

**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**

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I. INTRODUCTION

Consider this hypothetical: an excited college student lines up outside of his newly pledged fraternity¹ house, ready to celebrate his

1. “Fraternity” and “sorority” as used in this Note refer to various Greek life organizations that are active on college campuses today, including organizations that are a part of the North American Interfraternity Conference (“NIC”), the National Panhellenic Conference (“NPC”), the National Pan-Hellenic Council, and the National Multicultural Greek Council. Typically thought of as social fraternities found on undergraduate college campuses, these groups are distinguished from other academic groups or those fraternal organizations outside of the university context. When two or more NIC organizations are present on a college campus, an Interfraternity Council (“IFC”) exists to further the local fraternity community. *About IFC*, NORTH AM. INTERFRATERNITY CONF., <http://nicindy.org/ifc/> (last visited Oct. 22, 2018). Sixty-six organizations make up the NIC, with about 6,100 undergraduate chapters. *Collaborating to Advance Fraternity*, NORTH AM. INTERFRATERNITY CONF., <https://nicfraternity.org/member-fraternities/> (last visited Oct. 22, 2018). NPC consists of twenty-six organizations with more than five million women initiated into member organizations. *NPC Fast Facts*, NAT’L PANHELLENIC CONF., <http://npcwomen.org/news/npc-fast-facts/> (last visited Oct. 22, 2018). Throughout this Note, references to the national organization or national Greek life organization refer to the headquarters of the respective fraternity or sorority group as distinguished from the local collegiate chapter. Additionally, this Note will refer to

newfound brotherhood with his pledge² brothers. Once inside, the new pledge class lines up to begin their pledging “celebration”—the start of the chapter’s hazing traditions. To start, the group is given a handle of vodka to chug between them as quickly as possible. Next, the chapter tradition known as “the gauntlet” begins. One by one each pledge runs through a series of stations set up throughout the fraternity house, consuming the alcohol provided to them while older fraternity members watch, drinking and cheering at the spectacle they themselves previously participated in. The stations include chugging more vodka, shot-gunning beers, and slapping the bag—gulping from a bag of wine—all before a party at the end of the evening with even more alcohol provided. The gauntlet results in the pledge consuming about eighteen alcoholic beverages in a little under an hour and a half, leaving the pledge in a severely intoxicated state.

While the drinking rages on, the pledge falls down a flight of basement stairs. After the fall, brothers carry the unconscious pledge upstairs, observing a large bruise on his torso and performing a series of tests, including a sternum rub, to determine whether he is merely intoxicated or in a more serious condition. Deciding that the pledge is just drunk, brothers throw shoes at the pledge and pour beer on him; they strap a book-filled backpack to the pledge to keep him from rolling over and choking on his own vomit. Throughout the night, multiple brothers observe the pledge’s condition, but no one seeks medical or other help; instead, he is left to sleep off the alcohol. Upon discovering the unconscious pledge the next morning, brothers attempt to clean up his appearance and search the internet for signs of alcohol poisoning. It is too late; the pledge dies as a result of his hazing injuries. Now consider that these facts are not a hypothetical at all but instead are the true story of nineteen-year-old Tim Piazza, who tragically died after a night of hazing at the hands of his “brothers.”³

trends or practices in Greek life generally, as there will always be organizations that differ from the norm and implement other procedures and policies.

2. “Pledge” as used in this Note refers to new members who have accepted a bid to join a fraternity but have not yet been initiated as brothers of the organization. See *Pledge*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/pledge> (last visited Oct. 22, 2018) (defining pledge as “(1): a promise to join a fraternity, sorority, or secret society [or] (2): a person who has so promised”).

3. See Order Releasing Grand Jury Report Number 11 at 7–11 (Dec. 13, 2017) No. CP-14-MD, <http://centrecountypa.gov/DocumentCenter/View/4839>

Tim Piazza's story is not an anomaly. Over the past year, three other fraternity pledges died, allegedly due to incidents involving hazing and typically involving excessive alcohol consumption.⁴

[hereinafter Grand Jury Report]; Caitlin Flanagan, *Death at a Penn State Fraternity*, THE ATLANTIC (Nov. 2017), <https://www.theatlantic.com/magazine/archive/2017/11/a-death-at-penn-state/540657/> [hereinafter Flanagan, *Death at Penn State*] (detailing the alleged hazing and subsequent timeline in the death of Tim Piazza, a pledge of Beta Theta Pi's Penn State University chapter). There are multiple cameras located in the Beta Theta Pi house that show Tim Piazza in an intoxicated state and, additionally, show fraternity members moving his body, slapping him, and pouring beer on him. *Id.*; see also Matthew Haag, *10 Additional Penn State Students Charged in Hazing Death of Pledge*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/us/penn-state-fraternity-hazing.html> (explaining the new charges brought against Beta Theta Pi members in the alleged hazing death of Tim Piazza, including a charge of tampering with evidence against one fraternity member who is accused of deleting video footage from the cameras located in the chapter fraternity house). The F.B.I. recovered video footage of the alcohol-based hazing that took place before Tim Piazza's death, and the footage suggests Piazza consumed eighteen drinks over the course of eighty-two minutes. *Id.*

4. See Stephanie Saul, *10 Arrested in Death of L.S.U. Student After Fraternity Drinking Ritual*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/lsu-hazing-arrests.html> (explaining that after the death of a pledge during a fraternity drinking ritual, Greek life at Louisiana State University was suspended for about three weeks and a task force created to combat issues in the university's Greek life community). Florida State University suspended Greek life for several months following both the death of a pledge and the arrest of a fraternity member on suspicions of dealing cocaine. Byron Dobson, *'We've Got a Serious Problem': Thrasher Suspends Greek Life on FSU Campus*, THE TALLAHASSEE DEMOCRAT (Nov. 6, 2017, 12:02 PM), <http://www.tallahassee.com/story/news/2017/11/06/thrasher-address-death-pi-kappa-phi-fraternity-pledges-death/836055001/> (statement of FSU president John Thrasher) ("For this suspension to end, there will need to be a new normal for Greek Life at the university. . . . There must be a new culture, and our students must be full participants in creating it."). Texas State University also temporarily suspended Greek life following the death of a pledge of the school's Phi Kappa Psi chapter. Kalhan Rosenblatt, *Texas State University Suspends Greek Life Activity After Frat Pledge Dies*, NBC NEWS (Nov. 15, 2017, 9:13 AM), <https://www.nbcnews.com/storyline/hazing-in-america/texas-state-university-suspends-greek-life-activity-after-frat-pledge-n820946>.

Due to hazing allegations, the University of Michigan IFC, which boasts twenty-seven IFC groups, implemented a self-imposed suspension on all social events and pledging activities for fraternities. Anemona Hartocollis & Steve Friess, *Clampdown on University of Michigan Fraternities After Reports of Sexual Misconduct and Alcohol Abuse*, N.Y. TIMES (Nov. 10, 2017) (citing Matt Harmon, *Interfraternity Council Suspends All Fraternity Social Activity in Midst of Hazing*, *As-*

Hazing is not exclusive to the Greek community and impacts roughly fifty-five percent of college students involved in organizations and clubs.⁵ According to one study analyzing hazing: “Alcohol consumption, humiliation, isolation, sleep-deprivation, and sex acts are hazing practices common across student groups.”⁶ About sixty-nine percent of students say they are aware that hazing occurs on their college campuses.⁷ Of the college students who experience hazing, ninety-five percent will not report the incident;⁸ further, of those students who experience hazing, nine out of ten are unlikely to label the event as hazing.⁹ While hazing impacts multiple student organizations, seventy-three percent of sorority or fraternity members experience at least one occurrence of hazing while trying to join a Greek

sault Allegations, THE MICH. DAILY (Nov. 9, 2017, 8:32 PM), <https://www.michigandaily.com/section/campus-life/interfraternity-council-suspends-all-fraternity-social-activity-midst-hazing>), <https://www.nytimes.com/2017/11/10/us/michigan-fraternities-suspension.html> (outlining that the University of Michigan IFC elected to suspend all social events and pledging activities because of sexual misconduct allegations, hazing allegations, dangerous drinking practices at fraternity social events, and thirty hospital transits during the weekend of the Michigan versus Michigan State football game). Additionally, Ohio State University suspended “all social, recruitment and new member activities” as a result of eleven of the university’s thirty-seven fraternal organizations being under investigation by the university since the start of the 2017–2018 school year. Melissa Gray, *Ohio State University Suspends Fraternity Activities*, CNN (Nov. 17, 2017, 1:15 PM), <http://www.cnn.com/2017/11/16/us/ohio-state-suspends-fraternity-activities/index.html> (quoting Ryan Lovell, the university’s Director of Greek Life) (“[T]he university will not tolerate behavior that puts the health and safety of students at risk[.]”).

5. ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK: INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING 14 (2008), http://www.stophazing.org/wp-content/uploads/2014/06/hazing_in_view_web1.pdf (outlining statistics from a national study on student hazing). The study defined hazing 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.” *Id.* at 2. The study analyzed responses from nearly 11,500 undergraduate students at fifty-three colleges and also included 300 interviews with both students and campus faculty at eighteen of the surveyed institutions. *Id.*

6. *Id.* at 16.

7. *Id.* at 28–31.

8. *Id.* at 28.

9. *Id.* at 33.

life organization or maintain membership; hazing in fraternities and sororities is the second most prevalent among college student organizations, following only varsity athletic teams.¹⁰

When injuries are sustained in a fraternity hazing incident, civil litigation¹¹ is likely to follow, with plaintiffs naming all possible parties as defendants. National Greek life organizations are structured to shield themselves from liability for the local chapters' actions,¹² and the courts tend to protect the national organization from liability for the injuries that occur at the local chapter level.¹³ The modern Greek organization can appear complicated to an outsider; the intricate organizational structure,¹⁴ coupled with some negative media attention,¹⁵ presents uncertainty about the place of Greek organizations on today's college campuses.¹⁶ As the conversation

10. *Id.* at 15–16.

11. Criminal charges, especially for hazing incidents, also occur. This Note will not focus on the criminal charges that result in fraternity hazing incidents. See Timothy M. Burke, *Guilty! A National Fraternity Criminally Convicted*, FRATERNAL L., Nov. 2017, at 1, 1–3, <https://fraternallaw.com/wp-content/uploads/2017/12/Fraternal-Law-Newsletter-December-2017.pdf> (detailing the criminal conviction of Pi Delta Psi Fraternity for the 2013 hazing death of one of its local chapter pledges); Timothy M. Burke, *PKA International Indicted*, FRATERNAL L., Jan. 2018, at 2, 2–3, <https://fraternallaw.com/wp-content/uploads/2018/01/Fraternal-Law-Newsletter-January-2018.pdf> (detailing the recent indictment of Pi Kappa Alpha Fraternity for a hazing injury of a local chapter's pledge), for information about the recent criminal conviction of Pi Delta Psi and the criminal charges brought against Pi Kappa Alpha.

12. *See infra* Section II.A.

13. *See infra* Section II.B.

14. *See infra* Section II.A.

15. *See supra* notes 3–4 and accompanying text.

16. In May 2016, and recently adopted on December 5, 2017, Harvard College announced a new university policy that no longer allows students to hold leadership positions in student groups or on athletic teams and bars the ability to receive letters of recommendation for certain scholarships if students are members of “unrecognized single-gender social organizations.” *Unrecognized Single-Gender Social Organizations: Harvard College Social Organizations Policy*, HARV. C., <https://www.harvard.edu/media-relations/media-resources/popular-topics/unrecognized-single-gender-social-organizations> (last visited Oct. 23, 2018). Beginning with the entering class of 2021, the policy impacts Harvard's sororities, fraternities, and finals clubs and is the result of various task forces including the Task Force on the Prevention of Sexual Assault. *Id.* The new policy highlights a radical move by a university in response to sexual assault statistics and a call for increased awareness of diversity. The adoption of the policy begs the question of whether

around hazing and Greek life organizations' role on college campuses continues, it is clear something must change to decrease the pervasiveness of hazing in the Greek life community.¹⁷

While a civil claim may be successful against the local chapter or individual chapter members,¹⁸ the question arises as to which entity is in the best position to prevent future hazing injuries. The national organization is such entity. The national Greek life organization is in the best position to implement change to prevent hazing related injuries at its local chapters given that the national organization sets the standards for its individual chapters, controls the status of its chapters, can remove members of its local chapters, and sets the educational standards of its chapters.¹⁹ Hazing persists as national organizations avoid liability; liability for the national organization will provide a suitable remedy for injured plaintiffs and will also incentivize the national organization to take a greater role in implementing preventative policies.

To accomplish these changes, there is a need to find a legal duty grounded in tort law—limited to certain scenarios to not over-

other private universities will follow suit while also calling into question the role of the modern Greek life organization on today's college campus. Recently, eight Greek life organizations filed state and federal lawsuits against Harvard because of this policy. See *Update on Lawsuits, STAND UP TO HARV.*, <https://www.standuptoharvard.org/lawsuit-update/#> (last visited Jan. 27, 2019).

17. There are various criticisms of Greek life organizations; Caitlin Flanagan, who spent a year researching fraternities stated, “[f]raternity tradition at its most essential is rooted in a set of old, deeply American, morally unassailable convictions, some of which—such as a young man’s right to the freedom of association—emanate from the Constitution itself.” Caitlin Flanagan, *The Dark Power of Fraternities*, THE ATLANTIC (Mar. 2014), <https://www.theatlantic.com/magazine/archive/2014/03/the-dark-power-of-fraternities/357580/> [hereinafter Flanagan, *Dark Power*]. Further, Flanagan states, “[w]hen there is a common denominator among hundreds of such injuries and deaths [fraternities], one that exists across all kinds of campuses, from private to public, prestigious to obscure, then it is more than newsworthy: it begins to approach a national scandal.” *Id.* Additionally, the Arizona Court of Appeals stated, “[t]he national fraternity invites membership in a loosely associated group of clubs, one of the primary purposes of which is to engage in parties where liquor is served.” *Estate of Hernandez v. Flavio*, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995).

18. See *infra* Section II.A.

19. See, e.g., *infra* notes 182–94 and accompanying text (explaining one national fraternity’s process of controlling its local chapters).

burden the national Greek life organization nor end its presence on the modern college campus entirely—to deter hazing and provide compensation to fraternity members injured by hazing. Tort law serves several important functions; it restores plaintiffs to where they were before the injury by awarding damages and serves the public interest by addressing corporate misconduct that impacts public welfare.²⁰ Additionally, tort law deters wrongful conduct, vindicates individual's rights of redress, and encourages socially responsible behavior.²¹ These underlying policies of tort law align with the goal of finding a duty owed by the national organization to hazed local chapter members. If courts recognized such a duty, it could encourage adequate compensation of hazing victims and also deterrence of conduct that would result in future hazing incidents because the national organization is in the best position to deter future conduct through its control over local chapters and greater access to monetary and educational resources. Specifically, such a duty should be found by recognizing a special relationship between the national organization and its local chapter members.

Broadly, there is no currently recognized tort-based duty when an actor merely fails to act to protect another—known as nonfeasance.²² Rather, the actor's conduct must affirmatively create the risk of physical harm.²³ There are several exceptions, however, to the nonfeasance principle, which operate to impose an affirmative duty of reasonable care on an actor to aid or protect others.²⁴ The broadest exception is where a special relationship exists between an actor and the victim of the actor's non-conduct.²⁵

20. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1–3 (2001).

21. VICTOR E. SCHWARTZ ET AL., TORTS CASES AND MATERIALS 1 (13th ed. 2015).

22. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 (AM. LAW INST. 2012).

23. *Id.* § 7(a) (“An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.”).

24. See *id.* §§ 38–44, for the *Third Restatement* sections that provide exceptions to nonfeasance.

25. See *id.* § 40. This section lists special relationships that give rise to an affirmative duty exception to nonfeasance. See *infra* Section III.B.

This Note argues that courts should recognize a “special relationship” under section 40 of the *Restatement Third of Torts* between a national Greek life organization and its members for hazing incidents that occur during chapter-sanctioned activities. Specifically, this Note advocates for a four-factor analysis that courts should apply in civil actions for hazing-related injuries to determine whether such a special relationship exists. Recognizing a special relationship between the national organization and its local chapter members will impose a duty of reasonable care on the national organization to take affirmative measures to prevent harm to fraternity members from hazing. A special relationship has not previously been found in this context, suggesting the issue settles before reaching trial.²⁶

Part II of this Note identifies the current roadblocks to imposing liability on the national Greek life organization by looking at the current structure of the modern fraternity, including insulating characteristics that shield the organization from liability and the typical claims that plaintiffs bring in fraternity litigation. Part III explores the existence of a tort duty arising from an affirmative duty exception to nonfeasance by recognizing a “special relationship” owed by national Greek life organizations to act with reasonable care toward fraternity members to protect them from hazing. Part IV proposes four factors that courts should consider in determining the existence of a special relationship between a national Greek life organization and its local chapter members. Part V briefly concludes.

II. ROADBLOCKS TO LIABILITY

Hazing litigation is not a new concept,²⁷ and it is axiomatic that a civil suit would follow hazing-related injuries, especially those that result in serious injury or death. In the context of fraternity litigation, multiple individuals and entities can be included as defendants: the national organization, the local chapter, the housing corporation, the local chapter’s officers, the local chapter’s individual

26. See *infra* Section II.C.

27. See Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities’ Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 81–93 (2014) (discussing liability for hazing incidents in the early twentieth century).

members, or alumni volunteers as chapter advisers.²⁸ Greek life organizations represent a complicated organizational structure for those unfamiliar with such organizations. Greek life organizations consist of multiple entities working together to maintain the national brand and live out the organization's mission, but the organizations are designed to shield each entity from liability for the actions of the other entities.²⁹

A. Structure of the Modern Fraternity

The modern Greek organization consists of several entities and individuals: the national organization or headquarters, local chapters, housing corporations, the local chapter's officers, the local chapter's individual members, alumni advisers, chapter volunteers, chapter consultants who are employed by the national organization, and typically a foundation.³⁰ Additionally, there is the relationship with the university where the local chapter operates, and the university can also be named in suits related to fraternity or sorority litigation.³¹ The national organization, local chapter, and housing corporation are all separate legal entities, predetermining which entity may be held responsible for the incident.³² While national Greek life organizations are structured to shield each entity from liability for the other entities' actions, there is still interaction among the entities, and the national organization maintains control over its local chapters.³³

28. See *infra* Section II.A.

29. See *infra* notes 32–33 and accompanying text.

30. A foundation is another separate legal entity that generally promotes educational and charitable purposes for undergraduate and alumni members through scholarships and other resources. See generally *Phi Gamma Delta Educational Foundation*, PHI GAMMA DELTA FRATERNITY, <https://www.phigam.org/2016/the-foundation/educational-foundation> (last visited Oct. 23, 2018), for information on a fraternity foundation.

31. This Note will not specifically focus on the role of the university, other than by comparison if necessary.

32. Cassandra Coolidge, *Fraternizing with Franchises: A Franchise Approach to Fraternities*, 66 EMORY L.J. 917, 927 (2017) (“Ultimately, fraternity structure is an important component when determining who may be held responsible for a fraternity incident.”).

33. See Coolidge, *supra* note 32, at 921–22, 922 n.23 (2017) (citing *Brown v. Delta Tau Delta*, 2015 ME 75, ¶ 33, 118 A.3d 789, 798) (Alexander J., concurring in

National Greek life organizations are organized as nonprofit corporations.³⁴ The national organization exists to benefit its local chapters by facilitating its local chapters' functioning and providing services for the local chapters.³⁵ The national organization operates out of a headquarters and is responsible for running the national organization; maintaining the organization's mission and brand; providing educational resources related to finances, chapter management, and health and safety to the local chapters and alumni members; and providing chapter consultant visits to local chapters, among other resources.³⁶

At the local level, a fraternity's possible sources for liability consist of the local chapter, its individual members, and the housing corporation. The local chapter is typically an unincorporated association, and a plaintiff's ability to sue the local chapter depends on state law.³⁷ Within the local chapter, there are various chapter officers in-

part and dissenting in part) (“[Delta Tau Delta National Housing Corporation’s] ownership of the Orono chapter’s real estate, and creation of the local chapter as an unincorporated association of students, *is part of a sophisticated legal mechanism, managed by [Delta Tau Delta], to attempt to immunize its local chapter real estate from court process and liability . . .*”) (emphasis added); Flanagan, *Dark Power*, *supra* note 17 (discussing how fraternities have structured themselves to avoid liability).

34. See *Brown*, 118 A.3d 789 (“DTD [the national fraternity] is a national non-profit corporation organized in New York and doing business in Indiana.”); see also *Officers and Staff*, THE PI KAPPA ALPHA INT’L FRATERNITY, INC., <https://www.pikes.org/about-pike/officers-and-staff> (last visited Oct. 13, 2018) (“The International Fraternity is a nonprofit organization and serves as a trade association providing chapters and alumni associations a multitude of services, resources and assistance dealing with virtually every aspect of Fraternity operations.”).

35. See *Doe v. Andrews*, No. 3:15-CV-1127, 2017 U.S. Dist. LEXIS 126101, at *2 (M.D. Tenn. Aug. 9, 2017) (“National is a collegiate fraternal organization whose stated purpose is to advance its members’ educational interests, their leadership skills, and their standards of life, happiness, and integrity. It is a Tennessee corporation headquartered in Memphis, Tennessee.”); Byron L. Leflore, Jr., *Alcohol and Hazing Risks in College Fraternities: Re-Evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 205 (1988) (citing BETA THETA PI, CODE OF REGULATIONS (21st ed. 1981)).

36. Leflore, *supra* note 35, at 205–06. See also THE PI KAPPA ALPHA INT’L FRATERNITY, INC., *supra* note 34, for an example on the role of the national organization in relation to local chapters and alumni members.

37. See FED. R. CIV. P. 17(b)(3)(A) (“[An] unincorporated association with no such capacity under that state’s law may sue or be sued in its common name to

cluding: chapter president, house manager, risk manager, social chairman, historian, and treasurer.³⁸ If an injury-causing incident occurs, the local chapter might not have sufficient funds to cover damages.³⁹ This scenario is seen if the chapter's charter is suspended or revoked and the unincorporated association ceases to exist, presenting additional issues of recovery for the plaintiff.⁴⁰ Besides the local chapter, the individual members involved in the hazing incident will likely be named as defendants and may be held individually liable.⁴¹

The housing corporation is organized as a separate entity from the national organization—one that is set up to insulate the national organization from liability.⁴² A housing corporation's structure de-

enforce a substantive right existing under the United States Constitution or laws.”); DEL. CODE ANN. tit. 10, § 3904 (2017); *Furek v. Univ. of Del.*, 594 A.2d 506, 513 (Del. 1991) (finding that under Delaware law, unincorporated associations can sue and be sued). *But see Brown*, 118 A.3d at 790 n.1 (stating that because the fraternity's local chapter is considered an unincorporated association, it cannot be sued but the individual members can be sued); *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 405 (Kan. 2002) (stating that unincorporated associations cannot sue or be sued in Kansas, thus the local chapter was properly dismissed from the action).

38. See FRATERNAL INFO. AND PROGRAMMING GRP., FIPG RISK MANAGEMENT MANUAL (2013), http://0104.nccdn.net/1_5/161/330/2d3/FIPG_MANUAL.pdf, for a description of several local chapter leadership roles.

39. Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scorned . . . and Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 366–67 (1998).

40. *Id.*

41. In certain instances, the officers of the local chapter may also be named in a suit but are only found liable where the officer planned, directed, or participated in the event. *See generally* *Marshall v. Univ. of Del.*, No. 82C-OC-10, 1986 WL 11566, at *6 (Del. Super. Ct. Oct. 8, 1986) (citing *Libbey v. Perry*, 311 A.2d 527 (Me. 1973); *Lyons v. Am. Legion*, 175 N.E.2d 733 (Ohio 1961)) (finding that individual members are not liable unless they “authorized, planned, directed, or participated in an event,” thus exposing local chapter officers to the potential for liability for other members' actions when the officers were also involved in the event even if they were not the perpetrators).

42. *See* Rutledge, *supra* note 39, at 367 (“Courts have rarely imposed liability on [housing corporations] on the theory that landlords have no duties coextensive with their duties as lessors to supervise parties held on the premises of the local chapters.”). National organizations and housing corporations “are closely related entities, with [the housing corporation] being [the national organization's] agent for

depends on both the university and the national organization.⁴³ Often, a housing corporation is a separate non-profit organization for each local chapter, set up to lease the house to the local chapter.⁴⁴ Yet some facilities are considered on-campus and controlled by the university, some are on-campus but controlled by a housing corporation, and some organizations have a housing corporation that is fraternity wide.⁴⁵ Housing corporations, regardless of precisely how they are organized, are integrated with the national organization. At the local chapter level, alumni advisors can serve as both chapter advisor and a member of the housing corporation, particularly in areas with less alumni support, illustrating the national organization's connection to

owning the real estate of its local chapters.” *Brown*, 118 A.3d at 798 (Alexander, J., concurring in part and dissenting in part).

43. Pi Kappa Phi established its national housing corporation, Pi Kappa Phi Properties, for the sole purpose of acquiring chapter housing and working to establish local housing corporations to assist in the local chapter's house management. *Fraternity Experience Through Access to Chapter Housing*, PI KAPPA PHI FRATERNITY, <https://pikapp.org/about/properties/> (last visited Oct. 23, 2018). Alpha Tau Omega prefers local housing corporations run by alumni members on a volunteer basis. *FAQ*, RICHMOND PROPERTY GROUP, <http://rpg.ato.org/docs/default-source/policy-and-procedure/faq---rpg.pdf?sfvrsn=2> (last visited Oct. 23, 2018). Despite this preference, Alpha Tau Omega has a wholly controlled subsidiary, Richmond Property Group, a non-profit 501(c)(7) organization that manages Alpha Tau Omega fraternity houses. *Our Company*, RICHMOND PROPERTY GROUP, <http://rpg.ato.org/our-company> (last visited Oct. 23, 2018). Pi Kappa Alpha also has local housing corporations, each organized as 501(c)(7) entities and also nationally, the White Horse Holding Corporation, which assists local housing corporations through resources such as loans for purchasing a local chapter house or making improvements to the local facility. *Loan Information*, THE PI KAPPA ALPHA INT'L FRATERNITY, INC., <https://www.pikes.org/resources/housing-resources/loan-information> (last visited Oct. 23, 2018). Sigma Chi chapter houses are either owned by a housing corporation run as a non-profit by alumni members, are university owned, or owned by a third party that rents the property to the local organization; the international fraternity neither owns nor operates any of the chapter facilities. *Housing*, SIGMA CHI FRATERNITY, <https://www.sigmachi.org/housing> (last visited Oct. 23, 2018). Delta Tau Delta also does not maintain any of the local chapter properties, and instead, local housing corporations control the chapter houses. *Frequently Asked Questions*, DELTA TAU DELTA, <https://www.delts.org/frequently-asked-questions> (last visited Oct. 23, 2018).

44. See *supra* note 43 and accompanying text.

45. See *supra* note 43 and accompanying text.

the housing corporation.⁴⁶ National organizations also provide specific resources for housing corporations, with several fraternities establishing entities solely to assist in the development of local housing corporations.⁴⁷ Some organizations can even have local chapter officers as housing corporation *ex officio* members. Communication between the housing corporation and the chapter officers is necessary for the success of the facility.⁴⁸ The national organization's intricate structure, with multiple entities and individuals involved, can present a roadblock to the plaintiff.

B. Failure to Find Liability for National Organizations

Plaintiffs allege various theories of liability in fraternity litigation to impute the actions of the local chapter members onto the national fraternity but without substantial success. These theories include: agency relationships,⁴⁹ negligence,⁵⁰ gross negligence,⁵¹ negligent infliction of emotional distress,⁵² negligent supervision,⁵³ voluntary undertaking,⁵⁴ premises liability,⁵⁵ the existence of a special relationship,⁵⁶ and various statutory causes of action involving social host liability.⁵⁷ While some courts have imposed liability on the national organization for actions that occur at the local chapter

46. FRATERNAL INFO. AND PROGRAMMING GRP., *supra* note 38, at 10–11, 41–42.

47. *See supra* notes 42–45 and accompanying text.

48. FRATERNAL INFO. AND PROGRAMMING GRP., *supra* note 38, at 10–11, 41–42 (discussing the importance of open communication between housing corporation members and the local chapter to maintain a well-functioning chapter facility).

49. *See infra* notes 60–62 and accompanying text.

50. *See infra* notes 63–64 and accompanying text.

51. *See infra* notes 63–66 and accompanying text.

52. *See infra* notes 63–66 and accompanying text.

53. *See infra* notes 63–64 and accompanying text.

54. *See infra* notes 67–71 and accompanying text.

55. *See infra* notes 72–76 and accompanying text.

56. *See infra* notes 77–91 and accompanying text.

57. Social host liability depends on the jurisdiction as some states do not recognize any liability for a social host. 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 12.05 (Matthew Bender & Co., 2012). *See generally id.*, for a synopsis of courts that have allowed social host liability against the national fraternity and courts that have denied social host liability against the national fraternity.

level, successful cases are relatively rare.⁵⁸ More often, the national organization's motions to dismiss or motions for summary judgment are granted, or alternatively, the case settles before liability can be litigated.⁵⁹ Looking at several proposed theories in turn will show how national organizations have avoided liability and support why recognizing a special relationship is necessary.

1. Agency Theory

To successfully pursue an action against the national organization under an agency theory, the plaintiff must allege facts showing that an agency relationship existed between the national organization and the local chapter, the national organization controlled or could control the conduct of the agent, and the conduct of the agent fell within the scope of the agency relationship.⁶⁰ In *Bogenberger v. Pi Kappa Alpha Corp.*, the national fraternity argued that even if an agency relationship exists, the local member's intentional tort would fall outside the scope of the agency relationship, thus releasing the national fraternity from any liability.⁶¹ The court found there was no agency relationship because the national organization did not hold the local chapter out as its agent nor authorized the local chapter to act on its behalf.⁶²

58. See *infra* note 90 and accompanying text.

59. See *infra* Section II.C.

60. See *Bogenberger v. Pi Kappa Alpha Corp.*, 104 N.E.3d 1110, 1119 (Ill. 2018) (citing *Wilson v. Edward Hosp.*, 981 N.E.2d 971, 978 (Ill. 2012)) (providing the factors the court considered in determining there was no agency relationship between the national organization and the local chapter).

61. *Bogenberger*, 104 N.E.3d at 1119–20; see also *Morrison v. Kappa Alpha Psi Fraternity*, 31805-CA, p. 18–20 (La. App. 2 Cir. 5/7/99); 738 So. 2d 1105, 1120 (stating that there is no vicarious liability on the national organization for the local chapter officer who committed the physical hazing, even assuming there is an agency relationship, because the national organization did not control the officer's actions of hazing).

62. *Bogenberger*, 104 N.E.3d at 1119–22; see also *Doe v. Andrews*, No. 3:15-CV-1127, 2017 U.S. Dist. LEXIS 126101, at *14 (M.D. Tenn. Aug. 9, 2017) (finding no vicarious liability for the national organization for a sexual assault committed by a local chapter member where the national organization argued that “there is no basis for vicarious liability against it because, even assuming the relationship between National and the Chapter is analogous to the relationship between a parent corporation and a subsidiary, [the plaintiff] has not overcome the presump-

2. Negligence

Almost all claims allege some form of a negligence cause of action against the national organization for injuries sustained in relation to fraternity activities including general negligence, gross negligence, negligent supervision, and negligent infliction of emotional distress.⁶³ These claims, however, often fail because the court finds the national organization does not owe a duty of care towards the plaintiff.⁶⁴ For example, in *Doe v. Andrews*, the plaintiff brought

tion of corporate separateness”); *Edwards v. Kappa Alpha Psi Fraternity, Inc.*, No. 98-C-1755, 1999 U.S. Dist. LEXIS 18247, at *14–15 (N.D. Ill. Nov. 17, 1999) (stating that the principal is not liable for its agent’s intentional torts that are committed outside the scope of the agency relationship, but noting also that pledging activities could possibly be within the scope of the agency despite national policies against the pledging process); *Yost v. Wabash College*, 3 N.E.3d 509, 521–22 (Ind. 2014) (stating there is not an agency relationship between the national fraternity and the local chapter based on the networking opportunities, brand of the national organization, and goals that the national organization provides to the local chapter). *But see Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488, 495–96 (S.C. Ct. App. 1986) (finding the national organization was liable for the actions of the local chapter under an agency theory). The *Ballou* court found that the local chapter’s hell night—consisting of excessive drinking and hazing of pledges—fell within the scope of the agency because the chapter required the pledges to go through an initiation ceremony, which the national organization allowed the local chapters to supplement with their own traditions. *Id.* The agency relationship with the local chapter was found only because the national organization stipulated to its existence. *Id.*; *see also Sunshine*, *supra* note 27 (proposing that an agency relationship exists between the local chapter and national organization, thus imputing liability on the national organization specifically in incidents of hazing during fraternity initiations).

63. *See infra* note 65.

64. *See Shaheen v. Yonts*, 394 F. App’x 224 (6th Cir. 2010) (bringing claims of negligence, negligent supervision, and statutory violations regarding social host liability against the national organization, the housing corporation, individual members of the fraternity, and a local alumni advisor; none of the defendants were liable when a chapter member became intoxicated at his home, consumed more of his own alcohol at the fraternity house—not as part of a chapter-sponsored event—and killed the victim during a subsequent car accident); *Colangelo v. Tau Kappa Epsilon Fraternity*, 517 N.W.2d 289 (Mich. Ct. App. 1994) (bringing a claim of negligent supervision against the national fraternity, finding it was unreasonable to believe the fraternity would foresee that a person under 21 would have access to alcohol at a chapter-sponsored party). *But see Morrison*, 738 So. 2d at 1119 (finding the national organization assumed a duty to “regulate, protect against and prevent hazing”

claims of gross negligence and negligent infliction of emotional distress against the national organization for a sexual assault that occurred during a chapter-sanctioned party at the chapter's fraternity house.⁶⁵ The court found no liability under any theory of negligence because the national organization did not owe the plaintiff a duty of reasonable care.⁶⁶

3. Voluntary Undertaking

Claims that the national fraternity voluntarily assumed a duty towards the plaintiff are also made under the voluntary undertaking exception to the nonfeasance rule found in the *Restatement (Third) of Torts: Liability For Physical and Emotional Harm* (“*Third Restatement*”) section 42.⁶⁷ The voluntary undertaking exception imposes an affirmative duty to exercise reasonable care on an actor who renders services to another and who knows that such services reduce the risk of harm.⁶⁸ In *Yost v. Wabash College*, the plaintiff alleged negligence on the part of the university and the national fraternity for injuries sustained from hazing.⁶⁹ Specifically, the plaintiff argued the national fraternity assumed a duty of reasonable care, “arising from affirmative steps to prohibit and prevent hazing.”⁷⁰ The court held

committed at the local chapter level because of knowledge the national organization had of hazing that occurred several years earlier in the same local chapter).

65. *Andrews*, 2017 U.S. Dist. LEXIS 126101, at *13–32.

66. *Id.*

67. Section 42 of the *Third Restatement* provides the voluntary undertaking affirmative duty exception:

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

- (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
- (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 (AM. LAW INST. 2012).

68. *See id.*

69. *Yost v. Wabash College*, 3 N.E.3d 509, 513 (Ind. 2014).

70. *Id.* at 520.

that while the national organization provided educational materials discouraging hazing, the specific undertaking did not extend to control or oversight of individual members and the national organization did not owe its chapter members a duty under section 42.⁷¹

4. Premises Liability

Another theory used by plaintiffs, particularly for injuries that occur during a chapter-sanctioned event or within the fraternity facility, is premises liability.⁷² The national organization typically avoids liability under premises liability when the injury-causing event took place at a facility that the national organization did not own or control, such as an annex house rented by fraternity chapter members through a third-party landlord or a privately-owned bar.⁷³ For example, the Iowa Court of Appeals reasoned in *Brakeman v. Theta Lambda Chapter* that the national fraternity could not be liable for a

71. *Id.* at 521; *see also* Scheffel v. Or. Beta Chapter of Phi Kappa Psi Fraternity, 359 P.3d 436, 458 (Or. Ct. App. 2015) (discussing that any voluntary undertaking on the part of the national organization would not extend beyond its local chapter members to a third-party guest who was sexually assaulted during a party at the local chapter house).

72. *See infra* note 73. The specifics of landlord-tenant law and whether the national organization or housing corporation can avoid liability through the lease are outside the scope of this Note.

73. *See* Ostrander v. Duggan, 341 F.3d 745, 748–49 (8th Cir. 2003) (applying Missouri premises liability law, the defendant did not own, possess, nor control the premises to establish a duty under premises liability for a sexual assault that occurred in a house leased by several local fraternity members—even though the house was referred to as the DTD [national organization] Annex house); Rogers v. Sigma Chi Int'l Fraternity, 9 N.E.3d 755, 759–61 (Ind. Ct. App. 2014) (holding there was no liability under premises liability because the national organization did not have control of the premises). *But see* Brown v. Delta Tau Delta, 2015 ME 75, ¶ 22, 118 A.3d 789, 795 (finding liability under Maine law for the national organization under a theory of premises liability because of a close relationship between the national fraternity and the local chapter members, the tort of sexual assault occurring in the chapter house was foreseeable, and the national organization controlled the local chapter “through constant monitoring, oversight, and intervention”). The holding of the *Brown* court extended premises liability to an “entity that did not own, possess, or manage the premises in question, but nonetheless knew the tort would happen.” Toby Franklin, Case Note, *Brown v. Delta Tau Delta: In A Claim of Premises Liability, How Far Should the Law Court Go to Assign a Duty of Care?*, 68 ME. L. REV. 363, 364 (2016).

chapter member's injuries that occurred during a chapter-sponsored event at a local bar.⁷⁴ The court found the national fraternity did not have control over the third-party bar, finding that to have control over the bar the national fraternity would need to be able to admit and exclude individuals from the bar's premises, a power the national fraternity does not have when using a third-party venue.⁷⁵ Thus, a theory of premises liability failed because the national organization did not have the necessary control to be considered a possessor of land—a third-party owned the bar and not the national organization—in order for liability to attach.⁷⁶

5. Special Relationships

Several courts have considered the existence of a special relationship in the fraternity context under the *Restatement (Second) of Torts* ("Second Restatement").⁷⁷ Recognition of a special relationship creates a duty of reasonable care under certain circumstances where society recognizes that a potentially vulnerable party may require protection from another party in a superior position to provide that protection.⁷⁸ In *Doe v. Andrews*, the plaintiff, a victim of a sexual assault by a local chapter member during a chapter-sponsored house party, alleged a special relationship between herself and the national organization or between her assailant and the national organization.⁷⁹ The court found neither special relationship because there was a lack of evidence that the national fraternity had the means or ability to control the local chapter member.⁸⁰

The Sixth Circuit in *Shaheen v. Yonts* also considered the existence of a special relationship between a national organization and local chapter members when a local chapter member consumed alcohol before going to the local chapter house and then later drove

74. *Brakeman v. Theta Lambda Chapter*, No. 01-0250, 2002 WL 31640619, at *3 (Iowa Ct. App. Nov. 25, 2002).

75. *See id.* at *2–3.

76. *Id.* at *3.

77. *See infra* notes 79–89 and accompanying text.

78. *See infra* Section III.B.

79. *Doe v. Andrews*, No. 3:15-CV-1127, 2017 U.S. Dist. LEXIS 126101, at *11, *30 (M.D. Tenn. Aug. 9, 2017).

80. *Id.* at *30.

drunk, killing the victim.⁸¹ The court analyzed whether finding a special relationship with the national organization would reduce the risk of the harm that actually occurred.⁸² Here, the court found a special relationship that imposed a duty would not have reduced the risk because the local member drank before going to the local chapter house; the drinking was not in relation to a chapter activity and thus the national organization could not have helped to reduce the risk.⁸³

Yet there are several cases where the court found that a special relationship between a national organization and local chapter could exist, but subsequent case history establishing a special relationship does not exist—suggesting these cases settle before the court establishes precedent.⁸⁴ In *Carnahan v. Alpha Epsilon Pi Fraternity*, a district court considered the issue at the pleading stage and held that the plaintiff pled sufficient facts to infer a special relationship to overcome the defendant’s motion to dismiss.⁸⁵ The court analogized the relationship between a national fraternity and its local members to that of “the economic benefits businesses and innkeepers derive from customers and guests, respectively.”⁸⁶ The plaintiff here was able to overcome the defendant national organization’s motion to dismiss, but the special relationship issue was not considered on appeal because the national organization was dismissed from the suit.⁸⁷ In

81. *Shaheen v. Yonts*, 394 F. App’x 224 (6th Cir. 2010) (considering a special relationship under Kentucky law).

82. *Id.* at 229.

83. *Id.*

84. *See Krueger v. Fraternity of Phi Gamma Delta, Inc.*, No. 004292G, 2001 WL 1334996, at *4 (Mass. May 18, 2001) (“Moreover, based on the allegations in the complaint and the reasonable inferences drawn therefrom, this court believes that the plaintiff may be able to produce evidence, first, of a special relationship between Krueger [the local chapter member] and FIJI National sufficient to give rise to a duty of reasonable care on the part of FIJI National toward him”) But there is no subsequent case history finding that such a relationship existed.

85. *Carnahan v. Alpha Epsilon Pi Fraternity, Inc.*, No. C17-86RSL, 2017 WL 5629502, at *2 (W.D. Wash. Nov. 22, 2017).

86. *Id.* at *2. The court also stated that a number of the cases cited by the defendant national organization were distinguishable from the case as they did not involve fraternity members as plaintiffs. *Id.* at *3.

87. *Id.* at *2–3. Stipulation to Dismiss Defendant Alpha Epsilon Phi Fraternity, Inc. and Order of Dismissal, *Carnahan v. Alpha Epsilon Pi Fraternity, Inc.*, No. 2:17-CV-00086 (W.D. Wash. June 19, 2018).

Mann v. Alpha Tau Omega Fraternity, Inc., the court also considered the existence of a special relationship between the national organization and the local chapter.⁸⁸ The court noted that the national organization had not “affirmatively demonstrate[d] that it lacked control or that control cannot be proven at trial.”⁸⁹ While there is not subsequent history for this case where a special relationship was affirmatively found, the importance of the court noting that a special relationship could exist should not be ignored.

In the few cases mentioned in the footnotes above in which courts found liability, the courts based those decisions on the consent of the national organization to the existence of an agency relationship, admission of specific knowledge of prior hazing within the local chapter, and the court finding the national organization controlled the local chapter and could foresee the tort.⁹⁰ Typically the national organization is free from liability, presenting a roadblock to the plaintiff seeking to recover from his injuries.⁹¹

While neither of the above referenced special relationship cases have subsequent appellate history affirmatively establishing a special relationship, this existing case law supports that a court could find a special relationship exists between the national organization and its local chapter members, imposing an affirmative duty of reasonable care upon the national organization for injuries that result from hazing.

C. Settlements as a Roadblock to Liability

Despite the prevalence of hazing and other fraternity related injuries,⁹² there is a limited amount of case law imposing liability on the national organization, most likely the result of settlements that occur before trial. Settlement is an attractive option for the national

88. *Mann v. Alpha Tau Omega Fraternity, Inc.*, No. W2012-00972-COA-R3-CV, 2013 Tenn. App. LEXIS 198, at *9–23 (Tenn. Ct. App. Mar. 22, 2013).

89. *Id.* at *22.

90. *See* *Brown v. Delta Tau Delta*, 2015 ME 75, ¶ 22, 118 A.3d 789, 795; *Morrison v. Kappa Alpha Psi Fraternity*, 31805-CA, p. 14–17 (La. App. 2 Cir. 5/7/99); 738 So. 2d 1105, 1118–20; *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488, 495 (S.C. Ct. App. 1986).

91. *See supra* Section II.B.

92. *See supra* notes 5–10 and accompanying text.

organization; settling the claim is cost-effective, more efficient, and better for chapter morale than a trial where a jury could award damages to an arguably sympathetic plaintiff.⁹³ Likewise, it may be easier for the plaintiff to avoid litigation costs, a negative ruling, and reliving the incident. Perhaps most significantly, settlement avoids the risk of establishing adverse judicial precedent that could establish liability in future litigation.⁹⁴ Additionally, because of the structure of some fraternities' insurance, it matters which entities or individuals are found liable.⁹⁵ Tort remedies provide compensation for the injured party, but deterring negligent actions is also a goal of tort litigation.⁹⁶ Despite settlement's benefits, which will continue to be an attractive option for both national organizations and plaintiffs, this

93. See Flanagan, *Dark Power*, *supra* note 17.

94. Consider that the subsequent litigation against the national organization resulting from Tim Piazza's hazing death settled before trial. Press Release, Beta Theta Pi, Beta Theta Pi and Piazza Family Reach Settlement in Wake of Tragic Penn State Death (Sept. 4, 2018), <https://beta.org/about/beta-theta-pi-and-piazza-family-reach-settlement/>. While this case settled for an undisclosed amount, providing some compensation to grieving parents, it furthers the argument that national Greek life organizations would prefer to settle than establish negative precedent, which may preclude the issue of liability from reaching a trier of fact. *Id.*

95. As litigation increased against fraternities in the 1980s, many organizations found they were losing their insurance coverage. Flanagan, *Death at Penn State*, *supra* note 3. Ranked riskier than hazardous waste disposal companies, Fraternities were the sixth riskiest groups to insure. FRATERNAL INFO. AND PROGRAMMING GRP., *supra* note 38, at 2. As a result, several organizations came together to self-insure, creating a trust. Shane Kimzey, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 469–72 (1997).

The local chapter member's intentional acts remove them from insurance coverage, with no effect on the national organization because that member is in violation of the fraternity's risk management policies and procedures. Flanagan, *Dark Power*, *supra* note 17. While the member is already liable for their intentional acts, they are further exposed because they are no longer under the coverage of the fraternity's insurance. See generally Kimzey, *supra*, at 468–69, for a discussion on the development of fraternity self-insurance. A collateral effect of self-insurance is the risk of moral hazard, where due to the guarantee of insurance, the organization is less likely to take precautions against risk. *Id.* at 480. Thus, because of the safety net of insurance, the national organization may not be as incentivized to incorporate drastic change. *Id.* Also, as these individual members often do not have their own insurance, their parent's homeowner's insurance is typically the source of damages. *Id.*

96. See *supra* notes 20–21 and accompanying text.

Note argues for the recognition of a special relationship if the issue reaches trial, and the parties do not reach a settlement. The pervasive and dangerous nature of hazing and the roadblocks to finding liability for the national organization necessitates finding a special relationship between the national organization and its local chapter members.

III. DUTY ARISING FROM A SPECIAL RELATIONSHIP

This Note advocates that courts recognize a special relationship to impose a duty of reasonable care for risks that arise within the national organization-local member relationship under a theory of negligence. This Part begins by discussing tort law's general principles regarding the nonfeasance doctrine and the exceptions to that doctrine, focusing specifically on duties to aid or protect others arising from a special relationship. Part IV then proposes that courts recognize a special relationship between national Greek life organizations and local chapter members as determined by applying a multi-factor balancing test because plaintiffs run into roadblocks in pinning the national organization with liability for hazing-related injuries.⁹⁷

While the issue of a duty is decided as a question of law,⁹⁸ a trier of fact determines the remaining elements of a negligence claim: whether the defendant national fraternity breached the duty it owed to the plaintiff, whether there is a causal connection between the breach and the injury, and if there was injury or damage to the plaintiff.⁹⁹ For a fraternity member injured in a hazing accident to succeed on a negligence claim, the defendant national organization must owe a duty of care to the local member plaintiff.¹⁰⁰ Until courts find a basis for a duty, the other elements of negligence will never reach a trier of fact for consideration.

97. See *supra* Part II (outlining the roadblocks to liability that plaintiffs face in litigation against national Greek life organizations).

98. *Doe v. Andrews*, No. 3:15-CV-1127, 2017 U.S. Dist. LEXIS 126101, at *18 (M.D. Tenn. Aug. 9, 2017) (citing *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005)) (stating whether a plaintiff is owed a duty of care is a question of law).

99. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 164–65 (5th ed. 1984).

100. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366 (3d Cir. 1993).

A. Nonfeasance and Affirmative Duties

When a plaintiff alleges negligence against the defendant national organization, the plaintiff must prove that the national organization owed a duty of reasonable care to the local fraternity member.¹⁰¹ Ordinarily, a defendant has a duty to exercise reasonable care when the defendant's conduct creates the risk of foreseeable harm.¹⁰² Thus, a defendant whose conduct does not create the risk of physical harm has no duty of care to another.¹⁰³ But under the *Third Restatement* there are seven affirmative duty exceptions to the general rule of nonfeasance that impose a duty of reasonable care for the circumstances, including the exception that is the focus of this Note: an affirmative duty based upon the existence of a special relationship.¹⁰⁴ Section 38 creates an affirmative duty when a statutory provision requires an actor to protect another.¹⁰⁵ Under section 39, an actor that creates a continuing risk of physical harm owes a duty to exercise reasonable care to prevent or decrease the harm.¹⁰⁶ Section 41 also creates an affirmative duty based on a special relationship, but the duty is to a third party based on the actor's relationship with the person posing the risk.¹⁰⁷ Per section 42, when an individual undertakes an action to render help to another or knows that such action will reduce the risk of physical harm to another, that actor is under an affirmative

101. *See id.*

102. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. LAW INST. 2012); *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 278 (N.J. 1958) (quoting *Heaven v. Pender* [1883] QB 11 at 509 (Eng.)) (“Whenever one person is placed by circumstances in such a position with regard to another that every one of ordinary sense . . . would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”).

103. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 (AM. LAW INST. 2012) (“An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable.”).

104. *Id.* §§ 38–44.

105. *Id.* § 38.

106. *Id.* § 39.

107. *Id.* § 41.

duty of reasonable care.¹⁰⁸ Likewise, under section 43, an actor's undertaking to render help to another can impose a duty of care towards a third party who might be exposed to harm because of the undertaking.¹⁰⁹ Lastly, section 44 provides that an affirmative duty of reasonable care arises when an actor takes charge of another.¹¹⁰

B. Nonfeasance Exception: Special Relationships

The affirmative duty exception to nonfeasance known as the special relationship exception found in section 40 relies upon the existence of a special relationship between the defendant and the plaintiff.¹¹¹ This nonfeasance exception provides courts with a tool to impose a duty on a national organization by recognizing a special relationship between the national organization and its individual members for hazing-related injuries. The existence of a special relationship is a question of law.¹¹² Currently, the *Third Restatement* section 40 recognizes several specific relationships that give rise to a duty:

- (b) Special relationships giving rise to the duty provided in Subsection (a) include:
 - (1) a common carrier with its passengers,
 - (2) an innkeeper with its guests,
 - (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
 - (4) an employer with its employees who, while at work, are:
 - (a) in imminent danger; or
 - (b) injured or ill and thereby rendered helpless,
 - (5) a school with its students,
 - (6) a landlord with its tenants, and
 - (7) a custodian with those in its custody, if:

108. *Id.* § 42.

109. *Id.* § 43.

110. *Id.* § 44.

111. *Id.* § 40.

112. *Id.* § 40 cmt. e.

- (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and
- (b) the custodian has a superior ability to protect the other.¹¹³

These special relationships require that the actor owe the other “a duty of reasonable care with regard to risks that arise within the scope of the relationship.”¹¹⁴ Subsection (a) provides an important limitation on the special relationship: the duty of reasonable care does not extend to risks that are outside of the relationship confines.¹¹⁵ Special relationships identify relationships in which individuals need protection and that warrant intrusion on one’s autonomy.¹¹⁶ These relationships sometimes represent a compromise by placing an affirmative duty on the party in a superior position to provide protection to potentially vulnerable individuals.¹¹⁷ The specific special relationships found in the *Third Restatement* illustrate a change from the *Second Restatement* and the drafters’ recognition of a need to broaden the categories of special relationships.¹¹⁸

113. *Id.* § 40(b).

114. *Id.* § 40(a).

115. *Id.* § 40 cmt. f.

116. *Id.* § 40 cmt. h.

117. *Id.* § 40 cmt. g.

118. The *Second Restatement* contains a special relationship provision in section 314A that imposes an affirmative duty based on certain special relationships. Under the *Second Restatement*, special relationships exist under four circumstances. RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965) (“(1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. (2) An innkeeper is under a similar duty to his guests. (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation. (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.”).

The *First Restatement of Torts* did not originally contain a provision dealing with special relationships. RESTATEMENT (SECOND) OF TORTS § 314A reporter’s notes (AM. LAW INST. 1965). The additional special relationships in the *Third Restatement* illustrate the drafter’s willingness to recognize new special relationships as society requires.

The *Third Restatement* added new special relationships not found in the *Second Restatement's* section 314A illustrating that “[c]hanging social conditions lead constantly to the recognition of new duties.”¹¹⁹ Significantly, section 40’s list of special relationships is not intended to be an exclusive list.¹²⁰ Courts continue to recognize new special relationships as they have since the *Second Restatement*.¹²¹ For example, a school’s special relationship with its students was not in the *Second Restatement* but is now found in the *Third Restatement*.¹²² A special relationship between a national organization and its local chapter members provides a new duty that courts should recognize given the “changing social conditions” that acknowledge the prevalence and danger of hazing on college campuses.¹²³ Courts should impose a duty of reasonable care on the national organization to protect its local members from hazing injuries.

IV. SPECIAL RELATIONSHIP BETWEEN THE NATIONAL ORGANIZATION AND ITS MEMBERS

Policy, precedent, and logic all support recognizing a special relationship between the national Greek life organization and its local chapter members.¹²⁴ In the area of special relationships, the variety

119. *Bogenberger v. Pi Kappa Alpha Corp.*, 104 N.E.3d 1110, 1132 (Ill. 2018) (Theis, J., dissenting in part and concurring in part) (citing *KEETON ET AL.*, *supra* note 99, § 53, at 359).

120. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. o (AM. LAW INST. 2012).

121. *Id.* (“Courts may, as they have since the *Second Restatement*, identify additional relationships that justify exceptions to the no-duty rule contained in § 37.”).

122. *Id.* § 40(b)(5); *see also id.* § 41(b)(4) (illustrating another example of the addition of new special relationships between actors and third parties by adding a special relationship between a mental-health professional and his patients).

123. *See supra* notes 3–9, 15–16 and accompanying text.

124. *See supra* notes 120–134 and accompanying text; *see also* Benjamin D. Ganellen, Note, *When Marching to the Beat of the Drum Means Beating the Drummer: An Analysis of Hazing in University Marching Bands*, 2016 U. ILL. L. REV. 2309, 2312 (2016) (arguing that the multi-factor test from *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993), could be modified and applied to hazing incidents that occur within university marching bands). This Note was inspired by Ganellen’s use of case precedent to argue that universities should protect marching band members from hazing.

of circumstances that lead to hazing incidents and the difficulty in creating and applying a bright-line rule that does not impose too burdensome of a duty support a multi-factor test. A multi-factor test provides flexibility, allows courts to consider the totality of the circumstances, and keeps the burden imposed on the national organization within reasonable bounds.

Courts consider special relationships outside of those explicitly noted in the *Restatements*, providing judicial precedent to support the use of a multi-factor test. For example, the Third Circuit in *Kleinknecht v. Gettysburg College* held that a special relationship exists between a college and its student athletes by considering several factors: the school actively recruited the student athlete, the injury occurred while the student acted in his capacity as a student athlete, and the school benefited from the student athlete.¹²⁵ The court limited its holding in *Kleinknecht* to recruited student athletes when participating in school-sponsored events.¹²⁶ Likewise, a narrow holding establishing a special relationship between the national organization and its chapter members for hazing incidents utilizing the multi-factor test outlined below will limit the special relationship from reaching too far.

Additionally, the court in *Carnahan v. Alpha Epsilon Pi Fraternity, Inc.* stated that when deciding if a special relationship exists, “courts look to the plaintiff-defendant relationship, the defendant-tortfeasor relationship, the defendant’s knowledge of the risk posed, and the defendant’s ability to prevent it.”¹²⁷ The court found that the plaintiff pled sufficient facts to infer a special relationship with the national organization to overcome the defendant fraternity’s motion to dismiss by alleging:

125. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366–69 (3d Cir. 1993). Additionally, the Court analyzed the foreseeability of the harm and found that the foreseeable risk of the harm was unreasonable. *Id.* at 1369–70. The holding is limited to the specific situation presented by the facts, that a college owes a duty to provide prompt emergency medical treatment to its student athletes who are engaged in school-sponsored activities where the student was actively recruited. *Id.* at 1371.

126. *Id.*

127. *Carnahan v. Alpha Epsilon Pi Fraternity, Inc.*, No. C17-86RSL, 2017 WL 5629502, at *2 (W.D. Wash. Nov. 22, 2017) (analyzing the existence of special relationships under Washington law).

[T]hat he . . . [was] recruited to join AEP, that he . . . rushed and pledged membership to AEP . . . that AEP provided [him] membership and a place to live (for which dues and housing fees were presumably paid), and that AEP was repeatedly disciplined for violating rules against providing alcohol to minor members.”¹²⁸

In *Davidson v. University of North Carolina at Chapel Hill*, the court recognized a special relationship between a university and a student athlete based on mutual dependence and control by the university.¹²⁹ The court in *Doe v. Andrews* considered a balancing test to determine if a special relationship existed between a third-party sexual assault victim and a national fraternity when a local chapter member committed the assault.¹³⁰ Specifically, that test calls for courts to consider:

[T]he foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.¹³¹

Further, other courts recognized an extension of special relationships when policy so required.¹³² In *Tarasoff v. Regents of University of California*, the California Supreme Court recognized a special relationship between a therapist and the victim of one of the therapist’s

128. *Id.*

129. *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927–28 (N.C. Ct. App. 2001) (finding a special relationship between the university and an injured cheerleader).

130. *Doe v. Andrews*, No. 3:15-CV-1127, 2017 U.S. Dist. LEXIS 126101, at *20–21, *33–34 (M.D. Tenn. Aug. 9, 2017).

131. *Id.* at *20 (quoting *Biscan v. Brown*, 160 S.W.3d 462, 479–80 (Tenn. 2005)).

132. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342–49 (Cal. 1976).

clients.¹³³ Courts have considered multiple factors when deciding whether a special relationship exists, including special relationships not named in the *Third Restatement*.

Prosser stated, “[duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”¹³⁴ Due to the increasing number of fraternity hazing-related deaths and injuries, policy supports finding a special relationship between the national organization and its local members to protect the local chapter members.¹³⁵ Special relationships identify individuals that are in need of protection and circumstances in which one’s ability to protect himself is better placed with the party in a superior position to provide such protection.¹³⁶ The national organization fits this description. A hazed fraternity pledge lacks the ability to protect himself in situations of hazing, particularly when that pledge is trying to gain membership in the group. The vulnerable position of the pledge warrants a special relationship between the pledge and the national organization because the national organization, if imposed with a duty of reasonable care, will be incentivized to increase educational support and take stronger action to prevent hazing in its local chapters.¹³⁷

As the *Third Restatement* recognizes additional duties not found in the *Second Restatement*, new duties can emerge “where, in general, reasonable persons would recognize it and agree that it ex-

133. *Id.* (extending a special relationship from a therapist to the victim of one of the therapist’s patients when the patient told the therapist he wanted to kill the victim).

134. *Id.* at 342 (citing PROSSER, LAW OF TORTS 332–33 (3d ed. 1964)).

135. *See supra* notes 4–9 and accompanying text.

136. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. g, h (AM. LAW INST. 2012); *see Bogenberger v. Pi Kappa Alpha Corp.*, 104 N.E.3d 1110, 1139 (Ill. 2018) (Theis, J., dissenting in part and concurring in part) (“Seeking the prestige of what being a Pi Kappa Alpha meant, as well as housing for the following school year, pledges put themselves at the mercy of the fraternity. And in doing so, *they became unable to protect themselves.*”) (emphasis added).

137. *See* Press Release, Beta Theta Pi, *supra* note 94 (stating that the national organization is adopting reforms to combat hazing, increasing education programs for members, encouraging accountability of members, and has voted to make all fraternity properties substance-free).

ists.”¹³⁸ Further, as society’s conception of people’s relation to institutions evolve so too should the law of duties evolve.¹³⁹ A special relationship that imposes an affirmative duty of reasonable care on the national organization does not unduly burden the national organization as the national organization has access to more resources than the local chapter to curb future hazing incidents.¹⁴⁰ The roadblocks to pinning liability on the national organization¹⁴¹ coupled with the policy considerations¹⁴² that the national organization is in the best position to curb hazing incidents support a court finding that a special relationship exists by considering several factors.

A. Proposed Multi-Factor Test

A multi-factor test, rather than a bright-line rule, is a better way to assess whether a special relationship exists between a national organization and local chapter members because it provides the court with flexibility, the means to assess the totality of the circumstances, and limits when the special relationship arises by not always imposing a duty upon the national fraternity. This limit is important for several reasons. It protects the national organization from absolute

138. KEETON ET AL., *supra* note 99, § 53, at 359.

139. *Id.* (citing William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12–15 (1953)).

140. *Edwards v. Kappa Alpha Psi Fraternity, Inc.*, No. 98-C-1755, 1999 U.S. Dist. LEXIS 18247, at *18–19 (N.D. Ill. Nov. 17, 1999) (citing *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1197–98 (Ill. App. Ct. 1987)). The court in *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity* stated:

When required to consume such large amounts of alcohol, it is foreseeable and likely that injuries will occur. Even the injury alleged here is foreseeable. *It is a small burden to guard against such injuries.* The activity was clearly an illegal hazing activity and discouraged by defendant’s own parent organization. Finally, we can think of no better party to bear the burden of plaintiff’s injuries than the one that required him to sustain them. The result is then predictable. A fraternal organization, held in high esteem, is to be liable for injuries sustained when requiring those seeking membership to engage in illegal and very dangerous activities.

507 N.E.2d at 1197–98 (emphasis added).

141. *See supra* Section II.

142. *See supra* notes 132–34 and accompanying text.

liability;¹⁴³ the national fraternity *should not be liable in all circumstances*, particularly for individual members' unforeseeable rogue acts. Next, the factors composing the balancing test will allow the national organization to understand in advance when liability could arise through a special relationship and take precautionary measures to help minimize risk. The factors that courts should consider are: (1) the benefits of membership to both the national organization and the local member; (2) whether the incident occurred in relation to chapter activities; (3) whether the national organization knew or should have known of prior similar incidents of hazing; and (4) the extent of the national organization's control over the local chapter. The next sections explain the relevance and application of each factor in the multi-factor balancing test.

1. Benefits of Membership

The first factor to consider is the benefits of membership the national organization derives from its individual members and, conversely, the benefits the individual member derives from the national organization. Many of the recognized special relationships under the *Third Restatement* section 40 involve those in which the actor receives some benefit.¹⁴⁴ For example, a business owner has the potential to receive an economic benefit from a customer as does an innkeeper from its guests.¹⁴⁵ Likewise, an employer receives benefits from its employees, such as their skill and expertise, that can contribute to recruiting other employees in the future.¹⁴⁶ Further, the *Third Restatement's* comments provide "[t]hat a defendant [who] derives a commercial advantage from the relationship has also been influential in the identification of special relationships."¹⁴⁷

143. Absolute or strict liability is "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe." *Strict liability*, BLACK'S LAW DICTIONARY (9th ed. 2009).

144. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 reporters' note, cmt. h. (AM. LAW INST. 2012).

145. *See id.* § 40(b)(2)–(3); *Carnahan v. Alpha Epsilon Pi Fraternity, Inc.*, No. C17-86RSL, 2017 WL 5629502, at *2–3 (W.D. Wash. Nov. 22, 2017).

146. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40(b) (AM. LAW INST. 2012).

147. *Id.* § 40 reporters' note, cmt. h.

The Third Circuit addressed this factor, in *Kleinknecht v. Gettysburg College*, in the context of a special relationship between a university and its student athletes by examining the benefits that a university can derive from student athletes, including the benefit that an athlete will bring in recruiting other students.¹⁴⁸ The court found a special relationship existed, stating, “[w]e cannot help but think that the College recruited [the student athlete] for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students.”¹⁴⁹ A school also receives economic benefits from student athletes whose games and sporting events generate revenue for the university.¹⁵⁰

National fraternities receive benefits from their members. For example, the national organization derives an economic benefit from its members when members pay dues to belong to the organization, much like “the economic benefits businesses and innkeepers derive from customers and guests, respectively,” or like the revenue benefits a university receives from a special relationship with its student athletes.¹⁵¹ Like other recognized special relationships, this economic

148. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1368 (3d Cir. 1993); see also Nick White, *Taking One for the Team: Should Colleges be Liable for Injuries Occurring During Student Participation in Club Sports?*, 7 VAND. J. ENT. L. & PRAC. 193, 196, 200 (2005) (stating that a noneconomic benefit universities receive from student athletes is “advertising them to prospective students”).

149. *Kleinknecht*, 989 F.2d at 1368.

150. See *Top School Revenue, 2016–17 Finances*, USA TODAY: SPORTS, <http://sports.usatoday.com/ncaa/finances/> (last visited Feb. 5, 2019) (detailing the revenue that colleges and universities receive from student athletics).

151. *Carnahan v. Alpha Epsilon Pi Fraternity, Inc.*, No. C17-86RSL, 2017 WL 5629502, at *2 (W.D. Wash. Nov. 22, 2017); see *Bogenberger v. Pi Kappa Alpha Corp.*, 104 N.E.3d 1110, 1139 (Ill. 2018) (Theis, J., dissenting in part and concurring in part) (“[T]he national organizations were engaged in the business of recruiting new members and derived most of their income from fees paid by members and pledges.”) (citations omitted); see also David Glovin, *Fraternities Resist Blame for Tragedies*, THE DAILY REPORT (Mar. 29, 2013, 12:00 AM), <https://www.law.com/almID/1202593945401/?slreturn=20180213133336> (“Revenue from dues and other sources for national fraternities and their related charitable groups rose to at least \$170 million in 2010 from about \$150 million in 2005, Internal Revenue Service filings show. Local chapters earned many tens of millions more. Fraternities own and operate more than \$3 billion in real estate, according to the Fraternal Government Relations Coalition, a lobbying group.”).

benefit should factor into the national organization owing local chapter members a duty of reasonable care for protection from hazing.¹⁵²

Besides economic benefits, the national organization sets standards for the type of members it wishes its local chapters to recruit.¹⁵³ Each year the local chapter engages in recruitment efforts to offer bids to new members and derives benefits from those new members who meet the national organization's membership criteria.¹⁵⁴ "The national organizations acknowledge . . . that active members of the [local] Chapter 'were arguably "employed" to secure new members for the ongoing stability of the national Fraternity.'"¹⁵⁵ The national organization benefits when its members bring the organization "favorable attention" and assist in recruiting others to join the organization, much like a university benefits from current student athletes that help recruit new students. Likewise, the individual chapter members benefit from the national organization. The national organization provides the members brotherhood, philanthropic involvement, networking opportunities, scholarships, and leadership training.¹⁵⁶

2. Hazing Occurs During Chapter-Sanctioned Activity

The second factor courts should consider is whether the hazing incident occurred as part of chapter-sanctioned activities. Restricting tort duties to acts that occur within the special relationship's scope is a logical, fair limitation that permeates the law of special relation-

152. A distinction could be made between pledges and initiated members based upon when dues are paid to the fraternity, but the exact time of when dues are paid arguably varies among organizations and thus is outside the scope of this Note. The court could, however, consider this timing when weighing the factor.

153. *Carnahan*, 2017 WL 5629502, at *2.

154. *Bogenberger*, 104 N.E.3d at 1138 (Theis, J., dissenting in part and concurring in part).

155. *Id.* at 1129.

156. *Id.* at 1129, 1137; see Timothy M. Burke, *Interesting Greek Life Facts*, FRATERNAL LAW, June 2017, at 1, 5, <https://fraternallaw.com/wp-content/uploads/2018/07/Fraternal-Law-Newsletter-June-2018.pdf> ("Those chapters are a unique community of support, providing opportunities for leadership development, civic engagement, personal growth, health and safety and academic success.").

ships.¹⁵⁷ This factor ensures that national organizations are not imposed with blanket liability for all incidents and focuses the analysis to only those hazing incidents that are chapter sanctioned.

The special relationship should not be limited to just chapter-sponsored or university-recognized events but should also include any chapter-sanctioned event—including those events the national organization or university might not approve, but the chapter nonetheless carries on the activity. Many hazing incidents take place during chapter “traditions” that directly violate both university and national organization policy.¹⁵⁸ In *Bogenberger v. Pi Kappa Alpha Corp.*, for example, the local chapter officers coordinated a “Mom and Dad’s Night” requiring pledges to participate and drink excessive amounts of alcohol.¹⁵⁹ The local chapter event did not comply with the national organization’s guidelines and was not registered with the university.¹⁶⁰ While not official chapter events, these types of chapter traditions are nonetheless chapter-sanctioned activities, particular-

157. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. f (AM. LAW INST. 2012).

158. See *Bogenberger*, 104 N.E.3d at 1119–21; Grand Jury Report, *supra* note 3, at 11.

159. *Bogenberger*, 104 N.E.3d at 1115. The court described the chapter tradition at issue in the case:

The plan designated seven rooms in the fraternity house to which two or three “Greek couples” would be assigned. The members were directed to obtain vodka for the pledges to consume during the event and to contact sorority women to serve as “Greek Mothers.” Each member would select a pledge for whom he and a sorority woman would serve as the pledge’s “Greek Mother and Father.” Couples were to ask the pledges various questions and give them a specific amount of alcohol, regardless of their answers. Pledges would be divided into groups of two or three and would rotate from room to room every 10 minutes. The plan called for most, if not all, pledges to become unconscious. Certain areas of the house were designated as places where pledges could “pass out.” Pledges would be checked periodically, and their heads and bodies would be positioned in such a way so that if they vomited, they would not choke. Officers kept Breathalyzers and would use them to measure the pledges’ blood alcohol level.

Id.

160. *Id.*

ly when coordinated by chapter officers.¹⁶¹ Thus, courts should analyze the context of where and when the hazing incident occurred, and a finding that the hazing occurred during a chapter-sanctioned activity should weigh towards finding a special relationship.

The duties imposed by section 40 are applicable only to risks that occur within that special relationship—for instance, a school owes a duty of reasonable care to its students while at school or engaged in school-related activities, but the duty ends after the student leaves the school or school-related activity.¹⁶² Additionally, if a restaurant patron suffers an asthma attack outside of the restaurant after finishing his meal, even though a waitress witnesses the former patron's medical condition occur and does nothing, neither the waitress nor the restaurant is subject to liability because the incident occurred outside of the scope of the special relationship between a restaurant and its patrons.¹⁶³ Once the plaintiff is outside the special relationship's confines, the duty no longer exists.¹⁶⁴ Likewise, the special relationship between a national organization and its members should not extend outside of chapter-sanctioned activities. Consider that the national organization should not be liable if two members decided to take a pledge, without direction of a chapter officer or in conjunction with chapter activities or traditions and haze him. In this hypothetical, the hazing is committed by rogue members and, while they may all be members of the same fraternity, it was not in relation to a sanctioned chapter activity and is thus outside of the scope of the special relationship that should exist between the national organization and local members. To weigh in favor of recognizing a special relationship, the hazing must occur within the scope of chapter-sanctioned activities.

161. *See id.* at 1115 (stating that certain local chapter officers approved the plan for the hazing activities in the days before the incident).

162. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. 1 (AM. LAW INST. 2012).

163. *See id.* § 40 cmt. f, illus. (providing examples of when something arises outside the scope of the affirmative duty imposed by a special relationship).

164. *Id.*

3. Prior Similar Incidents of Hazing

Prior similar incidents of hazing are a particularly relevant factor to consider in imposing a duty because it shows that the national organization either knew *or should have known* that hazing was likely to occur in the future. If the national organization has knowledge of hazing in its local chapter, this element is easily met.¹⁶⁵ The national organization oftentimes contests that it had such knowledge and instead claims it did not know about the hazing events because it lacks control of the local chapter's day-to-day operations.¹⁶⁶

The prior similar incidents test—one test courts use to establish foreseeability and duty in third-party criminal attack cases—recognizes a duty when there have been previous similar criminal attacks on or near the premises.¹⁶⁷ The prior similar incidents test provides helpful guidance in determining whether a special relationship exists between the national organization and local chapters because hazing is criminal conduct.¹⁶⁸ Courts that employ the prior similar incidents test consider the number of prior incidents, their location, the timing of the incidents, and the similarity in the crimes.¹⁶⁹ In

165. See *Edwards v. Kappa Alpha Psi Fraternity, Inc.*, No. 98-C-1755, 1999 U.S. Dist. LEXIS 18247, at *18–21 (N.D. Ill. Nov. 17, 1999) (finding duty when the national organization had knowledge of prior hazing); *Morrison v. Kappa Alpha Psi Fraternity*, 31-805, p. 14–17 (La. App. 2 Cir. 5/7/99); 738 So. 2d 1105, 1118–19 (imposing duty on the national organization when it had knowledge of prior hazing events within the local chapter).

166. See *infra* Section IV.A.4.

167. See *generally* *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 971–72 (Ind. 1999) (outlining several of the foreseeability tests that courts use in criminal third-party attack cases).

168. See *Hazing Law-Interactive State Map*, HAZINGPREVENTION.ORG, <https://hazingprevention.org/home/hazing/statelaws/> (last visited Oct. 30, 2018) (providing information about the hazing laws in each state).

169. *Delta Tau Delta*, 712 N.E.2d at 972. Courts also approach considerations of how proximate and similar the crimes need to be to establish foreseeability. *Id.* The Indiana Supreme Court compared two approaches, first that of the Alabama Supreme Court, which applied the prior similar incidents test strictly and did not find assault with a gun was foreseeable when there had been fifty-seven previously reported crimes over the past five years, six of which involved physical touching. *Id.* (citing *Baptist Mem'l Hosp. v. Gosa*, 686 So. 2d 1147, 1152–53 (Ala. 1996)). The Georgia Supreme Court, on the other hand, adopted a liberal interpretation of the prior similar incidents test finding that two previous burglaries in an apartment

Morrison v. Kappa Alpha Psi Fraternity, the court found it determinative that the national organization knew of prior hazing incidents at the local chapter, and thus that the current national procedures did not effectively prevent hazing.¹⁷⁰ The court also recognized a special relationship between the student and the university in *Morrison* because of the severity of harm caused by the hazing and the university's prior knowledge of hazing incidents within the local chapter.¹⁷¹

Typically, where the criminal act is within the scope of the risk created by an actor's conduct, courts are willing to find liability because "the risk of a criminal act is what made the original conduct negligent."¹⁷² Specifically, courts have imposed liability on business owners for not providing reasonable security measures to ensure the safety of patrons from criminal attacks.¹⁷³ One court noted a business can have a duty of reasonable care because "an atmosphere of violence existed on the premises."¹⁷⁴ Another court stated that both foreseeability and the gravity of the harm determine the duty the business owes and "[t]he greater the foreseeability and gravity of the

complex made a rape foreseeable. *Id.* (citing *Sturbridge Partners, Ltd. v. Walker*, 482 S.E.2d 339, 341 (Ga. 1997)). Policy considerations for the test include that the first victim will not be entitled to recover; a lack of enough prior similar incidents can prevent liability even where the crime was foreseeable; the test focuses too much on the specific crime and not foreseeability of the harm; and there is no incentive to implement security measures. *Id.* (citing *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 658–59 (Cal. 1985)). But these considerations are overcome in finding a special relationship as prior similar incidents of hazing is one of the factors for courts to weigh.

170. *Morrison v. Kappa Alpha Psi Fraternity*, 31805-CA, p. 14–17 (La. App. 2 Cir. 5/7/99); 738 So. 2d 1105, 1118–19. Additionally, the national organization did not follow its own procedures regarding hazing allegations at this local chapter, supporting a holding that the national organization had a duty to regulate, prevent, and protect members from hazing. *Id.*

171. *Id.* at 1115.

172. ANDREW JAY MCCLURG & BRANNON P. DENNING, GUNS AND THE LAW: CASES, PROBLEMS, AND EXPLANATION 350–51 (2016) (quoting the *Second Restatement of Torts* § 302B, "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal").

173. *Id.* at 350 (providing case examples where courts consider the duty of a business owner in failing to provide adequate security for customers).

174. *Id.* (quoting *Kroger Co. v. Knox*, 98 So. 3d 441, 443 (Miss. 2012)).

harm, the greater the duty of care that will be imposed on the business.”¹⁷⁵

Local chapters with a persistent hazing culture are arguably “atmosphere[s] of violence.”¹⁷⁶ Prior similar incidents of hazing increase the foreseeability that hazing will continue to occur in local fraternity chapters, whether the hazing occurs in one particular chapter or across several local chapters, because hazing in one chapter alerts the national organization that the current procedures in place are not working.¹⁷⁷ Furthermore, knowledge of other policy or procedure violations could also strengthen the argument that hazing violations might occur. Hazing has a high gravity of harm—it can result in serious injury or death.¹⁷⁸ Thus, because of the foreseeability that hazing could occur in local chapters and because of the high gravity of the harm, prior similar incidents of hazing should weigh in favor of recognizing a special relationship.

4. The National Organization’s Right to Control

The national organization’s control over the local chapter is a highly contested topic.¹⁷⁹ Control presents a unique conundrum for

175. *Posecai v. Wal-Mart Stores, Inc.*, 99-1222 (La. 11/30/99); 752 So. 2d 762, 768; see *McCLURG & DENNING*, *supra* note 172, at 350 (citing *Posecai*, 752 So. 2d 762).

176. *McCLURG & DENNING*, *supra* note 172, at 350 (citing *Kroger Co.*, 98 So. 3d at 443).

177. When hazing is alleged against one chapter, this alerts the national organization to the fact that additional hazing incidents could occur at another one of its local chapters, strengthening the argument for foreseeability of the harm. See *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 47–48 (Colo. 1987) (citing *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572, 576–77 (Cal. Ct. App. 1984)) (finding that evidence of prior armed robberies at the specific store supplemented with evidence of more than one robbery per year at other stores in the area was enough to make foreseeability a question of fact). While a court might not allow such a sweeping assumption, it does, perhaps, alert the national organization to the fact that the current measures in place to protect local chapter members from hazing are not working.

178. See *supra* notes 3–4.

179. See *Grenier v. Comm’r of Transp.*, 51 A.3d 367, 388 (Conn. 2012). The Connecticut Supreme Court in *Grenier v. Commissioner of Transportation* noted that liability is a function of control and also either acknowledges that risk management procedures are not being followed or that the local chapter is engaging in dangerous behavior. *Id.* In *Grenier*, the court found the national organization con-

the national organization: just how much interaction and authority can the national organization have with the local chapter's daily operations and still avoid liability? In court, national organizations assert they cannot dictate their local chapter's daily operations and therefore do not have control over them.¹⁸⁰ One court noted that just because the national organization “*does not* supervise the day-to-day operations of its local chapters does not equate to a finding that it *could not* exercise such supervision if it desired to do so or that it *should not* exercise such supervision based upon public policy considerations.”¹⁸¹ Another court, considering control and finding a special relationship between a university and its student athletes, stated that the university's *ability*—or right to control—to require standards of conduct, such as mandatory GPA requirements and restrictions on drinking in public, supported the court's finding that a special rela-

trolled the local chapter by providing funds to construct improvements on the chapter facility, the local chapter's use of chapter funds to purchase alcohol, the national organization following the industry standards of risk management policies, the national fraternity's ability to revoke local charters, and the remedial measures the national organization implemented as a result of the litigation-causing event. *Id.* at 389 (identifying the remedial measures taken by the national fraternity to change its transportation policies following the incident). *But see* *Yost v. Wabash Coll.*, 3 N.E.3d 509, 521 (Ind. 2014). Alternatively, the Supreme Court of Indiana found there was not sufficient control by the national organization to impose liability for a hazing injury sustained by a pledge in the fraternity house. *Id.* Despite well-established objectives for the local chapter to comply with promulgated by the national fraternity, the Indiana Supreme Court noted that the national organization lacked control because there were not any fraternity employees present in the chapter facility nor did it control the day-to-day functioning of the chapter. *Id.* The Indiana Supreme Court further noted policy concerns preclude finding a duty of care by the national organization. *Id.* The court stated: “Public policy concerns likewise do not favor recognition of a specific duty of care toward Yost by the national fraternity. . . . [T]he national organization . . . should be encouraged, not disincentivized, to undertake programs to promote safe and positive behavior and to discourage hazing and other personally and socially undesirable conduct.” *Id.* Yet programming alone does not impose a duty upon the national organization; it is a combination of resources but also direct control over the local chapter through other sources such as chapter consultants, alumni advisors, and headquarters staff.

180. *See, e.g.*, *Mann v. Alpha Tau Omega Fraternity, Inc.*, No. W2012-00972-COA-R3-CV, 2013 Tenn. App. LEXIS 198, at *3, *13–18 (Tenn. Ct. App. Mar. 22, 2013).

181. *Id.* at *21.

tionship existed.¹⁸² Thus, a similar inference can be made to distinguish the national organization's actual control and its right to control the local chapter; it is the national organization's ability to control that courts should weigh in determining whether a special relationship exists.

Courts should find this argument for control persuasive in making their decisions. In *Brown v. Delta Tau Delta*, the court found that the national organization controlled the local chapter "through constant monitoring, oversight, and intervention."¹⁸³ The *Brown* Court went through an in-depth review of the ways the national organization has the right to control the local chapter through its national by-laws and procedures, personnel on the ground reporting directly to the national organization, and through disciplinary powers. First, the national code of conduct, membership guidelines, constitution, and by-laws helped establish control.¹⁸⁴ The local chapter is required to establish its own by-laws that are in accordance with the national by-laws and constitution and must address chapter-specific risk management policies as well.¹⁸⁵ The local chapter must also implement certain nationally mandated educational programs, educate members about specific regulations regarding their conduct at chapter events, and ensure each member signs the national code of conduct.¹⁸⁶

Next the court noted two key positions that connected the local chapter to the national organization: the alumni advisor and the chapter consultant. First, the alumni advisor serves as a liaison to the national organization and a resource for the local chapter.¹⁸⁷ The alumni advisor's primary duties are to oversee the chapter's activi-

182. *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001).

183. *Brown v. Delta Tau Delta*, 2015 ME 75, ¶ 23, 118 A.3d 789, 795.

184. *Id.* at 794.

185. *Id.*

186. *Id.* ("The code requires members to refrain from sexual abuse and the abuse of alcohol, and also prohibits physical or psychological hazing and the use of illegal drugs."). The local chapter president is tasked with ensuring chapter members' compliance with the code of conduct and other national fraternity policies and procedures. *Id.*

187. *Id.* at 794–95.

ties, advise the local chapter officers, ensure compliance with the national rules, and report back to the national organization.¹⁸⁸

Representing a stronger connection of control over the local chapter is the chapter consultant. Chapter consultants are the national organization's employees who visit each local chapter several times a year.¹⁸⁹ The chapter consultant represents control because the consultant's role is to maintain a line of communication between the national organization and the local chapter. Specifically, during visits with the local chapter, the chapter consultant meets with the chapter's officers and advisors to gain an understanding of the chapter's operations.¹⁹⁰ Next, the chapter consultant works with the chapter to develop goals for improvement and reports back to the national organization on any areas of concern, including violations of policies and regulations.¹⁹¹

Finally, the *Brown* Court noted that the national organization's process for disciplining members established control.¹⁹² The local chapter must report all cases of misconduct to the national organization as members are entitled to certain "due process rights to notice

188. *Id.* at 795.

189. *Id.*

190. *Id.*

191. *Id.* (stating that potential violations could lead to investigations by the national organization and potential punishment for the chapter). Chapter consultants are typically positions held by alumni members who are one or two years out of undergrad themselves. The similarity in age of the chapter consultant and undergraduate members allows the chapter consultant to better connect with the local chapter. Chapter members and officers could be more likely to communicate information regarding potential risk management or other national policy violations to the chapter consultant rather than an older alumni advisor. Chapter consultants report violations to the national fraternity, often through extensive and detailed reporting mechanisms, which are shared with multiple alumni advisors at the national level as well as national organization staff. For example, a chapter consultant might learn the chapter is having unsanctioned parties that violate the national risk management policies or that the chapter is not properly educating all members on the risk management procedures. In *Brown*, the chapter president reported the alleged sexual assault to the chapter consultant and the following week, the fraternity expelled the accused member. *Id.* at 791; see also *Bogenberger*, 104 N.E.3d at 1138 (Theis, J., dissenting in part and concurring in part) ("[T]he national organizations, through its chapter consultants, exercised oversight of local chapters.").

192. *Id.* at 795.

and a hearing” when charged with a violation.¹⁹³ These individual charges run through the governing body, known as the Arch Chapter for the fraternity in *Brown*, thus illustrating the expansive control the national organization has over its local chapters’ individual membership.¹⁹⁴ But other courts have looked at similar factors and found there is no control present.¹⁹⁵

The *Brown* Court recognized what other courts have not: the national organization *does* maintain the ability to control the local chapter. Yet no national organization can constantly monitor the day-to-day happenings at each of its hundred-plus chapters nor control exactly how the individual members will behave. But through the developed mechanisms of the national organization, it does keep tabs on its local chapters through a variety of sources: reports from local officers, alumni advisers, the housing corporation; communications with the university; and by employing chapter consultants.¹⁹⁶ Each of the individuals in these roles can, and often do, have specific knowledge about the local chapter’s daily functions.¹⁹⁷ Therefore, the national organization has the ability to maintain control over its local chapters by “enforc[ing] its rules, regulations, and codes of conduct through constant monitoring, oversight, and intervention.”¹⁹⁸ Courts should weigh the national organization’s ability to control, plus the three other factors discussed, to determine the existence of a special relationship between the national organization and its local chapter members.

B. Applying the Special Relationship Factors to the Hypothetical

The proposed four factors—benefits of membership, hazing occurring at chapter-sanctioned activities, prior similar incidents of hazing, and the national organization’s control over the local chapter—

193. *Id.*

194. *Id.* (stating the national organization can levy sanctions such as “mandating educational workshops, imposing fines, conducting membership review, revoking a chapter’s privilege to hold events with alcohol, revoking a chapter’s charter, or suspending or expelling individual members”).

195. *See supra* note 179 and accompanying text.

196. *See supra* notes 179–91 and accompanying text.

197. *See supra* notes 185–91 and accompanying text.

198. *Brown*, 118 A.3d at 795.

—can be applied to the case of Tim Piazza (“Piazza”), discussed at the beginning of this Note.¹⁹⁹ The facts surrounding his hazing and subsequent death provide a concrete example of how to apply the proposed factors to establish a special relationship between the national organization and the local chapter.

Tim Piazza pledged Beta Theta Pi at Penn State University in the spring of 2017 and died the day after receiving his bid to join the fraternity.²⁰⁰ First, there was a benefit of membership both for the national organization and for Piazza. The national organization benefited from Piazza as a new pledge; he was a vibrant young man, athletic, and smart.²⁰¹ The national fraternity and local chapter would benefit from a member like Piazza because he would contribute a positive reputation to the organization and could assist in recruiting other high caliber young men to join the fraternity.²⁰² Piazza would also provide the national organization with an economic benefit by paying dues.²⁰³ The national organization would provide benefits to Piazza as well, namely a group to belong to while attending Penn State along with leadership and networking opportunities both as an undergraduate and alumni member.²⁰⁴ Therefore, there were benefits of membership for both the national fraternity and Piazza.

These facts also satisfy the second factor, whether the incident occurred at a chapter-sanctioned activity. Here, the hazing occurred the day after the local chapter extended Piazza a bid during the chap-

199. See *supra* Section I. As mentioned in *supra* note 94, Tim Piazza’s parents settled their suit against the national organization, Beta Theta Pi, for an undisclosed amount. Darran Simon & Rob Frehse, *Parents of Timothy Piazza Reach Settlement with Beta Theta Pi Fraternity After Pledge’s Death*, CNN (Sept. 5, 2018, 12:28 AM), <https://www.cnn.com/2018/09/05/us/piazza-family-fraternity-settlement-penn-state/index.html>. The settlement also requires Beta Theta Pi to implement several fraternity wide changes, such as making the fraternity properties substance-free and supporting measures to increase education initiatives for its chapter members. *Id.* While this specific case settled—furthering the point that there is a lack of case law finding liability because national organizations want to avoid negative precedent—the facts provide a helpful analysis for this multi-factor test.

200. Flanagan, *Death at Penn State*, *supra* note 3.

201. *Id.*

202. See *supra* notes 154–55 and accompanying text.

203. See *supra* note 151.

204. See *supra* note 156.

ter's annual bid acceptance night event.²⁰⁵ The local chapter held the event in the chapter facility.²⁰⁶ The chapter considered "the gauntlet" a chapter tradition, one that also took place in the semester preceding Piazza's death.²⁰⁷ Even though the event occurred in violation of the national organization's policies and procedures, the hazing nonetheless occurred during a chapter-sanctioned event that the pledges were required to attend to continue towards membership in the fraternity.²⁰⁸ The local chapter officers planned and coordinated the event.²⁰⁹ Thus, the hazing took place in relation to chapter activities.

Next, there were prior similar incidents of hazing.²¹⁰ The Penn State local chapter installed cameras throughout the chapter house because of constant partying.²¹¹ These cameras provided evidence of multiple policy violations, and the national organization shut down the Penn State chapter in early 2009 because the chapter was hazing and committing other policy violations; the chapter reopened in 2010.²¹² The local chapter alumni board knew of the local chapter's bad behavior but did not try to stop it.²¹³ The national organization also had knowledge of prior incidents of hazing with the local chapter.²¹⁴ The national organization should have known that hazing incidents could still take place in its local chapter based on the prior incidents of hazing that shut the chapter down in 2009 and the policy violations that the local chapter continued to commit.

Finally, the national organization maintained the right to control the local chapter. Beta Theta Pi's national organization estab-

205. See Grand Jury Report, *supra* note 3, at 1; see also Flanagan, *Death at Penn State*, *supra* note 3.

206. See Grand Jury Report, *supra* note 3, at 1.

207. See Grand Jury Report, *supra* note 3, at 2–3. The history of hazing at the chapter stretched back multiple semesters. *Id.* at 2–7; see also Flanagan, *Death at Penn State*, *supra* note 3.

208. Grand Jury Report, *supra* note 3, at 1.

209. See *id.* at 7–11.

210. See *id.* at 15–16.

211. *Id.* at 24.

212. *Id.*; see Flanagan, *Death at Penn State*, *supra* note 3.

213. Grand Jury Report, *supra* note 3, at 15.

214. See *id.* at 11–23. Flanagan, *Death at Penn State*, *supra* note 3. Additionally, the university was aware of hazing allegations. *Id.* At an orientation session in the fall of 2014, a parent spoke out about hazing following the university's assurance that Penn State was free of hazing. *Id.*

lishes guidelines, policies, and rules for the local chapters.²¹⁵ The local chapter pledge manual specifically prohibits alcohol and establishes how the local chapter is to run its new members' pledging process.²¹⁶ The national organization's policy also explicitly prohibits hazing.²¹⁷ Additionally, the local chapter had an involved housing corporation and alumni active in chapter relations.²¹⁸ The national organization monitored the local chapter through its alumni members and housing corporation, established specific guidelines for the local chapter, and thus had control over the local chapter. Therefore, based on these facts, the four factors weigh in favor of establishing a special relationship between the national organization and the local chapter where the national organization owes a duty of reasonable care to protect the local chapter pledges from hazing; this allows a trier of fact to next determine if the national organization breached that duty.

V. CONCLUSION

"It doesn't get better. . . . It hurts just as much now as it did a year ago."²¹⁹ Tim Piazza's parents are left wondering how their son died at the hands of his friends and questioning who could be held liable in subsequent civil litigation, although settlement with the national organization precludes liability in this case.²²⁰ Would judicial precedent recognizing a special relationship as a basis for establishing a tort duty between a national Greek life organization and its local

215. Lexi Shimkonis, *Full Grand Jury Presentment in Beta Theta Pi Case*, ONWARD ST. (May 5, 2017, 11:13 AM), <https://onwardstate.com/2017/05/05/document-full-grand-jury-presentment-in-beta-theta-pi-case/>.

216. *Id.*

217. *Id.*

218. Grand Jury Report, *supra* note 3, at 12, 15; *see also* Shimkonis, *supra* note 215.

219. Sean Rossman, *A Year Ago, Penn State's Tim Piazza Died, and His Parents Aren't Letting Up*, USA TODAY (Feb. 1, 2018, 3:52 PM), <https://www.usatoday.com/story/news/nation-now/2018/02/01/penn-state-tim-piazza-hazing-drinking-fraternities/1078862001/> (discussing the one-year anniversary of Tim Piazza's death with his parents and their anti-hazing movement to prevent future hazing deaths).

220. *See* Press Release, Beta Theta Pi, *supra* note 94; Simon & Frehse, *supra* note 199.

members have prevented Tim Piazza's death? Possibly. A realistic threat of tort liability is a powerful incentive to implement measures that will deter conduct and prevent hazing injuries.

Courts should recognize a special relationship between the national organization and its local fraternity members for hazing incidents when there is mutuality of benefits from membership, the hazing takes place during a chapter-sanctioned activity, there are prior similar incidents of hazing, and the national organization has practices in place that present it with the right to control the local chapter. Recognizing such a special relationship does not mean the national organization will always be found liable; the national organization must have breached its duty of reasonable care under the circumstances as found by the trier of fact.²²¹

Greek life organizations occupy an important place on the modern American college campus and continue to benefit members beyond their collegiate days. Yet hazing is a pervasive problem among sororities and fraternities,²²² and while hazing incidents might not always end in injury, those that do often end in grave injury or even death.²²³ Acknowledging this special relationship is one step towards curbing the number of hazing incidents that occur in the future and will necessitate that national organizations develop and promote meaningful change in their policies and procedures to limit future hazing injuries.

221. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. d (AM. LAW INST. 2012).

222. *See supra* notes 5–9 and accompanying text.

223. *See supra* notes 3–4 and accompanying text.