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The Litigation Landscape of Fraternity and Sorority Hazing: Defenses, Evidence, and Damages

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The Litigation Landscape of Fraternity and Sorority Hazing: Defenses, Evidence, and Damages

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Abstract

In recent years, increasing public and media attention has focused on hazing, especially in collegiate fraternities and sororities. Whether it is because of the deaths, major injuries, or litigation, both criminal and civil, collegiate fraternities and sororities have received increased scrutiny. In this Article, we explore a range of tactical considerations that lawyers must consider—from defenses to evidentiary concerns. We also explore how damages are contemplated in the context of hazing litigation.

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INTRODUCTION

In the past few years, legal scholars have increasingly focused their attention on hazing. This research has spanned organizational types—athletics,[1] Asian fraternities,[2] Black

1. *See generally* Gregory S. Parks & Nicolette DeLorenzo, *Hazing in High School Athletics: An Analysis of Victims*, 29 MARQ. SPORTS L. REV. 451 (2019).

2. *See generally* Gregory S. Parks & Wendy Marie Laybourn, *Asian American Fraternity Hazing: An Analysis of Community-Level Factors*, 22 UCLA ASIAN PAC. AM. L.J. 29 (2017).

fraternities,[3] Black sororities,[4] white fraternities,[5] white sororities,[6] marching bands,[7] and the military.[8] Much of this work has drawn from disciplines outside of the law to explicate the phenomenon of hazing,[9] and some of it has been empirical in

3. *See generally* Gregory S. Parks & Matthew Hooker, *Organizational Ideology and Institutional Problem-Solving: Hazing Within Black Fraternities*, 44 L. & PSYCH. REV. 91 (2020); Gregory S. Parks, *"Midnight Within the Moral Order": Organizational Culture, Unethical Leaders, and Members' Deviance*, 40 T. MARSHALL L. REV. 115 (2014) [hereinafter Parks, *"Midnight Within the Moral Order"*]; 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 (2015) [hereinafter Parks et al., *White Boys Drink, Black Girls Yell*]; Gregory S. Parks et al., *Menacing Monikers: Language as Evidence*, 49 WAKE FOREST L. REV. 799 (2014) [hereinafter Parks et al., *Menacing Monikers*]; Gregory S. Parks et al., *Victimology, Personality, and Hazing: A Study of Black Greek-Letter Organizations*, 36 N.C. CENT. L. REV. 16 (2013) [hereinafter Parks et al., *Victimology, Personality, and Hazing*].

4. *See generally* Gregory S. Parks & E. Bahati Mutisya, *Hazing, Black Sororities, and Organizational Dynamics*, 43 L. & PSYCH. REV. 25 (2019); Parks, *"Midnight Within the Moral Order"*, *supra* note 3; Parks et al., *White Boys Drink, Black Girls Yell*, *supra* note 3; Parks et al., *Menacing Monikers*, *supra* note 3; Parks et al., *Victimology, Personality, and Hazing*, *supra* note 3.

5. *See generally* Gregory S. Parks & Sabrina Parisi, *White Boy Wasted: Race, Sex, and Alcohol Use in Fraternity Hazing*, 34 WIS. J.L., GENDER & SOC'Y 1 (2019); Parks et al., *White Boys Drink, Black Girls Yell*, *supra* note 3.

6. *See generally* Gregory S. Parks & Sarah J. Spangenburg, *Hazing in "White" Sororities: Explanations at the Organizational-Level*, 30 HASTINGS WOMEN'S L.J. 55 (2019); Parks et al., *White Boys Drink, Black Girls Yell*, *supra* note 3.

7. *See generally* Gregory S. Parks & Katherine E. Wenner, *Making the Band: Hazing and an Analysis of Interpersonal Dynamics*, 18 VA. SPORTS & ENT. L.J. 35 (2018).

8. *See generally* Gregory S. Parks & Jasmine Burgess, *Hazing in the United States Military: A Psychology and Law Perspective*, 29 S. CAL. INTERDISC. L.J. 1 (2019).

9. *See* Parks & Burgess, *supra* note 8, at 15 (investigating "the various factors" that bear "on individuals and their decision to haze others"); Parks & Hooker, *supra* note 3, at 93 (exploring "the system of ideas and ideals that form the basis of culture and policy within black fraternities"); Parks & Wenner, *supra* note 7, at 37 (contemplating "the issue of hazing from a social-ecological approach"); Parks & DeLorenzo, *supra* note 1, at 490 (considering "how a variety of cognitive biases influences the judgment and decision-making of hazing victims"); Parks & Parisi, *supra* note 5, at 1 (analyzing "the extent to which anxieties about race and masculinity influence hypermasculinity [and hazing] amongst young white men"); Parks & Mutisya, *supra* note 4, at 29 (exploring "a subset of factors that influence hazing's persistence"); Parks & Spangenburg, *supra* note 6, at 94 (analyzing hazing's causes through a

nature.[10] This has been helpful in elucidating what undergirds and propels hazing and, as a result, why legal sanctions are limited in their effectiveness in curtailing hazing. Nonetheless, some scholars have offered a purely doctrinal analysis of hazing.[11] In this Article, we seek to do the same. In Part I, we explore the various defenses that are put forth in hazing litigation. In Part II, we explore the various evidentiary issues that arise in hazing litigation. In Part III, we explore the various damages that plaintiffs seek, and challenges to their recovery.

I. LITIGATION DEFENSE

When injuries are sustained in a fraternity hazing incident, plaintiffs pursuing litigation often name all possible parties as defendants. Collegiate fraternities and sororities consist of multiple entities—for example, the national organization; regional, state, and local affiliates; and foundations—that work in conjunction toward a concerted vision and mission.[12] In the context of litigation, any and all of these entities could be defendants.[13] However, fraternity and sorority national organizations are structured to shield themselves from liability

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"sensemaking, design-thinking, and the social-ecological model"); Parks & Laybourn, *supra* note 2, at 32 (recognizing the "intersecting systems at the individual, interpersonal, organizational, cultural, and societal levels" that influence hazing behaviors).

10. *See generally* Gregory S. Parks et al., *Hazing as Crime: An Empirical Analysis of Criminological Antecedents*, 39 L. & PSYCH. REV. 1 (2015); Parks et al., *White Boys Drink, Black Girls Yell*, *supra* note 3; Gregory S. Parks et al., *Complicit in Their Own Demise?*, 39 L. & SOC. INQUIRY 938 (2014); Parks et al., *Victimology, Personality, and Hazing*, *supra* note 3; Gregory S. Parks et al., *Belief, Truth, and Positive Organizational Deviance*, 56 HOW. L.J. 399 (2013) [hereinafter Parks et al., *Belief, Truth, and Positive Organizational Deviance*].

11. *See* Gregory S. Parks & Tiffany Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQ. L. REV. 1, 7–14 (2013) (summarizing criminal and civil treatment of consent and hazing).

12. *See* Whitney L. Robinson, Note, *Hazed and Confused: Overcoming Roadblocks to Liability by Clarifying a Duty of Care Through a Special Relationship Between a National Greek Life Organization and Local Chapter Members*, 49 U. MEM. L. REV. 485, 493–94 (2019) (discussing fraternities' structure and goal to "maintain the national brand").

13. *See id.*

for the local chapters' and their members' actions.[14] While plaintiffs may bring any number of claims against national fraternities or sororities, national organizations often succeed on various motions to dismiss, or they settle.[15] As such, this Part addresses various aspects of the litigation process in fraternity hazing cases, including the role of insurance companies, alternative dispute resolution and arbitration, and procedural defenses, that may thwart litigation or significantly reduce damages—specifically, defenses of unconscionability, comparative and contributory negligence, consent, and third-party liability.

A. *Fraternities, Sororities, and Insurance Coverage*

Hazing, alcohol abuse, and sexual assaults pose acute risks of liability for fraternities and sororities across the country and have led to an explosion of fraternity-related litigation.[16] As a result, many Greek-letter organizations have begun to obtain, or attempt to obtain, liability insurance to combat these risks.[17] Based on the severity of injury involved in many such cases, these organizations understand the potential for enormous verdicts or settlements. For example, a fraternity at the University of Texas at Austin entered a settlement for $21 million after a fraternity member was thrown from a moving truck and became permanently disabled.[18] Many view fraternities as a breeding ground for liability, leading fraternities to become wary of the potential for litigation and its

14. *See id.* at 498.

15. *See id.* at 499, 506 (detailing the factors that make settlements common).

16. *See id.* at 490 ("When injuries are sustained in a fraternity hazing incident, civil litigation is likely to follow . . . ."); William C. Terrell, Note, *Pledging to Stay Viable: Why Fraternities and Sororities Should Adopt Arbitration as a Response to the Litigation Dilemma*, 43 U. MEM. L. REV. 511, 521 (2012) (emphasizing that hazing-related litigation has "skyrocketed over the last thirty years").

17. *See* Shane Kimzey, Note, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 460 (1997).

18. *See id.* at 463–64.

serious financial consequences.[19] As a consequence, insurance has come to play a significant role with respect to Greek-letter organizations.[20]

When a dispute involves diverse parties—for example, "individuals involved in an incident, the chapter, the college or university, the chapter's house corporation, the national fraternity, and certain chapter officers, usually the president, the treasurer, and either the social chairman or the rush chairman"—"the fraternity's insurer will usually direct those brought into a suit in addition to the fraternity itself."[21] Insurers have resisted providing insurance to such high-risk organizations, making it difficult for Greek organizations to secure adequate coverage.[22] The National Association of Insurance Commissioners ranked fraternities as only slightly less risky than hazardous waste disposal companies and asbestos contracts.[23] In general, most fraternities will purchase one comprehensive general liability policy on the national fraternity level that also insures local chapters, their house corporations, and their officers, members, and volunteers in the scope of their duties for the fraternity.[24] However, many insurers do not provide coverage for hazing and sexual assault—which are arguably the largest sources of liability for these organizations.[25]

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19. *See id.* at 466 ("One commentator has quipped that '[s]ubpoenas and depositions may be replacing beer cans and pledge paddles as icons on fraternity row.'" (alteration in original) (citing Gary Taylor, *Increasingly Vulnerable: Fraternities Face (Legal) Facts*, NAT'L L.J., Dec. 31, 1990, at 26)).

20. *See id.* at 467–69.

21. *Id.* at 465–66.

22. *See id.* at 467 ("One university official has said that 'fraternities "are the third riskiest property to insure behind toxic waste dumps and amusement parks."'" (quoting Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261, 306 n.197 (1992))).

23. *See id.* ("The Fraternity Insurance Purchasing Group (FIPG) manual indicates that the National Association of Insurance Commissioners ranks fraternities as the sixth worst risk, behind hazardous waste disposal companies and asbestos contracts.").

24. *See id.* at 472–75.

25. *See id.* at 473.

B. *Arbitration*

Over the last three decades, national Greek organizations have seen a significant increase in litigation resulting from fraternity and sorority hazing practices and pledges' injuries.[26] Definitions of hazing are matters of state law, generally defined as "any activity expected of someone joining or participating in a group that humiliates, degrades, abuses, or endangers them regardless of a person's willingness to participate."[27] Such activities often include punching, kicking, and other forms of bodily harm, as well as psychological harm stemming from verbal abuse, threats, humiliation, and ridicule.[28]

Unfortunately, hazing is not an uncommon occurrence in Greek organizations, where "pledges" or "aspirants" are willing to submit to or engage in rituals that can result in severe mental and physical injury merely to earn membership.[29] As students continue seeking membership, courts have attempted to keep up with the hazing litigation that inevitably results year after year.[30] Nonetheless, Greek organizations are turning to the arbitration process to remain "viable," because arbitration is typically less costly, more confidential, and much faster than the judicial process.[31]

Pursuant to the Federal Arbitration Act (FAA),[32] "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

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26. *See* Terrell, *supra* note 16, at 514.

27. *Id.* at 513 (quoting ELIZABETH J. ALLEN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK: INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING 14 (2009)).

28. *See id* at 513–14 (pointing to statutory and judicial definitions of hazing).

29. *See* Parks et al., *Belief, Truth, and Positive Organizational Deviance*, *supra* note 10, at 419 (discussing research finding that "aspirants willingly submit to hazing rituals in order to feel accepted by their peers").

30. *See* Terrell, *supra* note 16, at 522–25 (surveying influential hazing litigation cases from 1979 to 2007).

31. *See id.* at 544–54.

32. 9 U.S.C. § 2.

law or in equity for revocation of any contract."[33] The FAA was enacted to "'revers[e] centuries of judicial hostility to arbitration agreements' by 'plac[ing] arbitration agreements upon the same footing as other contracts.'"[34] In determining whether arbitration is appropriate in an individual case, courts apply ordinary contract law principles.[35] Under contract law principles, a court may not direct the parties to arbitration unless the agreement is valid.[36]

1. Fraud in the Inducement

One rule in determining the validity of an arbitration agreement is that courts may not direct the parties to arbitration if the agreement was entered into through fraud in the inducement.[37] Fraud in the inducement generally consists of (a) a misrepresentation (b) of a material fact (c) concerning the subject matter of the contract, and (d) reliance by the other party on the misrepresentation (e) in executing the contract (f) to his or her detriment.[38]

When fraud in the inducement is alleged, the enforceability of an arbitration clause will depend on two issues: (1) whether federal or state arbitration law governs the contract, and (2) whether the fraud is alleged as to the contract as a whole or as to the arbitration clause itself. Under federal law, a court may only hear a claim of fraudulent inducement as to the making of the arbitration clause itself. The FAA provides that an agreement to arbitrate any controversy arising out of a contract

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33. *Id.*

34. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225–26 (1987) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974)).

35. *See* Griffen v. Alpha Phi Alpha, Inc., No. 06-1735, 2007 WL 707364, at *4 (E.D. Pa. Mar. 2, 2007) ("[T]he laws of the states yield 'generally applicable contract defenses' to the validity of an agreement to arbitrate." (quoting Kiesel v. Lehigh Valley Eye Ctr., P.C., No. 05-4796, 2006 U.S. Dist. LEXIS 47486, at *11 (E.D. Pa. July 12, 2006))).

36. *See id.* at *7 (finding that an arbitration agreement was valid, and thus, enforceable); Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 264 (3d Cir. 2003).

37. *See Ex parte* Perry, 744 So. 2d 859, 863 (Ala. 1999).

38. *See* Johnson Mobile Homes of Ala., Inc. v. Hathcock, 855 So. 2d 1064, 1067 (Ala. 2003).

involving commerce is enforceable.[39] In contrast, if the plaintiff alleges fraud in the formation of the arbitration clause itself, then the arbitration clause may not be enforceable.[40] When a claim is brought in court pertaining to a contract containing an arbitration clause, the FAA requires that the court first ensure that the "agreement for arbitration or the failure to comply therewith is not in issue."[41] A claim of fraud in the inducement of the actual arbitration clause is "an issue which goes to the 'making' of the agreement to arbitrate."[42] Thus, a claim of fraud in the making of the arbitration clause itself will not be compelled to go to arbitration; a court may consider that claim.[43] For contracts not involving commerce, the FAA does not apply, and relevant state law is binding.[44] A majority of states have adopted the Uniform Arbitration Act,[45] the Revised Uniform Arbitration Act,[46] or substantially similar legislation[47] (collectively referred to throughout this Article as the UAA). Most states that have adopted the UAA have followed the separability doctrine articulated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[48] But a minority of states that

39. 9 U.S.C. § 2; *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967) (summarizing FAA provisions on the enforceability of arbitration agreements).

40. *See Prima Paint Corp.*, 388 U.S. at 403 (providing that arbitration can proceed if "the making of the agreement for arbitration" is not at issue).

41. 9 U.S.C. § 4.

42. *Prima Paint Corp.*, 388 U.S. at 403–04.

43. *See id.*

44. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201 (1956).

45. *See* UNIF. ARB. ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2000), https://perma.cc/4P5D-MNSJ (PDF).

46. *See id.* at prefatory note (discussing UAA and RUAA differences).

47. *See id.* at prefatory note; N.C. GEN. STAT. §§ 1-569.1–1-569.31 (2021) (adopting a form of the Revised Uniform Arbitration Act).

48. 388 U.S. 395 (1967); *see id.* at 404 ("[I]n passing upon . . . a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."); *e.g.*, Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St., 673 P.2d 251, 256 (Cal. 1983) ("[T]he majority rule, as reflected in cases like *Prima Paint* . . . is compatible with California's arbitration statute."); Weinrott v. Carp, 298 N.E.2d 42, 47 (N.Y. 1973) ("The result we suggest in this case is consistent with the policy adopted by the Federal courts . . . ."); Shaffer v. Jeffrey, 915 P.2d 910, 916, 916 n.12 (Okla. 1996) (collecting cases).

have adopted the UAA have rejected the separability doctrine.[49] In those states, a court will not compel arbitration, neither when the fraud alleged pertains to the arbitration clause itself nor when it pertains to the contract as a whole.[50] Whether or not a court will consider allegations of fraud in the inducement of the contract will generally depend on the particular state.

Typically, fraud cannot exist without an "express misrepresentation."[51] That misrepresentation can take the form of either a "false statement of material fact"[52] or the concealment of "material facts when that person has a duty to disclose."[53] Generally, that fact must be either a past or existing fact.[54] A misrepresentation is fraudulent when, "to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by the recipient."[55] An expression of opinion cannot be the basis of a claim of fraud.[56]

Concealment of a fact only constitutes fraud when the party has a duty to disclose a material fact.[57] That duty only arises in special circumstances.[58] For example, "[w]hen a party injects himself into a business transaction," a duty arises to "disclose all material information necessary to prevent representations

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49. *See, e.g.*, Shaffer v. Jeffrey, 915 P.2d 910, 916, 916 (Okla. 1996) (agreeing with "[c]ourts in Louisiana, Minnesota, and Tennessee [that] have declined to" adopt *Prima Paint*'s reasoning). *But see* Signature Leasing, LLC v. Buyer's Grp., LLC, 466 P.3d 544, 549 (Okla. 2020) (noting that the Oklahoma legislature effectively overruled *Shaffer*).

50. *See, e.g.*, *Shaffer*, 915 P.2d at 917–18.

51. Lilliston v. Regions Bank, 653 S.E.2d 306, 310 (Ga. 2007) (quoting Miller v. Lomax, 596 S.E.2d 232, 237 (Ga. Ct. App. 2004)).

52. Gordon v. Lewis, 81 A.3d 491, 500 (Md. Ct. Spec. App. 2013).

53. *Id.*

54. *See* James v. Integon Nat'l Ins. Co., 744 S.E.2d 491, 493 (N.C. Ct. App. 2013).

55. Miller v. Lockport Realty Grp., Inc., 878 N.E.2d 171, 179 (Ill. App. Ct. 2007) (quoting Soderlund Bros. v. Carrier Corp., 663 N.E.2d 1, 10 (Ill. App. Ct. 1995)).

56. *See* Soderlund Bros. v. Carrier Corp., 663 N.E.2d 1, 10–11 (Ill. App. Ct. 1995).

57. *See Lilliston*, 653 S.E.2d at 310–11 (upholding a grant of summary judgement on a concealment claim because the parties lacked a duty to disclose).

58. *See* Sletto v. Wesley Constr., Inc., 733 N.W.2d 838, 846 (Minn. Ct. App. 2007).

he makes . . . from misleading other parties . . . ."[59] But when parties deal at arms-length, there is no duty to disclose unless there is a confidential relationship[60] and the information is actually requested.[61] Additionally, a duty to speak can arise from a partial disclosure.[62] Consequently, even if there is initially no duty to disclose, if a party chooses to speak, "then he must make a full and fair disclosure of the matters he discloses."[63] The duty has been characterized as one to "disclose those facts that are material to the ones already stated so as to make them truthful."[64]

2. Unconscionability

Another traditional contract doctrine that could prevent the enforceability of an arbitration agreement in the context of Greek-letter organizations is the doctrine of unconscionability. Under relevant contract law, arbitration agreements between individuals seeking fraternity membership and large fraternal organizations may be unconscionable. Fraternities often have greater bargaining power and superior knowledge, while individual litigants are often young, lack requisite mental capacity, and lack a meaningful choice to enter into such an agreement. Because fraternal organizations are often nationwide corporations and carry significant bargaining power, arbitration agreements in these scenarios are rarely

59. Nat'l Consumer Coop. Bank v. Madden, 737 F. Supp. 1108, 1112 (D. Haw. 1990).

60. *See Lilliston*, 653 S.E.2d at 309–10 (concluding no duty to disclose existed between the bank and its customer).

61. *See* Ladas Land & Dev., Inc. v. Merritt & Walding Props., LLP, 978 So. 2d 55, 59 (Ala. Civ. App. 2007); Gewin v. TCF Asset Mgmt. Corp., 668 So. 2d 523, 528 (Ala. 1995) (finding no duty where the sophisticated plaintiff never asked about the information at issue).

62. *See* Ragland v. Shattuck Nat'l Bank, 36 F.3d 983, 992 (10th Cir. 1994) ("In . . . cases involving the duty to disclose, . . . Oklahoma has followed the rule that one who has no duty to speak, but makes a disclosure nevertheless, undertakes to speak truthfully." (citing MSA Tubular Prods., Inc. v. First Bank & Tr. Co., 869 F.2d 1422, 1424 (10th Cir. 1989))).

63. Freese v. Smith, 428 S.E.2d 841, 846 (N.C. Ct. App. 1993) (citing Ragsdale v. Kennedy, 209 S.E.2d 494, 501 (N.C. 1974)).

64. Freightliner, LLC v. Whatley Cont. Carriers, LLC, 932 So. 2d 883, 895 (Ala. 2005).

negotiated.[65] Individuals consent to these agreements on a "take-it-or-leave-it" basis with little understanding of the long-term implications of submitting to arbitration, which typically favors parties that arbitrate more often.[66] For these reasons, and for several others, arbitration agreements between litigants and large fraternal corporations may be deemed unconscionable. Nonetheless, courts infrequently invalidate arbitration agreements in these circumstances, even when the agreements seem prima facie unconscionable.[67]

"As a defense to validity, unconscionability relieves a party from an unfair contract or from an unfair portion of a contract."[68] The party asserting unconscionability bears the burden of proof, and must show that a challenged arbitration agreement is both procedurally and substantively unconscionable.[69] A contract is procedurally unconscionable when its formation reflects the "absence of [a] meaningful choice on the part of one of the parties."[70] One party to a contract is often found to lack a meaningful choice when the contract is one of adhesion, or a "boilerplate" contract that is "prepared by one party, to be signed by the party in a weaker position . . . who has little choice about the terms."[71] Specifically, contracts of adhesion present an offer

65. *See, e.g.*, Griffen v. Alpha Phi Alpha, Inc., No. 06-1735, 2007 WL 707364, at *1–2 (E.D. Pa. Mar. 2, 2007) (describing the defendant fraternal corporation as an "international organization . . . with . . . chapters throughout the United States and foreign countries" that requires applicants to sign and agree to abide by terms of its arbitration clause prior to becoming members).

66. *See* Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 543 (E.D. Pa. 2006) ("Often the other party to the contract is told that the terms of the contract are non-negotiable. There may also be conditions which prevent the consumer from obtaining the product or services except by acquiescing to the contract." (internal citations omitted)).

67. *See, e.g.*, *Griffen*, 2007 WL 707364, at *9 ("[T]he intent of all the parties to this litigation to be bound by the compulsory arbitration of the present claims is clear.").

68. *Id.* at *4.

69. *See id.* at *5–8.

70. Witmer v. Exxon Corp., 434 A.2d 1222, 1228 (Pa. 1981) (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

71. *Griffen*, 2007 WL 707364, at *5 (quoting Kiesel v. Lehigh Valley Eye Ctr., P.C., No. 05-4796, 2006 U.S. Dist. LEXIS 47486, at *14 (E.D. Pa. July 12, 2006)).

to a weaker party on a "take-it-or-leave-it" basis, "prepared by a party with excessive bargaining power."[72] Courts typically find contracts of adhesion to be procedurally unconscionable.[73] There are several similarities between contracts of adhesion and arbitration clauses,[74] namely that parties with higher bargaining power do not give weaker parties an opportunity to negotiate, and that the weaker parties often lose the benefit of the rest of the contract if they do not submit to the terms of the arbitration agreement.[75]

A contract is substantively unconscionable when "the terms of the arbitration clause itself . . . [are] unreasonably favorable to the party with greater bargaining power."[76] Several examples of substantively unconscionable arbitration agreements include:

> arbitration provision[s] . . . [that] severely restrict[] discovery for the weaker party, place[] the burden of costs on the weaker party, limit[] the remedies available to the weaker party, limit[] the period in which the weaker party may bring a claim, raise[] the burden of proof of claims higher than the burden of proof in a judicial forum, or provide[] only the stronger party with judicial recourse.[77]

Public policy also comes into play because substantive unconscionability can be grounded in public policy principles, "provided that the public policy is derived from law or precedent and not couched in general terms of morality."[78] Several factors can be assessed to determine if arbitration clauses in the hazing context are unconscionable.

One of the main factors the unconscionability theory relies on in challenging the validity of an arbitration agreement in fraternity hazing litigation is the age of the fraternity member. Age is of particular importance in considering unconscionability

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72. *Id.*

73. *See, e.g.*, *id.*

74. *See id.*

75. *See id.*

76. *Id.* at *6 (citing *Witmer*, 434 A.2d at 1228).

77. *Id.* (citing Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 543 (E.D. Pa. 2006)).

78. *Id.* at *7 (citing Hall v. Amica Mut. Ins. Co., 648 A.2d 755, 760–61 (Pa. 1994)).

in fraternity arbitration clauses because it speaks to the relative expertise and bargaining power of the parties to an arbitration agreement. Although undergraduate students seeking fraternity membership are typically over eighteen years of age and are legally able to enter contracts, large institutions may take advantage of students' youth and any correlated vulnerability.[79] In *Griffen v. Alpha Phi Alpha, Inc.*,[80] the plaintiff, an Alpha Phi Alpha "aspirant" or pledge, submitted to arbitration as a requirement to join the organization when he was under the age of twenty-one.[81] The court ultimately found that the fraternity's arbitration agreement was not unconscionable, because the plaintiff failed to equate the risk of not submitting to arbitration and not joining the fraternity to more dire circumstances in which arbitration clauses were found to be unconscionable.[82]

However, procedural and substantive unconscionability requirements do not in themselves require that circumstances be "dire."[83] For example, in *Higgins v. Superior Court*,[84] the court found that an arbitration agreement between a television network and the twenty-one-year-old petitioner was unconscionable, in large part because of the petitioner's youth and inferior knowledge of the agreement's implications.[85] Similarly, in fraternal organizations, potential members are vulnerable to agreeing to an arbitration clause at an age at which they have inferior knowledge of hazing and its risks

79. *See* Higgins v. Superior Ct., 45 Cal. Rptr. 3d 293, 304 (Ct. App. 2006) ("The . . . defendants knew petitioners were young and unsophisticated . . . . Indeed, it was petitioners' vulnerability that made them so attractive to the . . . defendants.").

80. No. 06-1735, 2007 WL 707364 (E.D. Pa. Mar. 2, 2007).

81. *Id.* at *1–2.

82. *Id.* at *5. Some of these examples were the threat of eviction, *see generally* Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa. 2006), and threat of economic livelihood, *see generally* Trailer Marine Transp. Corp. v. Charley's Trucking Inc., 20 V.I. 282 (1984).

83. Griffen v. Alpha Phi Alpha, Inc., No. 06-1735, 2007 WL 707364, at *5 (E.D. Pa. Mar. 2, 2007).

84. 45 Cal. Rptr. 3d 293 (Ct. App. 2006).

85. *See id.* at 304.

compared to the knowledge of the organization.[86] Thus, courts should render arbitration clauses in these situations unenforceable.

A second factor of critical importance in determining the unconscionability of an arbitration agreement in fraternity hazing cases involves analysis of the relative bargaining power of the parties. Courts analyze the bargaining power of both parties to determine whether an arbitration clause is substantively unconscionable.[87] The substantive unconscionability analysis looks at the arbitration clause itself and determines if it "is unreasonably favorable to the party with greater bargaining power."[88] Examples of unreasonably favorable conditions could include cost-shifting provisions, restrictions on remedies, prohibition of the right to appeal, or one-sided *access* to the courts.[89] These conditions are amplified in cases in which an individual litigant challenges hazing-related injuries against a large fraternal organization.[90]

Further, while "[a]dhesion is not a prerequisite for unconscionability,"[91] "the threshold inquiry of an unconscionability analysis is whether the arbitration agreement is adhesive."[92] Arbitration agreements in fraternity "Membership Process Forms" or similar documents are considered adhesive, are presented on a "take-it-or-leave-it"

86. *Compare id.* at 295, 303–04 (dealing with a twenty-one-year-old plaintiff against a much more sophisticated party offering a contract with nonnegotiable terms), *with Griffen*, 2007 WL 707364, at *55 (dealing with a similarly aged plaintiff against a similarly sophisticated party offering a nonnegotiable contract).

87. *See Higgins*, 45 Cal. Rptr. 3d at 305 (examining the ability of the parties to "compel arbitration without fearing that doing so would preclude them from seeking injunctive or other equitable relief in a court of record").

88. *Griffen*, 2007 WL 707364, at *6.

89. *See id.* (enumerating criteria of substantive unconscionability); *Ostroff*, 433 F. Supp. 2d at 545–47 (same).

90. *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 711 (2001) ("Because of the lack of court oversight, arbitration critics fear that arbitrators will disregard the applicable law—particularly laws that favor individuals over corporations.").

91. Higgins v. Superior Ct., 45 Cal. Rptr. 3d 293, 301 (Ct. App. 2006) (quoting Harper v. Ultimo, 7 Cal. Rptr. 3d 418, 424 (Ct. App. 2003)).

92. THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 10:18 (3d ed. 2020).

basis to suggest uneven bargaining power, and are limited to the remedies available to the weaker party.[93] Accordingly, these agreements are procedurally and substantively unconscionable in spite of the fact that courts may not find the inability to join a Greek organization to be "dire."[94] A large fraternal organization has much higher bargaining power than individual litigants, particularly when individuals agree to whatever terms the organization suggests in order to gain prestigious membership.[95] The plaintiff's youth in *Griffen* likewise amplifies the unequal bargaining power as not only between an individual and a large organization, but also between a very young individual and a sophisticated, nationwide fraternity.[96] Therefore, courts should find that, in these instances, arbitration agreements are unconscionable and thus unenforceable.

A third factor to consider when evaluating the potential unconscionability of an arbitration agreement of this type is whether the pledge had a meaningful choice in the formation of the agreement. As in other contexts, enforcement of arbitration clauses in the hazing context should be deemed unconscionable if the potential member lacks a meaningful choice. When one

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93. *See* Griffen v. Alpha Phi Alpha, Inc., No. 06-1735, 2007 WL 707364, at *5 (E.D. Pa. Mar. 2, 2007).

94. *See id.* (distinguishing Griffen's circumstances from, for example, those in *Ostroff* where the "plaintiff's elderly mother was evicted from her former home and had no place to live but for the defendant's assisted living community").

95. *See* Terrell, *supra* note 16, at 546 ("It has long been held that fraternal organizations have the power to determine the path of their membership at will, without judicial interference.").

96. It is important to note that, like in *Griffen*, many courts do not strike an arbitration agreement as unconscionable in similar scenarios. *See* OEHMKE & BROVINS, *supra* note 92, § 10:9

> A mere disparity in bargaining power between contracting parties, standing alone, does not make a contract unconscionable. Indeed, mere inequality or disparity in bargaining power is insufficient to invalidate an arbitral agreement. Indeed, to topple an ADR agreement, the resulting contract terms must be so one-sided as to be oppressive, or the party with superior bargaining power (i.e., dominant party) must have taken unfair advantage of the weaker counter-party. Nothing is unconscionable about a party consciously surrendering the right to ordinary judicial procedures in favor [of] arbitration.

party in an arbitration agreement lacks a meaningful choice, it is altogether unfair to enforce the agreement.[97] When determining an absence of a meaningful choice for a weaker party, courts should analyze, inter alia, whether the party suffered an injury, the relative disparity in the party's bargaining power, and the parties' relative sophistication.[98]

In *Anderson v. Ashby*,[99] the Supreme Court of Alabama concluded that the arbitration clause between the parties was unenforceable because the clause attempted to force the defendants to spend considerable time and money to find another finance company and potentially lose the financing from the plaintiff.[100] Similarly, in the hazing context, arbitration clauses do not give the potential member a meaningful choice because the individual either is required to sign the contract to join the fraternity or is not allowed to join at all and may lose the ability to join another fraternal organization.[101] In addition, fraternal organizations tend to be more knowledgeable and sophisticated in regard to hazing, its risks, and the implications of arbitration in these cases than the potential member. As discussed above, fraternal organizations also have higher bargaining power than the potential member. Additionally, because parties choose a preferred arbitrator, a large, experienced organization may be in a better position to make such a choice and the chosen arbitrator may accordingly favor the organization.[102] Thus, courts should conclude that

97. *See* Smith v. D.R. Horton, Inc., 790 S.E.2d 1, 4 (S.C. 2016).

98. *See* Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (stating that courts "should take into account . . . whether there is an element of surprise in the inclusion of the challenged clause[] and the conspicuousness of the clause" (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989))).

99. 873 So.2d 168 (Ala. 2003).

100. *See id.* at 179.

101. *See Griffen*, 2007 WL 707364, at *1 ("The Fraternity required all aspirants, including Mr. Griffen, to complete an Official Application for Membership [containing an arbitration clause] in order to become a member of the Fraternity.").

102. *See* Drahozal, *supra* note 90, at 708–09. In choosing an arbitrator, the parties "circulate[] a list of prospective arbitrators . . . strike objectionable names, rank the rest, and the highest ranking remaining name serves as the arbitrator." *Id.* at 709. This process, while presented simply, inevitably proves challenging for parties with weaker bargaining power who likely cannot

arbitration clauses in the hazing context are unconscionable because the potential member lacks a meaningful choice.

The fourth and final factor commonly considered in determining the unconscionability of arbitration clauses in fraternity hazing cases relates to a pledge's mental capacity or capacity to contract. The question of mental incapacity in the context of arbitration agreements is determined by courts and not by an arbitrator. "If the making of an arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."[103] Courts have interpreted this provision of the FAA to require that courts decide the applicability of mental capacity defenses.[104] In the hazing context, potential members could be vulnerable to agreeing to an arbitration clause without the requisite mental capacity to render such an agreement enforceable. In these instances, courts have concluded that it should be the court, rather than an arbitrator, that determines if the arbitration clause is enforceable.

Although courts strictly limit scenarios in which they find arbitration clauses to be unconscionable in fraternity hazing cases, such agreements may lend themselves to findings of both procedural and substantive unconscionability and may thus be unenforceable.

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identify "objectionable" arbitrators or "rank" potential options in the same way a large fraternal organization can. *See id.* at 708.

103. 9 U.S.C. § 4.

104. *See* Amirmotazedi v. Viacom, Inc., 768 F. Supp. 2d 256, 263 (D.D.C. 2011) ("Because th[e] mental capacity defense goes to the formation, or the 'making' of the Arbitration Agreement, under § 4 of the FAA it must be decided by this Court."); Spahr v. Secco, 330 F.3d 1266, 1273 (10th Cir. 2003) ("We hold that Spahr's mental incapacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract. Therefore, Spahr's claim . . . placed the 'making' of an agreement to arbitrate at issue under § 4 of the FAA."); Est. of Grimm v. Evans, 251 P.3d 574, 577 (Colo. App. 2010) ("Even when aimed at the entire contract, the [mental capacity] defense must be resolved by a court (and not an arbitrator) because it denies that 'an agreement to arbitrate exists' . . . ." (citation omitted)).

C. *Assumption of Risk, Comparative Fault, and Contributory Negligence*

Victims of hazing incidents often find that criminal charges against hazing perpetrators are inadequate to address their harm. In most cases, criminal sanctions impose only minimal punishments at the misdemeanor level.[105] By contrast, hazing victim plaintiffs have a much better chance of meaningful compensation in an action in civil court.[106] As such, many victims and victims' parents file personal injury suits to achieve more legitimate recovery and vindication.[107] The development of hazing case law, and the enactment and enhancement of state anti-hazing statutes, have—not surprisingly—resulted in various defenses.[108] These include comparative fault, contributory negligence, and assumption of risk.[109] Comparative fault and contributory negligence both suggest that the plaintiff "knew or should have known" of the risk that resulted in their harm.[110] While the former allows for recovery based on the degree (percentage) to which the plaintiff was at fault, the latter is a bar to recovery.[111]

Another defense fraternities use in litigation is that a plaintiff cannot recover for injuries sustained if the plaintiff assumed the risks of foreseeable injuries involved in performing the activity that caused their harm. The general principle of

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105. *See* Parks et al., *Complicit in Their Own Demise?*, *supra* note 10, at 941.

106. *See id.*

107. *Id.*

108. *Id.*

109. *See, e.g.*, Ballou v. Sigma Nu Gen. Fraternity, 352 S.E.2d 488, 494–95 (S.C. Ct. App. 1986) (claiming the defenses of contributory negligence and assumption of risk).

110. Parks et al., *Complicit in Their Own Demise?*, *supra* note 10, at 942 (citing Weil v. Selzer, 873 F.2d 1453, 1457 (D.C. Cir. 1989).

111. *Id.* at 942–43. Some states, such as South Carolina, bar recovery in tort on the plaintiff's behalf for contributory negligence but refuse to apply the doctrine to fraternity hazing cases. *See Ballou*, 352 S.E.2d at 495 (barring the use of the contributory negligence defense because the defendant fraternity's conduct leading to the decedent's death was willful); Parks et al., *Complicit in Their Own Demise?*, *supra* note 10, at 943 (discussing the implications of the *Ballou* decision in South Carolina).

assumption of risk is that "[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[112] A defense of assumption of risk can also be established through the concept of *implied* assumption of risk. According to the Restatement (Second) of Torts Section 496C, implied assumption of risk occurs when "a plaintiff fully understands the risk of harm caused by the defendant's conduct" and the plaintiff "voluntarily chooses" to remain engaged in the situation in which that risk exists.[113] Implied assumption of risk can be further subdivided into two categories: *primary* implied assumption of risk and *secondary* implied assumption of risk.[114] The elements that must be proven to show primary implied assumption are that the plaintiff: (1) had knowledge of the risk, (2) appreciated the risk, and (3) had a choice to avoid, but voluntarily chose to accept, the risk.[115] Primary implied assumption requires only that the plaintiff has knowledge of the risk,[116] whereas secondary assumption requires the plaintiff to have knowledge of a risk that was directly created by the defendant's breach of a duty.[117]

Some courts have rejected tort defense doctrines like assumption of risk in hazing cases on the ground that hazing victims fail to fully appreciate the dangers involved.[118] For example, in *Ex parte Barran*,[119] a fraternity defended itself against claims arising out of a hazing incident by asserting that the plaintiff, Jones, assumed the risks of the hazing process by "consciously and voluntarily participating in the hazing activities."[120] In response, Jones argued that he did not assume any risks and that "his participation was 'not necessarily

112. RESTATEMENT (SECOND) OF TORTS § 496A (AM. L. INST. 1965).

113. *Id.* § 496C.

114. *See* Bennett v. Hidden Valley Golf & Ski, Inc., 318 F.3d 868, 873 n.3 (8th Cir. 2003).

115. *See* Reimer v. City of Crookston, 326 F.3d 957, 966 (8th Cir. 2003).

116. *See id.* at 966 (citing Wegscheider v. Plastics, Inc., 289 N.W.2d 167, 170 (Minn. 1980).

117. *See Bennett*, 318 F.3d at 873 n.3 (8th Cir. 2003).

118. *See, e.g.*, *Ballou*, 352 S.E.2d at 495.

119. 730 So. 2d 203 (Ala. 1998).

120. *Id.* at 205.

voluntary.'"[121] In this case, Jones was subjected to numerous paddlings, gauntlet runs, and other hazing rituals over the course of a full academic year.[122] University officials, as well as Jones's parents, had asked if he was being hazed, but he chose not to tell them that he needed assistance or intervention.[123] Further, Jones continued to participate in the hazing rituals until he was suspended from the university for poor academic performance, despite knowing that between 20 and 40 percent of pledges had ended their pledgeship due to hazing.[124] These facts led the court to conclude that his participation was voluntary and that he had assumed the risk of injury related to these hazing activities.[125] On appeal the Court of Civil Appeals reversed, reasoning that "in today's society numerous college students are confronted with the great pressures associated with fraternity life and . . . compliance with the initiation requirements [that] place[] the students in a position of functioning in what may be construed as a coercive environment."[126] The Court of Civil Appeals held that assumption of risk did not support summary judgment against Jones.[127]

D. *Consent*

Some defendants turn to victim consent as an affirmative defense and a bar to recovery.[128] When a plaintiff attempts to show that a battery (which is committed without consent) should form a basis for tort recovery, the impact of intent in the

121. *Id.* at 205–06.

122. *Id.* at 205.

123. *Id.* at 206.

124. *Id.* at 207.

125. *Id.* at 205.

126. Jones v. Kappa Alpha Order, Inc., 730 So. 2d 197, 200 (Ala. Civ. App. 1997), *rev'd in part sub nom. Ex parte* Barran, 730 So. 2d 203 (Ala. 1998).

127. *Id.*

128. *See* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1605 (2012) (quoting RESTATEMENT (FIRST) OF TORTS § 13(a) (AM. L. INST. 1934)); RESTATEMENT (SECOND) OF TORTS § 892A (AM. L. INST. 1979).

battery claim becomes of critical importance.[129] In *Davies v. Butler*,[130] for example, the court held that "consent is not effective as a defense to battery 'where the beating is excessively disproportionate to the consent, given or implied, or where the party injured is exposed to loss of life or great bodily harm.'"[131] Further, "capacity to consent requires the mental ability to appreciate the 'nature, extent and probable consequences of the conduct consented to.'"[132]

Often, consent is not a fruitful defense in hazing cases. In sixteen states, legislatures have added provisions to their existing anti-hazing statutes that bar the victim-consent defense, while in others, the statutes provide for a presumption against consent or a presumption of per se forced activity.[133] The language of such provisions varies. Some make consent irrelevant to charges under their respective anti-hazing

129. *See* Parkell v. Danberg, 21 F. Supp. 3d 339, 359 (D. Del. 2014), *aff'd in part, rev'd in part on other grounds*, 833 F.3d 313 (3d Cir. 2016) ("Lack of consent is an essential element of assault and battery. The intent necessary for battery is the intent to make contact with the person, not the intent to cause harm." (internal citations omitted)).

130. 602 P.2d 605 (Nev. 1979).

131. *Id.* at 612 (quoting Wright v. Starr, 179 P. 877, 878 (1919)).

132. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 892A cmt. b (AM. L. INST. 1979)).

133. *See* Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 386 n.75 (2002) (listing state statutes with anti-hazing measures); *id.* at 386 (stating that any hazing activity is "presumed to be 'forced' activity, the willingness of an individual to participate in such activity notwithstanding" (citing 24 PA. CONS. STAT. § 5352 (1992), *repealed by* 28 PA. CONS. STAT. §§ 2801–2811 (2021)). When it repealed this statute, the Pennsylvania legislature created an entirely new anti-hazing title. That title does not retain the quoted language; however, the new statute states that consent, whether "sought or obtained," "shall not be a defense to any offense" under the new anti-hazing title. 18 PA. CONS. STAT. § 2806 (2021). Similarly, Delaware's anti-hazing statute mimics the same language. *See* DEL. CODE ANN. tit. 14, § 9302 (2021) (providing that any activity within the statutory definition of "hazing" is "presumed to be 'forced' activity, the willingness of an individual to participate in such activity notwithstanding"); *see also* OKLA. STAT. ANN. tit. 21, § 1190 (2021) (stating that any hazing activity is "presumed to be a forced activity, even if the student willingly participates in such activity").

statutes[134] and others explicitly remove consent as a consideration altogether;[135] but they nonetheless improve the likelihood of a favorable judgment for the plaintiff involved in hazing litigation. They also signal a trend toward legislative understanding of the various social pressures that hazing victims face. These pro-plaintiff additions lessen or eliminate the need for subjective inquiry into victims' mental abilities and the effect of social pressures the individual may have faced in a given context.[136] By simplifying the judicial process in this way, hazing litigation can be more streamlined and victims' ability to assert their rights and ultimately obtain a favorable judgment is reinforced.

III. EVIDENTIARY MATTERS

The evidence used in cases involving hazing injuries and deaths has evolved and expanded as litigation involving Greek-letter organizations has become more common.[137] Much of this evidence is used to analyze the underlying values held by such organizations, which may inform the policies and practices Greek organizations employ, as well as the perception of members and pledges as to their experience with hazing

134. *See, e.g.*, IOWA CODE § 708.10 (2021) (including "forced activity" within the definition of prohibited acts, but not applying a presumption that hazing activities are "forced" per se); GA. CODE ANN. § 16-5-61 (2021).

135. *See, e.g.*, Pelletier, *supra* note 133, at 386–87 (stating that Nevada's anti-hazing statute provides that "[c]onsent of a victim of hazing is not a valid defense to a prosecution conducted [under the anti-hazing statute]" (quoting NEV. REV. STAT. § 200.605(2) (2001))); MO. REV. STAT. § 578.365(4) (2021) ("Consent is not a defense to hazing."); VT. STAT. ANN. tit. 16, § 570j(d) (2021) ("It is not a defense . . . that the person against whom the hazing was directed consented to or acquiesced in the hazing activity."); MD. CODE ANN., CRIM. LAW § 3-607(c) (LexisNexis 2021) ("The implied or express consent of a student to hazing is not a defense."); IND. CODE § 35-42-2-2.5 (2020) ("'[H]azing' means forcing or requiring another person *with or without* the consent of the other person . . . to perform an act that creates a substantial risk of bodily injury." (emphasis added)); W. VA. CODE § 18-16-2 (2021) ("[T]he implied or expressed consent or willingness of a person or persons to hazing may not be a defense under this section.").

136. *See* Pelletier, *supra* note 133, at 386.

137. *See* Gregory S. Parks & Rashawn Ray, *Poetry as Evidence*, 3 U.C. IRVINE L. REV. 217, 221 (2013) (describing BGLO pledges' knowledge of poems as useful evidence in hazing litigation).

rituals.[138] More specifically, these symbolic practices become emblematic of traits such as reverence for tradition, perseverance, endurance, and loyalty, among others.[139] Though these practices arguably give insight into the psyche of pledges and members who participate in ritualized hazing, questions remain about the admissibility of such sources in court proceedings.[140] In addition to these elements, this Part analyzes other sources of evidence, like information from social media, organizational culture, application of select discovery devices, and the role of expert witnesses.

A. *Poems and Songs, Signs, and Symbols*

The proliferation of fraternity and sorority hazing litigation has led to an evolution in the types of evidence employed in such litigation. Pledges' poems, songs, chants, and greetings to members may provide indicia of what they knew about their hazing experience and when they knew it.[141] For example, Black Greek-letter organization (BGLO) pledges learn poems as part of their pledge process.[142] These poems often reflect an

138. *See id.* at 238 (describing songs and poems that touch on the sacrifice, hardship, and suffering that pledges experience throughout the pledge process).

139. *See id.* at 221 (noting that BGLOs provide "institutional frameworks, a sense of community, life-long fictive kinship ties, ritual, and a politic of racial uplift").

140. *See id.* at 237 (describing a case in which evidence of racist lyrics was barred due to the risk of undue prejudice).

141. *See id.* at 221. "The use of song lyrics as evidence provides a useful analog to the type of evidence that might be used in civil BGLO hazing litigation." *Id.* at 228. "Over the past several decades, both state and federal courts have increasingly allowed for the admissibility of song lyrics as evidence in criminal trials." *Id.* at 238–46.

142. *See id.* at 240

> Many BGLOs have specific poems that members learn either as part of the initiation process or in the context of the organization's broader culture. The poems "If" and "Invictus" have special significance in Black Greek life, as they are the only two poems that BGLO members seem to collectively share regardless of sorority or fraternity affiliation, generation, or region of the country. The poems not only are enduring favorites in the English-speaking world, but also play a central role in Black "Greek" life discourse.

understanding of themes like hardship and perseverance.[143] Similarly, BGLO pledge chants, greetings, and songs often bespeak of enduring brutality.[144]

Signs and symbols may play an important evidentiary role in hazing litigation. Organizational symbolism is a system of behavior and meaning that helps organizations provide identification schemas for outsiders as well as members.[145] For example, Alpha Phi Alpha—a BGLO that prides itself on being an organization for strong, intelligent African-American men—uses the image of a Sphinx as a symbol of strength, history, African-American heritage, mystery, and guidance.[146] Many members see the Sphinx as a positive image for the fraternity and as a corporeal representation of the principles of the fraternity.[147] On the other hand, Alpha's other well-known symbol, an image of an ape, receives mixed reactions from members of the fraternity, as some consider the obvious racist connotations of equating African-American men with apes to be uncomfortable.[148]

Symbols serve four primary functions: "(1) to reflect organizational culture, (2) to serve as a trigger of internalized

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143. *See id.* at 252 (citing statistical data regarding pledges' interpretations of these poems).

144. *See* Parks et al., *Complicit in Their Own Demise?*, *supra* note 10, at 952–53

> Nearly 90 percent of fraternity members and 85 percent of sorority members learned or made up at least one song, chant, or greeting about the pledge experience. This is an overwhelming majority of respondents who were introduced to information about the pledge process and what it means to pledge. A much smaller percentage, however, report learning songs, chants, or greetings that suggested hazing. While 56 percent of fraternity members report learning information that suggested hazing, only 16 percent of sorority members do. Although a similar gender gap exists, an even lower percentage of respondents report making up songs, chants, or greetings that suggested hazing. Thirty-seven percent of fraternity members and 13 percent of sorority members report making up information that suggested hazing.

145. *See* GREGORY S. PARKS & JOANNA S. HUNTER, ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE 51–53 (2011).

146. *Id.*

147. *Id.* at 53.

148. *Id.*

norms and values, (3) to act as a frame for conversations about experience, and (4) to serve as an integrator of organizational systems of meaning."[149] In the case of BGLOs in particular, these symbols and iconography reflect the fraternity's organizational identity by demonstrating its links to African culture and society.[150] These connections are made both consciously and unconsciously.[151] By associating such images with the fraternity, members learn a framework for behavior and personal identity, while the organization as a whole develops a strong group identity.[152]

In addition to visual symbols, many BGLO chapters take on monikers—for example, "Bloody," "Deadly," or "Ruthless."[153] Having a chapter moniker makes it more likely that a fraternity chapter will receive a cease and desist order and be suspended at the university and organizational levels.[154] Having menacing, as opposed to benign (for example, "Mighty"), monikers also results in more hazing activity accusations.[155] As such, chapters with menacing monikers tend to be labeled—fairly or unfairly—as more likely to be involved in hazing.[156] Not surprisingly, judges may allow such monikers to be admitted into evidence at their discretion, after weighing the monikers' probative value against their prejudicial impact.[157] In the

149. *Id.* at 51 (citation omitted).

150. *Id.* at 52.

151. *Id.*

152. *Id.* at 51.

153. *See* Parks et al., *Menacing Monikers*, *supra* note 3, at 800 (stating that BGLOs have monikers that denote their endorsements of violence in the context of hazing).

154. *See id.* at 807 (showing that having a chapter moniker increased the chances of receiving a cease-and-desist order by 78 percent and the risk of suspension by 64 percent).

155. *See id.* at 810 ("[T]he presence of a menacing moniker leads to more accusations of hazing activity, but not necessarily to more suspensions. This suggests that menacing monikers may be a stigma that influences external perception, but may not lead to any real consequences for organizations that employ them.").

156. *See id*.

157. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."); *see also* Petrilli v. United States, 129 F.2d 101, 104 (8th Cir. 1942)

context of hazing, there have not been clear answers to whether monikers will be allowed as evidence.

B. *Social Media*

When building hazing cases, social media and technology provide an opportunity to bring transparency to the secrecy and silence of hazing because they can make private acts visible to the public and provide additional evidence of hazing in lawsuits. Today, phones and social media provide additional evidence to strengthen the visibility and validity of hazing claims. Although common law is generally silent on the correlation between social media and hazing cases, there are a few examples in which social media is used as further evidence of hazing and harassment. For example, in *J.J. v. Olympia School District*,[158] male student athletes at a high school practiced a hazing ritual referred to as Boys Next Door ("BND")—anal penetration of hazing victims.[159] The fact that unidentified students created a Facebook page where they threatened other students with BND online was an indication that this form of hazing was a common practice at the high school.[160] An "ongoing culture of sexual harassment" at the high school was one of the bases for the plaintiff's claims, and the existence of the Facebook page was evidence supporting the existence of this culture.[161]

In *Green v. Jacksonville State University*,[162] a band referred to as "STL" used a Facebook page to harass new members, particularly those who were African American.[163] STL members posted a number of racist memes and jokes on the STL Facebook page.[164] In addition, after the plaintiff informed the school about the harassment that he faced from STL members, one of the members posted a "terroristic image of a Confederate battle

(stating that a defendant can request that aliases be omitted, until their relevance has been properly developed, in order to "protect himself").

158. No. C16-5060, 2017 WL 347397 (W.D. Wash. Jan. 24, 2017).

159. *Id.* at *1.

160. *See id.*

161. *See id.*

162. No. 16-CV-1047, 2017 WL 2443491 (N.D. Ala. June 6, 2017).

163. *Id.* at *8.

164. *See id.*

flag," which the plaintiff understood to be an allusion to white supremacy and a direct threat.[165] These Facebook posts were used as evidence to support the plaintiff's claim of harassment on the basis of race in court.[166] But in order for social media posts to be admissible, they must be relevant to the claim in the case at bar.[167] In *Vega v. Sacred Heart University*,[168] the court refused to enter Facebook entries into evidence because, though they were from a person of interest in the hazing case, they were not relevant to any of the issues in the case.[169]

In *Burch v. Young Harris College*,[170] one of the plaintiffs was previously a pledge of Gamma Psi sorority.[171] As a pledge, the plaintiff was subjected to five nights of hazing as a precondition to membership in the organization.[172] The plaintiff was blindfolded, required to stand, kneel, sit, and swim in a cold creek, as well as be berated and criticized by sorority and fraternity members.[173] The plaintiff disclosed her hazing experience to an administrator at the school, who used copies of online exchanges among sorority members to confirm the plaintiff's claim of hazing.[174]

In addition to cell phone use and social media's relevance to gathering evidence for a hazing case, news outlets have also reported on the importance of technology and social media in bringing transparency to the issue of hazing.[175] In 2015, an Indiana University chapter of Alpha Tau Omega had its charter revoked after a video circulated online showing a hazing ritual

165. *Id.* at *10.

166. *Id.* at *7–10.

167. *See* FED. R. EVID. 402 ("Irrelevant evidence is not admissible.").

168. No. 3:10CV1870, 2013 WL 12284587 (D. Conn. Jan. 2, 2013).

169. *Id.* at *2 (barring admission of Facebook entries of an alleged harasser's involvement in a separate entity during January of 2009 when the hazing at issue occurred during the night between October 2 and 3, 2008).

170. No. 2:13-CV-64-WCO, 2013 WL 11319423 (N.D. Ga. Oct. 9, 2013).

171. *Id.* at *1.

172. *See id.*

173. *See id.*

174. *See id.* at *2–3.

175. *See, e.g.*, Jessica Mendoza, *Indiana Fraternity Hazing Video Shows Social Media's Positive Impact*, CHRISTIAN SCI. MONITOR (Oct. 8, 2015), https://perma.cc/6K7E-YZ8F.

that involved sexual misconduct.[176] Also in 2015, members of the University of Oklahoma chapter of Sigma Alpha Epsilon were suspended and the chapter shut down after a cell phone-recorded video clip surfaced that showed the members singing along to a racist chant.[177] In September of 2015, Ohio's Miami University shut down a fraternity after it discovered, via Snapchat and text messages, that the fraternity banned pledges from shaving or showering.[178] Psychologist Susan Lipkins stated that "social media . . . give[s] a face" to these realities—"[w]hen someone leaks [videos] to social media, we can't deny it anymore."[179] On the other hand, Kim Novak, an expert and consultant in student-focused risk management, stated, "[F]ootage and images lack context [because] 'a picture is a moment in time,' and a minute-long video doesn't tell the whole story."[180]

Social media and the advancement of technology are used to provide evidence to build hazing cases. Often, posts on social media may provide context or additional evidence to prove elements of a hazing or harassment claim.[181] On the other hand, pictures and videos disseminated through social media may be taken out of context because they do not provide all the facts of the situation. Although the information is limited, it appears that a few jurisdictions have used social media posts to provide additional evidence of hazing.[182] Overall, technological advancement is bringing transparency and visibility to the issue of hazing through the media and in courts of law.

C. *Organizational Culture of Hazing*

Courts have been slow to hold national organizations liable for failing to recognize the greater social influences and pressures in fraternal organizations that lead to an organizational culture of hazing both locally and nationally. In

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* (quoting Susan Lipkins).
180. *Id.* (quoting Kim Novak).
181. *See id.*
182. *Id.*

Commonwealth v. Pi Delta Psi, Inc.,[183] the Pennsylvania Superior Court made the following declaration:

> This corporation, though vicariously liable to make redress for the illegalities of its agent, did not kill anyone. While its negligent management may have fostered a corporate culture that permitted or even encouraged wanton behavior by student members, the corporation did not tackle or physically attack anyone. It has no body with which to do so.[184]

This declaration provided the basis for the court's finding that a "trial court may fashion new terms of probation to monitor how the corporation conducts its business . . . and whether it is taking steps nationally to reform its corporate culture of hazing."[185]

In *Edwards v. Kappa Alpha Psi Fraternity, Inc.*,[186] Donald Edwards alleged that the national fraternity acted with wanton disregard by allowing an "aura of violence" at the university at which he was matriculating.[187] Consequently, fraternity chapter members and others hazed him.[188] The court found this "aura" to be insufficient evidence that the national fraternity acted in wanton disregard for the rights of others and granted summary judgment for the national fraternity on the issue of punitive damages resulting from any of its alleged negligence.[189] Similarly, in *Morrison v. Kappa Alpha Psi Fraternity*,[190] Kendrick Morrison and his parents sought to offer evidence of Kappa hazing incidents at universities other than Louisiana Tech University, where he had been a student, to show a nationally tolerated culture of hazing within Kappa.[191] The trial court limited the use of evidence of hazing at other

183. 211 A.3d 875 (Pa. Super. Ct. 2019).

184. *Id.* at 892.

185. *Id.*

186. No. 98 C 1755, 1999 WL 1069100 (N.D. Ill. Nov. 18, 1999).

187. *Id.* at *4.

188. *Id.*

189. *See id.* at *8.

190. 31805 (La. App. 2 Cir. 9/24/99); 738 So. 2d 1105, *writ denied*, 99-1607 (La. 9/24/99); 749 So. 2d 634.

191. *See id.* at 1112.

universities,[192] and "instructed plaintiffs and their counsel that the court would not allow any further reference to specific hazing incidents at other universities."[193] The court of appeals concluded that the "trial court properly limited [the] plaintiffs to the presentation of non-specific testimony that hazing occurred both before and after" the national fraternity issued an order prohibiting hazing, and defendants were not entitled to de novo review on appeal.[194]

These cases illustrate that courts are reluctant to establish precedent that allows the culture of hazing to serve as a basis for liability for injuries alleged to result from this culture. But it can be argued that, by taking this narrow view, courts are failing to deter national and local organizations' ambivalence to such cultures. Instead of preventing a culture of hazing by pinning prospective liability on a national or local fraternity's culture of hazing, courts have instead turned to retroactive methods of probation to address this broad-reaching issue.

D. *Discovery Devices*

Three discovery devices are commonly used in hazing litigation, especially against organizational defendants. This Section focuses on these three devices—interrogatories, requests for production of documents, and depositions. While most hazing litigation takes place in state court, we provide a framework of analysis from the Federal Rules of Civil Procedure

192. *Id.* The national fraternity objected to the student's mother's unsolicited and unresponsive reference to a killing arising out of hazing at another university. *Id.* The court stated that it had reviewed the record and had found only one such reference. *Id.* The trial court, after excusing the jury, chastised the student's mother and instructed the plaintiffs and their counsel that the court would not allow any further reference to specific hazing incidents at other universities. *Id.*

193. *Id.* The trial court did not give a limiting instruction to the jury, and the national fraternity's attorney did not object. *Id.* The jury-imposed liability upon the national fraternity even without evidence of other incidents. *Id.* On this issue, the national fraternity appealed urging that they were entitled to de novo review by the court on appeal because the plaintiffs inflamed the jury by repeated reference to hazing incidents at other universities—evidence that was specifically excluded by the trial court. *Id.*

194. *Id.*

because most states model their rules of procedure on the federal rules.[195]

1. Interrogatories

Pursuant to Federal Rule of Civil Procedure 33(a)(1)–(2), "Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. . . . An interrogatory may relate to any matter that may be inquired into under Rule 26(b)."[196] Rule 26(b)(1) states,

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[197]

In the context of hazing litigation, interrogatories should focus on the following questions:

> (1) Who at the national level is responsible for providing information and training to fraternity/sorority members around risk management and hazing?
>
> (2) Do those individuals report to the national board?
>
> (3) How often are reports relative to training and sanctions made to the membership?

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195. *See* Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RSRV. L. REV. 501, 536 exhibit A (2016) (illustrating the relative influence of amendments to the Federal Rules of Civil Procedure on several states' rules of civil procedure).

196. FED. R. CIV. P. 33(a)(1)–(2).

197. FED. R. CIV. P. 26(b)(1).

> (4) What qualifies nationally elected leadership to train subordinates who train others?
>
> (5) How does nationally elected leadership decide who plays a crucial role in addressing hazing?
>
> (6) How many chapters in the fraternity/sorority have been sanctioned for hazing since [state year]?
>
> (7) What amount of fraternity/sorority funds is directed toward addressing hazing and risk management each year?

2. Requests for Production of Documents

Pursuant to Federal Rule of Civil Procedure 34(a)(1)(A)–(B),

> A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; (B) or any designated tangible things.[198]

Here, the primary things plaintiff's counsel will look for are (1) reports on hazing incidents within the organization dating back some years, (2) the various iterations of the new membership process, (3) records of chapter sanctions for hazing, (4) emails and other correspondences from and to national, and other, leadership concerning the hazing incident at issue and broader communications over time about how to address the issue, and (5) the organization's current risk management approach. The last of these raises the specter of the extent to which the organization uses effective teaching and learning methods as well as the best available practices, research, and data.

198. FED. R. CIV. P. 34(a)(1)(A)–(B).

3. Depositions

Pursuant to Federal Rule of Civil Procedure 30(a)(1), "A party may, by oral questions, depose any person, including a party, without leave of court."[199] Plaintiff's counsel will want to depose living victims, other "pledges," and members of the chapter to see who played an active role in the hazing. The chapter advisor(s) and relevant members of the advising alumni chapter/alumni association are also likely to be deposed. The goal will be to see who played a direct role in the hazing or who had constructive knowledge of the conduct. That could help tie the hazing incident to the national organization through those playing a supervisory role. Individuals who play an integral role in organizational risk management around hazing are also likely to be deposed to see if they were competent in their responsibilities. Lack of competence through said staff, and even volunteers, arguably ties the national organization to the hazing incident more strongly. In addition, members of the organization's leadership structure—e.g., area-level, state-level, and regional-level heads—help connect the national organization to the hazing incidents through actual or constructive knowledge. They may also do so, especially if they sit on the organization's national board, through their decisions concerning whether and how to address hazing, as well as who they bring to the table to aid in problem-solving.[200] Depending on the organization, either the Executive Director or National Head would be an ideal deponent to provide plaintiffs' attorneys a sense of how the organization has tried to combat hazing. For example, in BGLOs, the National Heads are like benevolent dictators—governing in a quasi-authoritarian fashion, exercising disproportionate political power within their organization, doing so, in many ways, "for the benefit of the membership and organization."[201] Accordingly, their decision-making and their rise to influence and power in their organization warrant query. Consider the following questions and their rationale:

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199. FED. R. CIV. P. 30(a)(1).

200. *See* Parks & Mutisya, *supra* note 4, at 63–97 (discussing leadership positions in fraternities).

201. *Id.* at 43.

> Q: How long have you been in leadership in your fraternity/sorority? [The goal is to ascertain, somewhat indirectly, how much experience they have had grappling with hazing in their organization.]
>
> Q: What leadership positions have you had in your fraternity/sorority? [The goal is to have them demonstrate that they have been in the system for quite some time and grappled with hazing at different levels, which may have called for different levels of authority and resources in combating the problem.]
>
> Q: When did you first know your fraternity/sorority had a hazing issue? [The goal is to see if they will be honest about knowing that hazing has been a substantial issue in their organization. If they suggest that they do not, does their assessment correlate with the data on hazing complaints within the organization and history of hazing litigation therein.]
>
> Q: When you ran for National Head did you have a platform plank on addressing hazing? [The goal is to show that either they have not demonstrated a commitment to addressing the issue or that their approach is naïve or lackluster. It would be wise to ask for campaign literature.]
>
> Q: As National Head, what has been your strategy to address hazing? [The goal is to ascertain their depth of understanding of the issue and whether they have been willing to push the envelope on addressing the issue.]
>
> Q: Do you know [name members of their fraternity/sorority who are noted experts on hazing] and have you ever invited them to the table? [The goal is to determine the extent to which he/she was willing to utilize internal expertise to solve problems.]

E. *Expert Witnesses*

Hazing experts can be employed to help litigators make sense of (1) what hazing is, (2) the research on what drives it, (3) the research on the best available solutions, and (4) specialized knowledge of how certain types of organizations operate considering the issue. Parties often rely on experts in both civil and criminal litigation to present their well-informed opinions with respect to a particular issue in a case. The issue

aligns with that expert's specialized knowledge about which the average person, with no particular training or understanding, cannot form accurate opinions or come to informed conclusions.[202] "An expert is one who has made the subject upon which he or she gives his or her opinion a matter of particular study, practice, or observation."[203] Most experts are regularly engaged in the practice of a profession, hold professional degrees from a university or college, and have had special professional training and experience regarding the subject on which their testimony is based.[204] Their purpose in a case "is to provide an opinion about a disputed issue"[205] to assist the judge or jury with information to determine a fact in issue requiring specialized knowledge not ordinarily known to the trier of fact.[206]

1. Legal Standard for Expert Testimony

Before an expert can give their opinion, they must be vetted by the court and must satisfy criteria set forth in the relevant rules of evidence of the jurisdiction in which they are asked to testify.[207] If these criteria are not met, the court has the discretion to disqualify the expert witness and refuse admission of their testimony.[208] Pursuant to Federal Rule of Evidence 702,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and

202. *See* 31A AM. JUR. 2D *Expert and Opinion Evidence* § 1 (2021) (citing Spears v. Stone & Webster Eng'g Corp., 161 So. 351 (La. Ct. App. 1935)).

203. *Id.* (citing Pridgen v. Gibson, 139 S.E. 443 (N.C. 1927)).

204. *Id.* (citing Prohaska v. Bison Co., Inc., 365 So. 2d 794 (Fla. Dist. Ct. App. 1978); Haymore v. Thew Shovel Co., 446 S.E.2d 865 (N.C. App. 1994)).

205. *Id.* (citing Rothstein v. Orange Grove Ctr., Inc., 60 S.W.3d 807 (Tenn. 2001)).

206. *See id.* (citing Ficic v. State Farm Fire & Cas. Co., 804 N.Y.S.2d 541 (N.Y. Sup. Ct. 2005)).

207. *See id.* (citing Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011)).

208. *See id.* § 41.

> methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[209]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[210] the United States Supreme Court interpreted Federal Rule of Evidence 702 and considered the admissibility of scientific expert testimony, stating that this testimony is admissible only if it is both relevant and reliable.[211] *Daubert* also held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[212] In looking to particular factors, the Court also addressed such specifics as testing, peer review, error rates, and degree of acceptance in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique."[213]

In *Motorola, Inc. v. Murray*,[214] the District of Columbia Court of Appeals sought to make sense of *Daubert*.[215] The court noted that "when a party proffers expert scientific testimony, the trial court must make 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'"[216] While the *Daubert* Court rejected the notion of "a definitive checklist or test," it "suggest[ed] factors to be considered, including whether the theory or technique ha[d] been tested, whether it 'ha[d] been subjected to peer review and publication,' 'the known or potential rate of error,' and 'the existence and maintenance of standards controlling the technique's

209. FED. R. EVID. 702.

210. 509 U.S. 579 (1993).

211. *See id.* at 588–89.

212. *Id.* at 597.

213. *Id.* at 593–94.

214. 147 A.3d 751 (D.C. 2016).

215. *See id.* at 754–56 ("[T]he impact of the *Daubert* trilogy has been mixed: These cases relax the initial barriers to the admission of expert testimony, but at the same time emphasize the trial judge's robust gatekeeping function.").

216. *Id.* at 754 (quoting *Daubert*, 509 U.S. at 592–93).

operation.'"[217] Moreover, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate."[218] In its *Motorola* opinion, the District of Columbia Court of Appeals went on to state that the *Daubert* Court underscored the trial judge's gatekeeping function:

> "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.[219]

The Supreme Court extended the *Daubert* standard to all experts—not just scientific experts. In *Kumho Tire Co. v. Carmichael*,[220] it also reaffirmed that the judge's gatekeeping role "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[221] The Court added that a trial court may consider any of the factors that *Daubert* mentioned to help determine the testimony's reliability.[222] However, as articulated in *Daubert*, the reliability test is "flexible," and *Daubert*'s list of specific factors "neither necessarily nor exclusively applies to all experts or in every case."[223]

2. Disqualification of an Expert Witness

Judges may also disqualify proposed expert witnesses on other grounds, namely for having conflicts of interest.[224] There

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217. *Id.* (quoting *Daubert*, 509 U.S. at 593–94).

218. *Id.* (omission in original) (quoting *Daubert*, 509 U.S. at 595).

219. *Id.* at 755 (quoting *Daubert*, 509 U.S. at 597).

220. 526 U.S. 137 (1999).

221. *Id.* at 152.

222. *See id.* at 141.

223. *Id.*

224. *See* Nina A. Vershuta, Note, *New Rules of War in the Battle of the Experts: Amending the Expert Witness Disqualification Test for Conflicts of Interest*, 81 BROOK. L. REV. 733, 741 (2016).

is limited judicial precedent, no Supreme Court precedent, no rule in the Federal Rules of Civil Procedure or any other statute, and no ethical guidance for this disqualification.[225] Though the law varies by jurisdiction, judges typically rely on their inherent judicial authority to remove expert witnesses if they deem them to be unqualified.[226] Though disqualification of experts is generally rare,[227] courts traditionally employ a two-part test to disqualify an expert witness.[228] The test applies when, "(1) opposing clients retain the same expert to testify in *separate cases* against each another [sic]; or (2) one party retains an expert formerly retained by the adverse party to testify in the same case."[229] The two elements of this test are: "First, was it objectively reasonable for the first party who retained the expert to believe that a confidential relationship existed, [and s]econd, did that party disclose any confidential information to the expert?"[230] Some courts have added a third element to the test, which aims to balance the policy objectives of dismissing expert witnesses.[231]

The seminal case for the traditional test for disqualification is *Paul v. Rawlings Sporting Goods Co.*[232] This is a product-liability case in which a baseball helmet failed to protect a player who consequently suffered brain damage.[233] One of the lawyers met with an expert witness for an hour, and the other

225. *See* Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 204 (2004).

226. *See* Vershuta, *supra* note 224, at 754 (stating that federal and state courts' inherent authority to disqualify experts and attorneys "derives from the court's 'judicial duty to protect the integrity of the legal process' and . . . 'preserve[s] the public confidence in the fairness and integrity of the judicial proce[ss]'" (citing Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 278 (S.D. Ohio 1988))).

227. *See id.* at 734.

228. *See id.* at 740.

229. *Id.* (emphasis added).

230. Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 913 (2000) (citing Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 580 (D.N.J. 1994)).

231. *See* Coffey, *supra* note 225, at 209 (citing Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 580 (D.N.J. 1994)).

232. 123 F.R.D. 271 (S.D. Ohio 1988).

233. *See id.* at 273.

side retained the witness seven months later.[234] The magistrate judge set out a two-pronged analysis, which is now generally accepted across the nation.[235] Under the two-element test, each inquiry requires its own independent answer. The burden of proof is on the party seeking the expert's disqualification.[236] In fact, there is a heightened burden, since courts have stated that "the movant cannot meet its burden with 'mere conclusory or *ipse dixit* assertions.'"[237]

There is a lack of consensus among jurisdictions as to what satisfies the first element of the test. Some courts require a specific contractual relationship, such as the signing of a nondisclosure agreement.[238] Generally, this issue arises when an expert was employed by a party in an unrelated matter and is then poised to testify against his former client.[239] Outside of the states that strictly require a contract, courts will generally follow a multi-factor test to determine if there was a confidential relationship. These factors vary by jurisdiction, but the more popular factors are:

> (1) whether the client and expert had a long-standing relationship, (2) whether the client and expert engaged in frequent contacts, (3) whether the client intended to or has called the expert as a witness at trial, (4) whether an actual exchange of attorney work product occurred, (5) "whether the expert was paid a fee," (6) "whether the expert was asked not to discuss the case with the opposing parties or counsel," and

234. *See* Coffey, *supra* note 225, at 203.

235. *See* Vershuta, *supra* note 224, at 741 ("[B]oth federal and state courts have accepted [the *Paul v. Rawlings Sporting Goods Co.* test] as the governing test to resolve conflicts of interest in the expert witness context.").

236. *See id.*

237. *Id.* at 742 (quoting Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 429 (E.D. Pa. 2001)).

238. *See id.* at 743 ("Some judges will not inquire beyond the existence of a confidentiality agreement, while others explicitly reject this limited inquiry.").

239. *See* Winzelberg v. 1319 50th St. Realty Corp., 940 N.Y.S.2d 854, 856–57 (N.Y. Sup. Ct. 2012), *aff'd*, 979 N.Y.S.2d 655 (N.Y. App. Div. 2014) (highlighting that defendants failed to disqualify plaintiff's expert witness because no confidential relationship existed between the expert and any defendants in the action, and no other basis for finding a conflict of interest was presented).

> (7) "whether the expert derived any of his specific ideas from work done under the direction of the retaining party."[240]

Which factors, if any, a court uses varies by jurisdiction. It is widely accepted that the client did not actually have to retain the expert for a confidential relationship to exist.[241]

The second prong of the test is that disqualification of an expert witness is appropriate if there was disclosure of confidential information.[242] There are two main areas of disagreement between courts on this prong. First, courts disagree on the definition of "confidential information," and second, courts disagree about whether the information disclosed to the expert in past litigation must relate to the current case.[243] The most common definition for confidential information is "information 'of either particular significance or . . . which can be readily identified as either attorney work product or within the scope of the attorney-client privilege.'"[244] There are also less strict standards. For instance, in *Chrisjulbrian Co. v. Upper St. Rose Fleeting Co.*,[245] the Eastern District of Louisiana found that only information that would not be subject to discovery could constitute confidential information.[246] Finally, like the first prong, there are several factors that courts may consider in determining whether privileged information was shared. Courts will generally find that privileged information was shared if the client and expert witness discussed:

> (1) litigation strategy or a theory of the case, (2) the moving party's views on each side's strengths and weaknesses, (3) the types of witnesses the moving party expects to retain and

240. *See* Vershuta, *supra* note 224, at 744 (footnotes omitted).

241. *See id.* at 745 ("[T]he only question is whether a confidential client-expert relationship existed . . . .").

242. *Id.* at 746.

243. *See id.*

244. *Id.* at 747 (quoting Hewlett-Packard Co. v. EMC Corp., 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004)).

245. No. 93-1879, 1994 WL 673440 (E.D. La. Dec. 2, 1994).

246. *See id.* at *2 (finding that the parties could not have an "'objectively reasonable' belief in a 'confidential' relationship" because the expert's testimony in other litigation was discoverable).

> the roles of such witnesses, (4) approach to discovery, (5) potential defenses, and (6) counsel's mental impressions.[247]

There is also a split among jurisdictions as to whether the information shared in previous litigation must relate to the subject matter of the current litigation.[248] The majority view is that the only requirement is some exchange of privileged information, but there is a minority view in some jurisdictions that the information must relate to the current subject matter.[249]

The court in *Cordy v. Sherwin-Williams Co.*[250] added a third element to the *Rawlings Sporting Goods Co.* test. The *Cordy* court wanted to "balance the competing policy objectives in determining expert [witness] disqualification."[251] It considered several factors to determine whether the expert witness should be disqualified including: "the need to ensure that litigants ha[d] access to expert witnesses and their specialized knowledge, the right of experts to pursue their professional calling, and" the worry that, if experts were easily dismissed, litigants might create relationships with many experts to prevent their opponents from enlisting their services.[252] This third element has been accepted by multiple courts.[253] However, each court chooses or creates its own factors for evaluation. Notably, the Fifth Circuit, in *Koch Refining Co. v. Jennifer L. Boudreaux, MV*,[254] endorsed both the *Rawlings Sporting Goods Co.* test and the third element.[255] Their factors included: (1) making sure there was access to expert witnesses, (2) making sure it was hard to dismiss experts, and (3) the availability and accessibility of other expert witnesses.[256]

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247. Vershuta, *supra* note 224, at 747–48.

248. *See id.* at 749.

249. *See id.* at 749–50.

250. 156 F.R.D. 575 (D.N.J. 1994).

251. *Id.* at 580.

252. Coffey, *supra* note 225, at 209.

253. *See id.* at 210–11.

254. 85 F.3d 1178 (5th Cir. 1996).

255. *See id.* at 1181–83 (considering the two-part confidential relationship test and evaluating whether all parties had access to hiring expert witnesses).

256. *See id.* at 1183 (consolidating these factors from lower court opinions).

3. Expert Testimony in the Context of Hazing Litigation

In *Ballou v. Sigma Nu General Fraternity*,[257] the plaintiffs put forward the expert testimony of Diane Ruth Follingstad, a clinical psychologist and associate professor of psychology, who testified to whether the pledge was psychologically manipulated into drinking excessive amounts of alcohol.[258] Follingstad testified about what psychological literature suggests about group dynamics.[259] The fraternity challenged her testimony as (1) being irrelevant, (2) relating to matters about which expert testimony was not required, (3) being offered without proper foundation, and (4) constituting hearsay.[260] The court responded to each of the fraternity's arguments in turn. First, the court stated that Follingstad's testimony was offered by the plaintiff to assist the jury in determining whether Ballou was psychologically manipulated into consuming alcohol.[261] On that basis, the court concluded that it was relevant.[262] Second, the court did not agree with the fraternity that Follingstad's testimony would have been within the jury's common knowledge or experience and that it was inadmissible on those grounds.[263] The court thought the role that group dynamics play on human behavior was a proper subject of expert testimony.[264] Third, the court rejected the fraternity's contention that the trial judge allowed the expert to testify about matters lacking an appropriate foundation and, therefore, lacking merit.[265] Fourth, regarding the hearsay objection, the court found that Follingstad "did not testify to an opinion."[266] Rather, she gave expert testimony in the form of an explanation of applicable

257. 352 S.E.2d 488 (S.C. Ct. App. 1986).

258. *See id.* at 496–97.

259. *See id.* at 497 (noting that her testimony was not based on opinion).

260. *Id.* at 496.

261. *See id.* at 497.

262. *Id.*

263. *See id.*

264. *See id.*

265. *See id.* (holding that a factual foundation is not required for testimony in an expert's unique knowledge of experience and study).

266. *Id.*

psychological principles that she gleaned from well-qualified research and study.[267]

In *Kenner v. Kappa Alpha Psi Fraternity, Inc.*,[268] Santana Kenner brought a negligence action against the fraternity.[269] He alleged that fraternity members psychologically and physically hazed him, resulting in renal failure and other medical issues.[270] As context, he indicated that in 1994, a Kappa Alpha Psi pledge died from hazing. In response, Kappa issued "Executive Order Number Three" that sanctioned hazing perpetrators. Further, Kappa instituted a national moratorium on its membership intake process. During the moratorium, Kappa contemplated new policies and procedures to prevent hazing when it lifted the moratorium.[271] In bringing a negligence action, to support his argument on the element of breach, Kenner relied on Dr. Catherine C. Scroggs's expert report, in which she opined that Kappa breached its duty because "[Kappa's] brief two-year moratorium seemed to be a symbolic gesture rather than an action with any substance if its goal was to eliminate hazing."[272] In her opinion,

> When we remove a chapter from campus for hazing, we remove them for at least four years, and when the chapter returns we prohibit members who were involved during the violation from affiliating with the chapter. There was no effort by Kappa Alpha Psi to rid its chapter ranks of those

267. *See id.*

268. 808 A.2d 178 (Pa. Super. Ct. 2002).

269. *Id.* at 181.

270. *See id.* at 180.

271. *Id.* at 179.

272. *Id.* at 183 (quoting Letter from Dr. Scroggs 4 (Mar. 19, 2001)). Dr. Scroggs might have considered the extent to which the fraternity employed content-matter experts to reconceptualize how it addressed hazing. *See* Parks & Mutisya, *supra* note 4, at 85–97. She might also have considered what informed the extent to which Kappa revised: (1) its process, *see* Gregory S. Parks, *Pledge to End Hazing*, 11 WAKE FOREST L. REV. ONLINE 111, 111–12 (2021); and (2) how it approached sanctions, Gregory S. Parks, *The Failure of Zero-Tolerance Policies in Addressing Hazing*, 126 PENN STATE L. REV. PENN STATIM 1, 7–8 (2021).

> undergraduates who believed the only way to be a 'real Kappa' was to endure physical abuse.[273]

However, the court did not find such testimony sufficient, because Scroggs failed "to refer to facts, testimony or empirical data supporting her opinion."[274] According to the court, absent such facts, "Kenner failed to make out a *prima facie* case of negligence to overcome Kappa's summary judgment motion."[275]

Kenner alleged that when he sought membership in Kappa in 1996, chapter members held an introductory meeting for prospective members. The chapter advisor, Kevin Clark, was in attendance. During two subsequent meetings, chapter members psychologically and physically hazed Kenner and other initiates. At one of these meetings, Kenner was paddled over two hundred times on his buttocks. Neither Clark nor Eric Morris, then Kappa's East Central Province President, attended the meetings where the hazing took place.[276] As to Kenner's claims about chapter advisor Clark, however, the court found that Kenner detailed Clark's conduct.[277] Clark indicated to Beta Epsilon members that an "interest meeting" was permissible despite knowing that it was prohibited by the moratorium.[278]

The court further observed that Clark offered the prospective members little insight at the interest meeting vis-à-vis hazing, despite feeling required to do so.[279] Kenner's expert, Scroggs, "point[ed] out that Clark did not understand the new membership intake process and did not take steps to find out what activity had occurred after an informational meeting

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273. Brief of Appellant Santana Kenner at 8, Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178 (Pa. Super. Ct. 2002) (No. GD 98-4464), 2001 WL 34735240.

274. Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 179 (Pa. Super. Ct. 2002).

275. *Id.* at 184; *see* Checchio *ex rel.* Checchio v. Frankford Hosp.-Torresdale Div., 717 A.2d 1058, 1062 (Pa. Super. Ct. 1998) (concluding that expert testimony was too unreliable to send to the jury because the expert offered subjective opinion without reference to medical literature or the expert's research).

276. *Kenner*, 808 A.2d at 180.

277. *Id.*

278. *Id.* (quoting Clark Dep. 71).

279. *Id.*

he conducted."[280] She opined that "Clark should have told initiates the next steps of the initiation process as a means of monitoring the membership intake process," and that "had Clark been more engaged in the membership process, Kenner would not have sustained his injuries."[281] In reviewing the sufficiency of Scroggs's testimony pertaining to Clark, the court noted that "Clark's testimony [was] the only factual material upon which Scroggs base[d] her opinion that a duty had been breached."[282] Finding this sufficient, the court determined that Kenner had established a prima facie case only of Clark's negligence.[283]

Another common objection to the admission of expert testimony in the context of hazing litigation has been that an expert testifies to "the ultimate issue."[284] In other words, the expert testifies to an opinion that makes a direct conclusion as to the legal elements at issue in a given claim. One case that has dealt with such objections is *Commonwealth v. Pi Delta Psi, Inc.*[285] In that case, the court held that "[a]n opinion is not excludable merely because it embraces an ultimate issue."[286] Despite this language, the trial court disallowed the organization's expert witness who would have opined that the corporation's anti-hazing policy and training met Greek Life's national standard of care.[287] Specifically, the Pennsylvania Superior Court noted that an expert opinion that embraces an ultimate issue may be objectionable on other grounds—for example, "depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice."[288] The court came to this decision because the prosecution's theory as to the corporation's guilt rested entirely on its vicarious liability for its

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Commonwealth v. Pi Delta Psi, Inc., 211 A.3d 875, 883 (Pa. Super. Ct. 2019).

285. 211 A.3d 875 (Pa. Super. Ct. 2019).

286. *Id.* at 882.

287. *See id.*

288. *Id.* (quoting McManamon v. Washko, 906 A.2d 1259, 1278–79 (Pa. Super. Ct. 2006)).

agents' misconduct.[289] The court emphasized that the corporation's standard of care was irrelevant, and the trial court did not abuse its discretion in excluding the expert's opinion on the standard of care.[290]

As a final example, in *Morrison v. Kappa Alpha Psi Fraternity*, Kendrick Morrison, a freshman interested in membership in Kappa Alpha Psi, was physically beaten by the president of the fraternity chapter during a gathering that took place in a dorm room.[291] That same night, Kendrick received treatment at the Lincoln General Hospital for injuries to his head and neck and reported the incident to campus police.[292] After filing suit against Kappa Alpha Psi and others, Kendrick and his parents testified that he had a lifelong desire to become a physical therapist.[293] Dr. Paul Ware, Kendrick's treating psychiatrist, testified that as a result of the hazing Kendrick's grades dropped below the point required for admission to a physical therapy program.[294] In addition to Dr. Ware's testimony, plaintiffs presented the expert testimony of Stephanie Chalfin, a vocational rehabilitation expert, as to the amount of future income that Kendrick could have earned as a physical therapist.[295]

The State retained Dr. Richard Galloway as its vocational rehabilitation expert and to review Kendrick's medical records and the depositions of Dr. Ware, Dr. Harju, and Ms. Chalfin.[296] Plaintiffs resisted the State's efforts to provide Dr. Galloway with Kendrick's grade transcript even though Ms. Chalfin had a

289. *See id.* at 882 (noting that, under the vicarious liability doctrine, the corporation is liable when local and national officers commit crimes in causing the death of an associate member).

290. *See id.* at 883 (emphasizing that the testimony discussing that the corporation met the national standard was of no relevance to the corporation's criminal culpability).

291. *Morrison v. Kappa Alpha Psi Fraternity*, 31805, p. 1 (La. App. 2 Cir. 9/24/99); 738 So. 2d 1105, 1110.

292. *Id.*

293. *Id.* at 1111.

294. *See id.*

295. *See id.* (noting that Stephanie Chalfin testified after reviewing plaintiffs school transcripts).

296. *See id.*

copy of the transcript.[297] The trial court ordered production of the transcript.[298] After reviewing the transcripts, Dr. Galloway opined that it was more probable than not that Kendrick would have been unable to gain admission to physical therapy school because his grades even before the hazing incident were inadequate.[299] In fact, Dr. Galloway noted that Kendrick's grades appeared to improve after the hazing incident.[300] Dr. Galloway noted that Dr. Ware, who had a different opinion, failed to take into account Kendrick's actual scholastic performance.[301]

On appeal, the plaintiffs contended that the trial court erred in allowing Dr. Galloway to testify on the issue of Kendrick's loss of earning capacity.[302] According to the plaintiffs, Dr. Galloway should have been precluded from changing his opinion on the eve of trial in a manner that prejudiced plaintiffs vis-à-vis his review of Kendrick's grade transcript from Louisiana Tech.[303] The court of appeals ultimately agreed with the trial court, finding that Dr. Galloway could testify as the State's vocational rehabilitation expert on the issue of the student's loss of earning capacity due to injuries allegedly sustained during fraternity hazing, even though the expert changed his opinion on the eve of trial.[304] In its reasoning, the court of appeals noted that the student and his parents resisted the State's efforts to provide the State's expert with the student's college transcript, even though their own expert had a copy of the transcript, and concluded that any delay in transcript production or change in the expert's opinion after his review was caused by the student and his parents.[305]

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297. *Id.*

298. *Id.*

299. *See id.* (explaining that Dr. Galloway noted that Kendrick's science and math grades were poor throughout his college career).

300. *See id.* (concluding that at most, the hazing incident delayed Kendrick from obtaining his undergraduate degree).

301. *Id.*

302. *Id.* at 1110.

303. *See id.* at 1110–11 (arguing that the last-minute change in Dr. Galloway's testimony was untimely, unfair, and prejudicial).

304. *See id.* at 1111–12.

305. *Id.*

IV. DAMAGES

This Part investigates the damages regime in hazing litigation as well as how courts navigate issues concerning collection.

A. *General Damages*

General damages involve "mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style that cannot be definitively measured in monetary terms."[306] The amount of general damages awarded to plaintiffs varies significantly from case to case.[307] Many states have statutory caps on damage amounts, which may make a tort claim less attractive to some plaintiffs.[308] While statutory caps do not affect the recovery of damages from private universities, the laws reduce the amount of relief possible from state colleges.[309]

In *Morrison v. Kappa Alpha Psi*, the plaintiffs brought suit against the fraternity's national organization, its insurer, its president, and the state for damages resulting from hazing activities.[310] The trial court noted that general damages do not have a common denominator but are decided on a case-by-case basis.[311] The student had claimed that he sustained mental and emotional injuries as a result of the hazing and urged the jury

306. Kessler v. Southmark Corp., 25941, p. 8 (La. App. 2 Cir. 9/21/94); 643 So. 2d 345, 351; *see* Killough v. Bituminous Cas. Corp., 28329, p. 12 (La. App. Cir. 5/8/96); 674 So. 2d 1091, 1100 (defining general damages as those "which may not be fixed with pecuniary exactitude").

307. *See* 6 AM. JUR. 3D *Proof of Facts* § 679 (2021) (providing a non-exhaustive list of factors that may affect the amount of general damages awarded to a plaintiff in a given case).

308. *See* Susan S. Bendlin, *Cocktails on Campus: Are Libations a Liability?*, 48 SUFFOLK U. L. REV. 67, 96–97 (2015) ("At least thirty-three states have statutory limits on the amount of compensatory damages that the state can pay.").

309. *See id.* at 97 (noting that many "states have statutorily barred some types of tort actions against state entities" in addition to "various immunity doctrines" which "shield universities and their administrators from suit").

310. Morrison v. Kappa Alpha Psi Fraternity, 31805, p. 1 (La. App. 2d Cir. 5/7/99); 738 So. 2d 1105, 1110.

311. *See id.* at 1121.

to award $100,000 in general damages.[312] The trial court awarded damages to the student in accordance with the $300,000 jury verdict—three times the amount the plaintiffs' attorney had asked for.[313] On appeal, the court had to determine what the highest amount reasonably within the jury's discretion was, ultimately concluding that $40,000 was the highest amount the jury could have reasonably awarded Kendrick for injuries that were primarily psychological and that had largely been resolved during trial.[314] Accordingly, the court of appeals found the jury's award of $300,000 to be "grossly excessive and tantamount to an imposition of punitive damages."[315]

B. *Actual Damages*

Actual, or "special," damages provide compensation for the reasonably foreseeable consequences of a defendant's actions that are pecuniary in nature.[316] Actual damages recoverable by or on behalf of an injured person may include compensation for necessary and reasonable medical expenses (actual past expenses for physician, hospital, nursing, and laboratory fees; medicines; prosthetic devices; etc.) as well as anticipated future medical expenses.[317] Additionally, actual damages can cover loss of past and future earnings, such as actual loss of wages or salary, loss of existing vocational skill, or loss of capacity to earn increased wages.[318]

In addition to the award of general damages in *Morrison*, the court assessed the propriety of awarding actual damages to the student.[319] To start, the court of appeals stated that

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312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *See* Jensen v. Matute, 2019-0706, p. 6 (La. App. 4 Cir. 1/29/20); 289 So. 3d 1136, 1142 (defining special damages as those with a calculable market value "such that the amount theoretically may be determined with relative certainty").

317. *See* 6 AM. JUR. 3D *Proof of Facts* § 679 (2021).

318. *Id.*

319. *See Morrison*, 738 So. 2d at 1121 (declining to second-guess the jury's decision on an award for future medical expenses).

> [i]n assessing damages in cases of offenses, quasi-offenses and quasi-contracts, much discretion is left to the trier of fact. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.[320]

The court noted that "[a]n award for future medical expenses is proper if the plaintiff is able to establish through medical testimony the necessity for such expenses . . . . It must be demonstrated that such outlays more probably than not will be incurred."[321] The evidence before the court established that as a result of the hazing incident, the student suffered bodily injuries consisting of contusions to the neck, headaches, and a cervical strain.[322] At most, the court noted, he was treated for fourteen months for his physical injuries.[323] An additional amount of actual damages was considered based on the testimony of the student's psychiatrist about the student's continued treatments and medications relating to the student's psychological injuries resulting from a hazing incident.[324] At the end of the case, the judge awarded damages in accordance with the jury's $6,000 award for the student's future medical expenses, but denied the parents' recovery for loss of consortium.[325]

C. *Propriety of Punitive Damages*

An award of punitive damages can typically only be awarded as a result of intentional, fraudulent, malicious, or reckless acts, or acts committed with willful and wanton

320. *Id.*

321. *Id.* at 1122.

322. *Id.* at 1121.

323. *Id.*

324. *See id.* at 1122 (stating that plaintiff would have permanent and residual fear because of the hazing incident).

325. *See id.* (finding that "[m]ental anguish suffered by the parents because of an injury to their child is not compensable in a loss of consortium claim").

disregard for the consequences.[326] This elevated intent standard is justified in the context of punitive damages because punitive damages are not compensation for harms a plaintiff faced, but rather function to punish the defendant and deter similar behavior of that defendant and others similarly situated in the future.[327] Though not a matter of right, even where the case's facts appear to render a punitive damages award appropriate, punitive damages are proper in any tort action that involves insult, fraud, or malice.[328]

In *Alexander v. Kappa Alpha Psi Fraternity, Inc.*,[329] a fraternity member brought a negligence claim and other tort claims against a fraternity and others.[330] The suit arose from a hazing incident that occurred as a part of "underground pledging," which was strictly forbidden by the fraternity.[331] The plaintiff argued that the national organization "acted with reckless disregard for the rights of the plaintiff when they refused to investigate [the perpetrator of the acts against Alexander] . . . and decided to initiate him into the Kappa Alpha Psi Fraternity in direct contravention of its policies."[332] The court stated that a person acts recklessly when he "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances."[333] The court determined that the fraternity attempted to investigate whether underground pledging was occurring, but the investigation was conducted by a fraternity member with no experience in such

326. *See* 6 AM. JUR. 3D *Proof of Facts* 679 § 11 (2021).

327. *See id.* (noting that there is a compelling state interest in punishing and deterring such conduct).

328. *See id.*

329. 464 F. Supp. 2d 751 (M.D. Tenn. 2006).

330. *Id.* at 754.

331. *See id.*

332. *Id.* at 757–58.

333. *Id.* at 758 (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992)).

matters.[334] The court thus stated that the defendants, at worst, delegated the investigation of alleged underground pledging to an untrained alumnus and initiated someone into the fraternity who had been identified as an underground pledging initiate.[335] In the court's view, these actions did not reveal the national headquarters' reckless disregard of the risk of hazing.[336] Thus, the court granted Defendants' motion for summary judgment on the issue of punitive damages, finding no genuine issue of material fact as to whether the actions of the national organization qualified as a gross deviation from the standard of care that an ordinary person would exercise in such circumstances.[337]

Similarly, the court in *Furek v. University of Delaware*[338] held that a university's conduct did not rise to a level that would have supported an award of punitive damages.[339] The pledge's suit against the university (and others) arose out of a fraternity hazing incident in which he was burned when lye-based liquid oven cleaner was poured over his body.[340] The trial court had previously directed a verdict in favor of all defendants on the claim for punitive damages.[341] The court of appeals agreed.[342] It reasoned that the university was on notice of hazing activities

334. *See id.* at 756–57 (finding that a reasonable jury could conclude that the fraternity breached its duty to prevent hazing-related activities because the fraternity failed to adequately conduct an investigation).

335. *See id.* at 758.

336. *Id.*

337. *See id.* (reasoning that although the steps taken by the fraternity may have been ineffectual, no genuine issue of material fact existed).

338. 594 A.2d 506 (Del. 1991).

339. *See id.* at 523.

340. *See id.* at 510.

341. *Id.* at 512. The court stated that a jury could find that the university was aware of dangers associated with hazing on account of a prior incident. *Id.* at 515. It noted that the university did issue a memo banning such activities after the incident. *Id.* But it also observed that their evidence in the record indicated that the university knew fraternities were still hazing at the time of the pledge's incident and prior thereto. *Id.* The court pointed out that there was no evidence of a concerted effort by the university, using the resources available to it, to abolish this activity completely or to effectively monitor the nature of the continued hazing. *Id.* at 520.

342. *See id.* at 523.

on its campus in the years preceding the pledge's injuries.[343] However, the university's response was well-intentioned and not characterized by a conscious disregard of a known risk—notwithstanding that a jury could have deemed the university's response ineffectual.[344] The court of appeals concluded that a directed verdict in favor of the defendants on the issue of punitive damages was proper.[345]

D. *Problems with Collection of Judgment*

Insurance plays a significant role in fraternity and sorority hazing litigation.[346] Sometimes, national organizations use organization assets to satisfy a judgment.[347] For example, many fraternity and sorority national organizations have some degree of self-insured retention (SIR), which they use to resolve claims up to their retention limits as determined by the size and loss experience of the national organization.[348] Fraternities and sororities with sound risk management programs can self-insure up to a certain limit—after which catastrophic coverage takes effect—using money saved from paying lower premiums.[349] This presents a challenge as plaintiffs struggle to collect judgments while facing the potential shifting of assets that occurs when an organization moves assets to an alter ego of the organization to avoid paying the judgment.

In *Blackston v. Omega Psi Phi*,[350] University of Louisville Omega Psi Phi Fraternity members hazed Shawn Blackston.[351]

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343. *Id.*

344. *See id.*

345. *Id.*

346. *See generally* Kimzey, *supra* note 17.

347. *See id.* at 468 (detailing the use of SIR funds by fraternities and sororities).

348. *See id.* at 468–69 (noting that the organizations use SIR funds to investigate, defend, and settle claims).

349. *See id.* at 469.

350. No. 97 CI 3463, 1999 KY Trial Ct. Rev. LEXIS 628 (Ky. Cir. Ct. July 30, 1999), https://perma.cc/8HLP-FDYX.

351. *See Student Possibly Paddled in U of L Fraternity Hazing*, LEXINGTON HERALD-LEADER Apr. 11, 1997, at B3, https://perma.cc/C4L8-L7TZ (PDF) (reporting that Shawn Blackston, a University of Louisville freshman, was

Blackston alleged that Omega knew or should have known that the Louisville chapter was hazing—given the awareness of Omega's regional trainer—and sued Omega for $500,000 in punitive damages.[352] The jury found that Omega was negligent but that Blackston was comparatively at fault (5 percent).[353] The jury awarded Blackston $931,428, which included $750,000 in punitive damages.[354] In an effort to collect, Blackston conducted a title search in Georgia, where Omega's world headquarters were located.[355] The search revealed that Emerson Carey, Jr.—Omega's attorney—transferred the world headquarters' property to a nonprofit called Friendship Foundation.[356] Blackston sued Omega, Friendship Foundation, and Carey, alleging fraudulent conveyance of real property.[357] The jury awarded Blackston $48,895 against Friendship Foundation.[358]

On the other end of the spectrum, when national organizations and chapters must pay a judgment because of members' actions, plaintiffs may pursue individual fraternity members in further litigation hoping to recover out of those defendants' parents' homeowner's insurance.[359] Some may look to recover from the members who personally took part in the acts that led to the finding of liability.[360] Thus, homeowner's insurance plays a role in fraternity-related litigation as well, where the individual member is not independently wealthy or otherwise judgment-proof.[361] It is important to note that the

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hospitalized with kidney and spleen damage and in critical condition after a beating at Omega Psi Phi Fraternity).

352. *Blackston*, 1999 KY Trial Ct. Rev. LEXIS 628; *see also* Parks et al., *White Boys Drink*, *Black Girls Yell*, *supra* note 3, at 119 (noting that there was evidence that the regional trainer for the fraternity had knowledge of the hazing rituals).

353. *See Blackston*, 1999 KY Trial Ct. Rev. LEXIS 628.

354. *Id.*

355. Blackston v. Friendship Found. Inc, No. 99-CV-10940, 2002 WL 1353906 (Ga. Super. Ct. Feb. 14, 2002), https://perma.cc/743C-NKE6.

356. *Id.*

357. *Id.*

358. *Id.*

359. *See* Kimzey, *supra* note 17, at 480.

360. *Id.*

361. *See id.* at 489.

typical rules governing cases involving insurance also apply in the fraternity context, as do the typical rules of exclusions.[362] Thus, there are several potential issues plaintiffs face when relying on homeowners' policies in hazing litigation. The first issue involves procedural hurdles, as the court must determine whether the student qualifies as an insured person under the parents' homeowner's policy.[363] Another issue is that homeowner's insurance policies generally do not provide coverage for intentional injuries—which might include sexual assaults, hazing, fights, or similar injuries.[364]

An example of the latter issue can be found in *Auto-Owners Insurance Co. v. American Central Insurance Co*.[365] That case involves a dispute between insurance carriers over coverage for the parties in the underlying case *Ex parte Barran*.[366] In *Ex parte Barran*, a pledge of the Nu Chapter of Kappa Alpha fraternity at Auburn University, filed suit against Barran, Kappa Alpha Order, Inc., and others, alleging that he was subjected to mental and physical abuse during brutal hazing incidents.[367] The pledge's allegations included:

> (1) having to dig a ditch and jump into it after it had been filled with water, urine, feces, dinner leftovers, and vomit; (2) receiving paddlings to his buttocks; (3) being pushed and kicked, often into walls, pits, and trash cans; (4) eating such foods as peppers, hot sauce, butter, and "yerks" (a mixture of hot sauce, mayonnaise, butter, beans, and other items); (5) doing chores for the fraternity and its members, such as cleaning the fraternity house and yard, serving as designated driver, and running errands; (6) appearing regularly at 2 a.m. "meetings" during which the pledges would be hazed for a couple of hours; and (7) "running the gauntlet," during which the pledges were pushed, kicked,

362. *See id.* at 485–86.

363. *See id.* at 483. Such policies usually provide that children of the insured are covered through a certain age or until completion of college. *Id.*

364. *See id.* at 482.

365. 739 So. 2d 1078 (Ala. 1999).

366. 730 So. 2d 203 (Ala. 1998).

367. *See id.* at 205.

> and hit as they ran down a hallway and down a flight of stairs.[368]

Jones argued that Barran and the other defendants participated in and allowed unlawful hazing tactics to be used against him; that they intentionally and recklessly caused him to suffer emotional distress; and that they committed assault and battery against him.[369]

After Jones sued Barran, Barran sought defense and indemnity from American Central under his father's homeowner's insurance policy.[370] American Central denied Barran coverage and refused to indemnify him, claiming that his father's policy excluded coverage for Barran's conduct.[371] American Central pointed to the language in the policy, specifically excluding coverage for "Personal Liability" and "Medical Payments to Others" resulting from "'bodily injury' or 'property damage' . . . . [a]rising out of sexual molestation, corporal punishment or physical or mental abuse."[372]

Barran's defense was subsequently submitted to Auto-Owners under an umbrella policy that had been issued to Barran's father.[373] Auto-Owners agreed to defend Barran.[374] Auto-Owners then sought a declaratory judgment to determine its duties and obligations under the umbrella policy, and American Central's duties and obligations under the homeowner's policy, to defend or indemnify Barran in the underlying action filed by Jones against Barran.[375] Auto-Owners requested that the trial court hold that American Central owed primary liability coverage for Barran, that American Central reimburse Auto-Owners for all defense costs that it incurred,

368. *Id.* at 204–05.
369. *Id.* at 204, 205 n.1.
370. *Auto-Owners Ins. Co.*, 739 So. 2d at 1079.
371. *Id.*
372. *Id.* at 1080.
373. *Id.* at 1079.
374. *Id.*
375. *Id.*

and that American Central provide Barran's full and complete defense.[376]

The question in *Auto-Owners Insurance Co. v. American Central Insurance Co.* thus turned on whether Barran's conduct, as alleged in Jones's complaint in the underlying action, *Ex parte Barran*, fell within the scope of American Central's policy exclusion for injury arising out of "physical or mental abuse."[377] The Supreme Court of Alabama ultimately affirmed the trial court's grant of summary judgment in favor of American Central Insurance Company, holding that:

> American Central's exclusion 1.k., excluding coverage for injury that arises out of "physical or mental abuse," is unambiguous. The acts of hazing that Jones alleges were committed against him, acts that he described in graphic detail in his complaint, clearly constituted physical and mental abuse. Therefore, any such acts allegedly committed by Barran were excluded from coverage under American Central's policy of insurance.[378]

Auto-Owners Insurance Co. v. American Central Insurance Co. illustrates the potentially limited applicability of homeowner's insurance policies for specific acts of hazing. It highlights the common exclusions of coverage for injuries that are "occurrence-" based or "accident-" based.[379] Nonetheless, so long as a complaint contains some allegation of negligence, carriers will generally provide a defense, and this can be a valuable source of recovery for plaintiffs involved in hazing litigation.[380]

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376. *See id.* (discussing the trial court's finding in favor of American Central, and concluding that, as a matter of law, Jones's claims against Barran were excluded under American Central's policy).

377. *See id.* at 1080.

378. *Id.* at 1081–82.

379. *See* Kimzey, *supra* note 17, at 483–84.

380. *See id.* at 484.

CONCLUSION

Hazing has been a high-stakes issue for fraternities and sororities in recent decades.[381] It results in the loss of life, criminal sanctions for members and organizations, increased insurance costs, and civil liability for various fraternity and sorority units, as well as their host institutions.[382] While the law may not be a good deterrent to hazing, it is still a terrain that must be traversed. As such, litigants should be more aware of the twists and turns, peaks and valleys of the litigation process. Hopefully, this Article offered that insight vis-à-vis certain components of that process.

381. *See id.* at 460 (noting that fraternities and sororities have become "fountainheads of liability").

382. *See* Susan J. Curry, *Hazing and the "Rush" Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 113 (1989).