faculty advisor for the college's Phi Beta Sigma chapter.[394] Halmon alleged that Walker had intentionally "acted in concert" with Phi Beta Sigma fraternity members during Halmon's hazing and had negligently failed to prevent Halmon's injuries by not intervening in or reporting the hazing.[395] Finally, Halmon alleged Lane College itself had been negligent in hiring, supervising, and retaining Mr. Walker.[396] The trial court granted summary judgment for Lane College for several reasons,[397] including that the college was not vicariously liable because Walker "was acting outside the course and scope of his employment."[398]

On appeal, the Tennessee Court of Appeals affirmed in part and reversed in part.[399] The Appeals Court affirmed the trial court's judgment that Lane College was not vicariously liable for Walker's alleged intentional torts because Walker's alleged actual participation in hazing was clearly beyond the scope of Walker's authority as an employee of Lane College.[400] The Appeals Court rationalized its decision by noting that "[h]azing is prohibited at the college, and as Mr. Halmon notes in his brief, it is 'undisputed that Mr. Walker recognized that his duties as faculty advisor included . . . ensuring fraternity members were not hazing pledges.'"[401] In other words, Halmon could not feasibly prove that engaging in hazing was part of Walker's role as an employee of Lane College.

However, the Appeals Court reversed the trial court's summary judgment on Lane College's vicarious liability for Walker's negligence in "failing to intervene in, stop, or report hazing."[402] As noted above, part of Walker's responsibilities as faculty advisor included "ensuring fraternity members were not hazing pledges," leaving open the possibility that Walker could have negligently performed this duty by failing to intervene in the hazing Halmon experienced.[403] Further, the facts surrounding Walker's alleged negligence were not undisputed at the time of summary judgment, and thus, could not properly be de-

393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.* The trial court's other reasons for granting summary judgment were that Lane College did not owe a duty to Halmon and that, under comparative fault, Halmon was at least 50% or more at fault for the hazing. *Id.*
398. *Id.*
399. *Id.*
400. *Id.* at *8.
401. *Id.*
402. *Id.*
403. *Id.*

cided at the summary judgment stage.[404] Accordingly, the Appeals Court reversed the trial court's summary judgment "to the extent it forecloses an imposition of vicarious liability based on acts of *negligence* by Mr. Walker."[405]

IV. CONCLUSION

Hazing has been a multi-generational issue for fraternities and sororities. Many lives have been lost; many more have been tragically harmed. Few have been (but likely an increasing number will be) prosecuted. Organizations, fraternal and educational, have, since the 1970s, increasingly felt the force of the courts and escalating costs from insurers. The law has provided the state and aggrieved individuals the tools to seek redress. This litigation terrain is robust and fraught with a great deal of nuance—some of which litigants are aware, but some that most do not contemplate. In this Article, we attempt to offer a detailed picture of hazing's litigation landscape. We do so not simply so potential parties on both sides of these disputes can craft a better strategy, but so they might begin to think about more productive ways to avoid harm and litigation altogether.

404. *Id.* at *9 ("It is simply not settled as a matter of undisputed fact as to exactly what occurred, and thus, the record before us leaves open the possibility of a finding that Mr. Walker was not directly involved in the hazing alleged but was still negligent in response to what allegedly transpired.").

405. *Id.* (emphasis added).