FRATERNIZING WITH FRANCHISES: A FRANCHISE APPROACH TO FRATERNITIES

ABSTRACT

Fraternities are founded on ideals such as scholarship, leadership, and community service, and provide benefits to their members such as lifelong friendship and leadership experience. But news headlines frequently highlight a dark side of fraternities and their members’ out-of-control conduct—hazing, sexual assaults, and excessive partying. Despite this conduct, national organizations may avoid liability for their local chapters’ actions. National organizations have insulated themselves from liability by not supervising local chapters actively, shifting responsibility, and developing policies that they know members may not follow. As one court expressed, it did not find a national organization liable in an effort to continue encouraging the fraternity to develop these policies.

Fraternities consist of a national organization and numerous local chapters located nationally, which operate similarly, hold the same values, and perform the same rituals. Fraternities are operationally and structurally similar to franchises. This Comment argues for courts to consider fraternities to be franchise arrangements and to apply franchise case law when determining the liability of national organizations. A franchise model provides a ready-made approach that considers fraternity structure and operation and finds liability when the requisite relationship and control exist. Accordingly, this Comment analyzes how fraternities are franchise arrangements and demonstrates the ready-made approach a franchise model provides by applying franchise liability to a fraternity using recent Maine cases.
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INTRODUCTION

Fraternities are founded on values and principles relating to community service, scholarship, and leadership. Fraternities are also beneficial for their members. For example, fraternity members often have higher grade point averages and higher graduation rates than unaffiliated students. Additionally, students in fraternities collectively raise millions of dollars for philanthropies and spend millions of hours serving the community annually. Further, fraternities help students establish valuable friendships and provide leadership opportunities and experience for their members. However, recent headlines reveal a dark side to fraternity life:

4. Jacobs, _supra_ note 2; see also Angela N. Marshlain, _Non-Hazing Injuries to Fraternity and Sorority Members: Should the Fraternal Association Be Required to Assume a Parental Role?_, 5 APPALACHIAN J.L. 1, 1 (2006) (“To many students, a fraternity or sorority provides a group of close friends, many social opportunities, an opportunity to take part in philanthropic activities . . . .”); Julia Ryan, _How Colleges Could Get Rid of Fraternities_, THE ATLANTIC (Mar. 3, 2014), http://www.theatlantic.com/education/archive/2014/03/how-colleges-could-get-rid-of-fraternities/284176/ (“Fraternities offer their members opportunities for community service, friendship, and leadership.”).
5. Flanagan, _supra_ note 3, at 75. Many American politicians and businessmen are members of fraternities. For example, in the 112th U.S. Congress, 42% of Senators and 23% of Congressmen were members of fraternities. _About, I Am A Fraternity Man_, http://www.iamafraternityman.org/about (last visited Aug. 23, 2016) (citing _Fraternity Stats, supra_ note 2). Additionally, in the 113th U.S. Congress, 39% of Senators and 24% of Congressmen were members of fraternities. _Id_. Further, “44% of all U.S. Presidents” and “31% of all U.S. Supreme Court Justices” were members of fraternities. _Id_. Lastly, “50% of the Top 10 Fortune 500 CEOs” were members of fraternities and “15% of Fortune 100 CEOs belong[ed] to a Greek organization.” _Id_.
Allegation Near Fraternity House; Fresno State Suspends Alpha Gamma Rho Fraternity for Hazing Activity. Not all fraternity members and chapters live up to the Animal House stereotype, but headlines do not lie: with increasing frequency, national organizations may face legal issues stemming from local chapters' actions.

When an unfortunate fraternity incident occurs, who is responsible? The member(s), the local chapter, or the national organization? That question is an overarching concern in the days following an incident. As to individual chapter members, they can face liability for their actions. Typically, a local chapter is an unincorporated association and whether it faces liability

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8 Brandi Walker, Christiana Silva & Meghan Fernandez, UAPD Investigates Sexual Assault Allegation Near Fraternity House, DAILY WILDCAT (Apr. 14, 2016, 9:02 AM), http://www.wildcat.arizona.edu/article/2015/09/uapd-investigates-sexual-assault-allegation-at-a-fraternity-house (“The fraternity issued a response . . . addressing claims of its involvement with the sexual assault . . . [that] included a statement from a UAPD Sergeant . . . which said that the investigation doesn’t involve the fraternity.”).


12 See Keri v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 333 (Wis. 2004) (“A person is generally only liable for his or her own torts.”); Byron L. LeFlore, Jr., Note, Alcohol and Hazing Risks in College Fraternities: Re-Evaluating Vicarious and Custodial Liability of National Fraternities, 7 REV. LITIG. 191, 195–96 (1988) (explaining a lawsuit against a local chapter that is formed as an unincorporated association is a lawsuit against the entity and the individual members of the association, but, “[w]ith regard to the individual members, liability extends only to those members of a social or benevolent unincorporated association who authorized, planned, directed, or participated in an event encompassing the tortious conduct”).

depends on the laws under which it was formed.\textsuperscript{14} But what about the national organization? It can be difficult to hold the national organization liable\textsuperscript{15} despite tragic incidents, and \textit{Smith v. Delta Tau Delta, Inc.}\textsuperscript{16} depicts this difficulty. In \textit{Smith}, Johnny Smith, a college freshman, had to participate in a “‘hell week’ of hazing and sleep deprivation” to gain membership into the Beta Psi Chapter of Delta Tau Delta and died as a result.\textsuperscript{17} Smith was spray painted when he failed to participate in an event to the fraternity brothers’ satisfaction and had to clean the house kitchen wearing only an apron.\textsuperscript{18} At a house party at the conclusion of “hell week,” Smith, after he “was visibly intoxicated,” participated in “pledge family drink night,” an event the chapter required freshmen pledges to participate in from time to time as a condition of membership, which involved “drink[ing] alcohol with their fraternity families.”\textsuperscript{19} That night, Smith consumed numerous beers and shots, fell down a stairwell sustaining several cuts, could not walk, and could barely talk.\textsuperscript{20} Smith, with a blood alcohol level near 0.40\%, died in a pool of his own vomit and was not discovered until four to eight hours later.\textsuperscript{21} Despite the national organization’s broad enforcement powers and provision of “informational resources, organizational guidance, common traditions, and its brand” to the local chapter, the Indiana Supreme Court did not hold the national organization liable.\textsuperscript{22}

\textsuperscript{14} See \textit{Marshall}, 1986 WL 11566, at *2 (stating Delaware unincorporated associations may be sued); Beta Beta Chapter of Beta Theta Pi Fraternity v. May, 611 So. 2d 889, 891–94 (Miss. 1992) (discussing whether unincorporated associations may be sued and holding that “Beta is a suable entity”); see also \textit{LeFlore}, supra note 12, at 195–96 (discussing how local chapters “typically are unincorporated associations” and “[w]hen a suit is brought against a chapter, the plaintiff effectively sues both the unincorporated association as an entity and the individual”); \textit{Reni Gertner}, \textit{Fraternity Lawsuits Becoming More Common: What to Evaluate in Suing a Fraternity}, LAW. WKLY. USA (Mar. 16, 2005), http://justiceatwork.com/wp-content/media/fraternity_lawsuits.pdf (discussing a case in which an attorney “wasn’t able to sue the local fraternity because state law consider[ed] fraternities unincorporated associations that can’t be sued”).

\textsuperscript{15} See Gertner, supra note 14; \textit{Rutledge}, supra note 11, at 391–92 (discussing the types of cases that are resolved in favor of, and against, fraternities). But see id. at 386 (“[i]njured pledges . . . have, since the late 1970s, been winning sizeable jury verdicts, or obtaining even larger settlements, against Greek organizations for hazing practices.”).

\textsuperscript{16} \textit{9 N.E.3d} 154 (Ind. 2014).


\textsuperscript{18} \textit{Id.} at 328–29.

\textsuperscript{19} \textit{Id.} at 329.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Smith}, \textit{9 N.E.3d} at 163–65 (holding that “[t]he national fraternity did not have a duty to insure the safety of the freshman pledges at the local fraternity,” and thus not holding the national fraternity liable on the claim of negligence for a breach of an assumed duty and concluding that “an agency relationship did not exist between the national fraternity and the local fraternity or its members” and thus not holding the national
In addition to the difficulty of holding national organizations liable, the public generally does not realize the extent to which national organizations go to prevent liability. To prevent liability, national organizations have self-insured, developed procedures and policies to transfer liability to outside parties, found creative ways to protect their assets from juries, and found ways to indemnify the national and local organizations for undergraduate members’ conduct. Moreover, a national organization’s imposed protocol following a fraternity incident can be self-serving:

Those questionnaires and honest accounts—submitted gratefully to the grown-ups who have arrived, the brothers believe, to help them—may return to haunt many of the brothers, providing possible cause for separating them from the fraternity, dropping them from the fraternity’s insurance, laying the blame on them as individuals and not on the fraternity as the sponsoring organization.

Further, national organizations may not “actively supervise” local chapters, rather they may remain “predominantly passive;” however, national organizations or local fraternity leadership may know of a local chapter’s fraternity vicariously liable). Maine examined Delta Tau Delta in a recent case and rejected a claim of vicarious liability. Brown v. Delta Tau Delta, 118 A.3d 789, 791 (Me. 2015). The court found Delta Tau Delta could be liable under a negligence theory, specifically premises liability, and held that the national organization had a duty to the social invitees of its local chapters. Id. at 795–96. In so holding, the court found the national organization “had the authority to control its individual members, . . . actually did [control its individual members], . . . [and] had a close, integrated relationship with [the local chapter], as demonstrated by [Delta Tau Delta’s] corporate structure.” Id. at 796.

See Brown, 118 A.3d at 798 (Alexander, J., concurring 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 for foreseeable lawsuits . . . .”; Flanagan, supra note 3, at 82 (“The way fraternities [obtain insurance, transfer liability to outside parties, protect their assets, and obtain indemnification] is the underlying story in the lawsuits they face, and it is something that few members—and . . . even fewer parents of members—grasp completely, comprising a set of realities you should absolutely understand in detail if your son ever decides to join a fraternity.”).


Flanagan, supra note 3, at 82.

Id. at 84.
conduct. National organizations have the resources and ability to reform their local chapters, but incidents continue and the consequences often fall on their local chapters and individual members.

This Comment proposes that fraternities are unofficial franchise arrangements due to their similarities in structure and operation. Consequently, this Comment argues for courts to apply franchise law when determining the liability of a national organization. A franchise model is a sensible approach because it provides a ready-made test for determining the degree of control national organizations have over local chapters. Similar to franchises, fraternity control and oversight varies, and a franchise model would impose liability when national organizations have the requisite control and prevent liability when it is absent.

This Comment proceeds in four Parts. Part I provides a background on fraternities by tracing their developmental history and explaining their structure. Part II discusses liability theories typically used to hold a national organization liable. Part III provides a background on franchise arrangements by discussing the structure of a franchise and franchisor liability for franchisee actions. Lastly, Part IV argues that courts should view fraternities as unofficial franchise arrangements and look to franchise case law when deciding the liability of a national organization.

I. A PORTRAIT OF FRATERNITIES

This Part proceeds in two sections. First, it provides a brief history of how fraternities developed by highlighting the progression, establishment and characteristics of modern social fraternities. Second, it explains how fraternities are typically structured and discusses the powers shared among the

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27 See National Fraternities Face More Legal Risk After Court Ruling, Indianapolis Bus. J. (May 15, 2013), http://www.ibj.com/articles/41361-national-fraternities-face-more-legal-risk-after-court-ruling (discussing that fraternities choose passive supervision); see also Grenier v. Comm’r of Transp., 51 A.3d 367, 389 (Conn. 2012) (discussing the national consultant’s recommendation to use public transportation if the local chapter were “to continue conducting the search and rescue mission as part of the pledging activities.”). But see Gertner, supra note 14 (“[A] national fraternity has no intent to control the day-to-day activities of a local chapter . . .”).

28 See Flanagan, supra note 3, at 83 (quoting a plaintiff’s attorney who has “recovered millions and millions of dollars from homeowners’ policies . . . . For that is how many of the claims against boys who violate the strict policies are paid . . . .”); National Fraternities Face More Legal Risk After Court Ruling, supra note 27 (noting a fraternity and its charitable foundation had $5.5 million of revenue in 2011). For further discussion about fraternity insurance, see generally Shane Kimzey, Note, The Role of Insurance in Fraternity Litigation, 16 Rev. Litig. 459 (1997).
three typical fraternal entities: the national organization, the local chapter, and the alumni organization.

A. Engrained in American History: The Development of Fraternities

Fraternities are engrained in American history. The first Greek-letter organization, established in 1776, was Phi Beta Kappa. Formed for literary and social purposes, Phi Beta Kappa “had all the characteristics of the present-day fraternity.” For example, Phi Beta Kappa had regular meetings, “secrecy, a ritual, oaths of fidelity, a grip, a motto, a badge for external display, a background of high idealism, a strong tie of friendship and comradeship, [and] an urge for sharing its value through nation-wide expansion.” Although Phi Beta Kappa was the first Greek letter organization, fraternal associations and secret societies were not a new concept in America. The Flat Hat Club was a secret society established in 1750, and the Freemasons’ establishment dates back as early as 1390.

Most Americans are familiar with social, Greek-letter fraternities. These fraternities are the focus of this Comment. The first fraternity of this nature was the Kappa Alpha Society, established in 1825. Following the Kappa

29 See Stevie V. Tran, Note, Embracing Our Values: Title IX, the “The Single-Sex Exemption,” and Fraternities’ Inclusion of Transgender Members, 41 Hofstra L. Rev. 503, 519 (2012) (discussing the development of fraternities and their values).
31 Id.
32 Id.
34 BAIRD’S MANUAL, supra note 30, at 5; The Flat Hat Club, 25 WM. & MARY Q. 161, 161 (1917). The Flat Hat Club, established at William and Mary, had members who were influential in American history, such as Thomas Jefferson. Id.
35 History of Freemasonry, MASONIC SERV. ASS’N OF N. AM., http://www.msana.com/historyfm.asp (last visited Aug. 23, 2016) (“The oldest document that makes reference to Masons is the Regius Poem, printed about 1390, which was a copy of an earlier work.”). The fraternity spread to the colonies about thirty years after the first Grand Lodge of England formed in 1717. Id. Famous forefathers George Washington and Benjamin Franklin, along with Chief Justice of the Supreme Court, John Marshall, were Freemasons. Id.
36 See Fraternity and Sorority, supra note 1.
37 This Comment focuses on social Greek-letter fraternities rather than on other types of Greek-letter fraternities, such as honor or professional Greek-letter fraternities.
38 BAIRD’S MANUAL, supra note 30, at 6; see also General History, supra note 33 (“The new fraternity was much like Phi Beta Kappa except that its purpose was social more than literary.”).
Alpha Society, Sigma Phi and Delta Phi were established in 1827. Encompassing the same characteristics as Phi Beta Kappa, these organizations comprised the “Union Triad,”... the pattern for the American Fraternity system.”

With the emergence of more fraternities, national organizations formed the National Interfraternity Conference in 1909. The purpose of the conference was to discuss “question[s] of mutual interest and... present[] to the fraternities represented... recommendations... the Conference shall deem wise, it being understood that the function of such Conference shall be purely advisory.” Today, the conference is known as the North-American Interfraternity Conference, and it has sixty-nine member fraternities.

B. The Structure of Fraternities: From Anarchy to Uniformity

Fraternity structure has evolved over time. Fraternities today are comprised of local chapters across the United States; but, in the beginning, local chapters were “united only by a common name and common principles. Each chapter was independent to the verge of anarchy and did pretty much as it pleased...” Fraternities took a step toward organization by designating either the parent chapter or another chapter to be the “grand” or “presiding” chapter. With that designation, the local chapter served as the governing body of the fraternity and “was to preserve and maintain some sort of settled policy in the administration of fraternity affairs.” The grand chapter was subject to

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39 BAIRD’S MANUAL, supra note 30, at 6.
40 Id. Additional triads developed as the Union Triad expanded in the East. Id. at 7. The Miami Triad, consisting of Beta Theta Pi, Phi Delta Theta, and Sigma Chi, developed in the South and West. Id. The Lexington Triad, consisting of Alpha Tau Omega, Kappa Alpha Order, and Sigma Nu, also developed in the Virginia area. See id.; Sigma Nu Fraternity, SAN JOSE ST. U., http://www.sjsu.edu/getinvolved/frso/groups/ifc/sn/ (last visited Aug. 20, 2016).
41 BAIRD’S MANUAL, supra note 30, at 29.
42 Id. at 30. Today the North-American Interfraternity Conference’s purpose is “to promote the well-being of its member fraternities by providing such services to them as the Meeting of Members may determine.” N.-AM. INTERFRATERNITY CONF., CONSTITUTION OF THE NORTH-AMERICAN INTERFRATERNITY CONFERENCE art. II, http://nicindy.org/wp-content/uploads/2016/07/nic_constitution_and_bylaws_1r_122.15_.pdf (last updated Dec. 2, 2015). Such services include “promotion of cooperative action in dealing with fraternity matters of mutual concern, research in areas of fraternity operations and procedures, fact-finding and data gathering, and the dissemination of such data to the member fraternities.” Id.
44 BAIRD’S MANUAL, supra note 30, at 11–12.
45 Id. at 12.
46 Id.
the assembly of delegates from the remaining chapters who met at a convention. Over time, the convention of delegates retained fraternity “legislative power” and fraternity alumni received the administrative and executive functions. The alumni soon became known as the executive council and frequently became legally incorporated. The rise of fraternity chapters necessitated central fraternity offices. The central fraternity office handles numerous business activities, such as maintenance of membership records and mailing lists, issuing of various publications, preservation of historical material, checking the financial operations of undergraduate chapters, arranging for conventions and conferences, issuing reports of national officers, directing the field staff, participating in interfraternity activities, and taking care of voluminous correspondence.

Coupled with guidance from the central fraternity office, local chapters normally have local undergraduate chapter counselors, faculty advisers, and alumni board officers.

Today, fraternity structure and governance is a historical hybrid. Generally, a fraternity has a national organization that governs matters affecting all local chapters. Fraternities also continue to hold conventions of chapter delegates. However, conventions now are held biennially or triennially, rather than annually, and may offer training opportunities where delegates gain skills relating to important chapter aspects, such as social life, public relations, house management, pledge training, and rituals. The national organization and the local chapter may be legally incorporated or unincorporated associations. For example, the fraternity Sigma Phi Epsilon consists of the undergraduate chapter, formed as an unincorporated association; the

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47 Id.
48 Id.
49 Id.; see also infra note 57 and accompanying text.
50 See Baird’s Manual, supra note 30, at 12.
51 Id. at 13.
52 Id. at 12.
53 See supra notes 50–52 and accompanying text; see also Mumford, supra note 10, at 763 (discussing the role and purpose of the national fraternity); C. Sidney Neuhoff, Note, Legal Status of Fraternities, 11 St. Louis L. Rev. 30, 36 (1925) (“Most national college fraternities consist of three units; the national organization, the local chapter, and the property holding unit for the local chapter.”).
54 See Baird’s Manual, supra note 30, at 13; Kendrick, supra note 11, at 409 n.13 (discussing that full membership in a fraternity or sorority allows members to attend the national convention).
56 See Neuhoff, supra note 53 at 36–37; Gertner, supra note 14; supra notes 13–14 and accompanying text.
undergraduate chapter alumni, incorporated as the Alumni and Volunteer Corporation; and the national fraternity, composed of a Board of Directors elected by the Grand Chapter that convenes biennially “to legislate and govern Sigma Phi Epsilon at-large.” Although Sigma Phi Epsilon is comprised of three legally separate, independent entities, they work together to “promote and foster the ideals and principles of Sigma Phi Epsilon.” Ultimately, fraternity structure is an important component when determining who may be held responsible for a fraternity incident.

II. HOLDING THE NATIONAL ORGANIZATION LIABLE

From 2014 to 2015, there were “6,186 fraternity chapters on roughly 800 college campuses,” for a total of “380,487 undergraduate[]” fraternity members. With large fraternity participation, it is not a surprise that unfortunate incidents occur, which could result in future litigation. According to “a 2010 analysis by Willis, a major fraternity insurer,” liability claims against a fraternity include assault and battery, sexual assault, slip and fall, falls from heights, auto accidents, and hazing. When a fraternity incident occurs, several theories of liability may be asserted to hold a national organization liable. Negligence and vicarious liability are common theories

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57 SIGMA PHI EPSILON FRATERNITY, INC., supra note 13, at 5. The alumni “serve as [the] landlord” and “provide advice and counsel to the undergraduate chapter.” Id. “The national Fraternity exists to advise and counsel the collective membership of Sigma Phi Epsilon.” Id.

58 Id.

59 Fraternity Stats, supra note 2.


61 Flanagan, supra note 3, at 79.

62 See, e.g., Rutledge, supra note 11, at 372–75 (discussing theories generally used in fraternity hazing litigation); Spring J. Walton, Stephen E. Bassler & Robert Briggs Cunningham, The High Cost of Partying: Social Host Liability for Fraternities and Colleges, 14 WHITTIER L. REV. 659, 667–68 (1993) (discussing the theory of social host liability and a case in which the court “stated that a national fraternity could possibly be liable for the tortious actions of the local chapter acting as a social host”); LeFlore, supra note 12, at 206–10 (identifying four methods that could be used to find a national organization liable for its local chapter’s actions: (1) a “traditional agency analysis”; (2) a “master-servant theory of vicarious liability, or respondeat superior” analysis; (3) an “agency by estoppel or ostensible agency” analysis, which is a form “vicarious liability . . . [that] can arise if the agent acts within the scope of apparent authority”; and (4) “custodial liability” (emphasis omitted)); Mumford, supra note 10, at 742 (“[C]ourts have held national fraternities liable for injuries in local chapters under theories of agency and general duty . . . .” (footnotes omitted)); infra notes 63–66, 102 and accompanying text.

63 A variation on the theory of negligence commonly used is negligence per se. See Shaeen v. Yonts, 394 F. App’x 224, 230 (6th Cir. 2010) (discussing the allegation of negligence per se and stating “there is no evidence that LXA [Lambda Chi Alpha] knowingly induced, assisted or caused Yonts to posses [sic]
asserted to hold a national organization liable\(^\text{64}\) and this Part considers each in turn.

A. Examining National Organization Liability Under the Theory of Negligence

Negligence is one theory of liability that can be asserted to hold a national organization liable, and it presupposes that the national organization owed a duty to the injured individual.\(^\text{65}\) When a theory of negligence is asserted, a duty is not always found;\(^\text{66}\) however, \textit{Brown v. Delta Tau Delta},\(^\text{67}\) a recent Maine case, illustrates a finding of a duty.

The \textit{Brown} court held the national organization of Delta Tau Delta could be liable for its local chapter’s actions under a theory of negligence, in particular, premises liability.\(^\text{68}\) In \textit{Brown}, a member of the local Gamma Nu chapter sexually assaulted Brown at a party held at the fraternity house.\(^\text{69}\) Brown reported the incident to the Gamma Nu chapter president, who then reported the incident to the chapter consultant, an employee of the national organization.\(^\text{70}\) The local chapter expelled the chapter member who assaulted Brown.

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\(^{64}\) See Jared S. Sunshine, \textit{A Lazarus Taxon in South Carolina: A Natural History of National Fraternities’ Respondeat Superior Liability for Hazing}, 5 CHARLOTTE L. REV. 79, 87 (2014) (“[A]s the corporation is vicariously liable for its employees’ acts in service of their employer, the national is liable for its members’ acts in service of the fraternity. This paradigm conceives an agency relationship . . . .”); Gertner, supra note 15; infra Part II.A–B.


\(^{66}\) See, e.g., Smith, 9. N.E.3d. at 163 (“[T]he national fraternity’s conduct did not demonstrate any assumption of a duty directly to supervise and control the actions of the local fraternity and its members. The national fraternity did not have a duty to insure the safety of the freshman pledges at the local fraternity.”); Yost v. Wabash Coll., 3 N.E.3d 509, 521 (Ind. 2014) (“[W]e conclude that the national fraternity had no general duty to Yost upon which this negligence action may be based. . . . We find that the national fraternity did not assume any duty upon which Yost may now claim liability for damages.”).

\(^{67}\) 118 A.3d 789 (Me. 2015).

\(^{68}\) Id. at 795.

\(^{69}\) Id. at 790.

\(^{70}\) Id. at 790–91.
Brown “for engaging in conduct unbecoming a member and for violating the national fraternity’s code of conduct and rules regarding alcohol and hazing.”71 As a result of the sexual assault, Brown brought an action against the national organization of Delta Tau Delta, alleging, in relevant part, vicarious liability, negligence, and premises liability.72

The court rejected Brown’s claim of vicarious liability because nothing in the record indicated the chapter member was acting as an agent of Delta Tau Delta’s national organization.73 However, the court focused on Brown’s negligence claims and held the national organization could be liable based on a premises liability theory.74 The court found the national organization had “a duty to exercise reasonable care in providing a reasonably safe environment for any social invitee to an event at the fraternity house.”75 To find a duty between the national organization and the local chapter’s social invitees, the court considered three principles: foreseeability, control, and relationship of the parties.76

First, examining the principle of foreseeability, the court found a national fraternity knows, or ought to know, that social events involving alcohol at a local chapter house could result in sexual assaults.77 The national organization of Delta Tau Delta was aware of such a possibility because it instituted the

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71 Id. at 791. Before the incident with Brown, the fraternity member “had developed a drinking problem and had recently caused property damage and engaged in fights with other fraternity brothers.” Id. at 790–91.
72 Id. at 791. Brown also brought a claim of negligent infliction of emotional distress against the national organization. Id. Against the Delta Tau Delta National Housing Corporation, Brown brought claims of vicarious liability, negligence, premises liability, and negligent infliction of emotional distress. Id. Brown also brought claims of assault, false imprisonment, negligence, premises liability, and negligent infliction of emotional distress against the fraternity member who assaulted her, and Brown also sought punitive damages. Id. Brown ultimately settled with the fraternity member and he was dismissed from the case. Id. Brown did not sue the local chapter because it was formed as an unincorporated association and could not be sued. Id. at 790 n.1.
73 Id. at 791.
74 Id. at 791, 795. As to Brown’s general negligence claim and negligent infliction of emotional distress claim, the court stated that:

[The undisputed facts in this case do not give rise to a duty beyond that related to Brown’s premises liability claim. . . . The summary judgment record reveals no ‘special relationship’ between Brown and [Delta Tau Delta] sufficient to sustain Brown’s general negligence claim, . . . nor does it reveal a special relationship or facts that would give rise to bystander liability sufficient to support Brown’s negligent infliction of emotional distress claim.

Id. at 792 (citation omitted).
75 Id. at 796.
76 Id. at 793.
77 Id. at 793–94.
“Policy on Alcohol and Substance Abuse” to control fraternity member conduct, which was integrated into the Member Responsibility Guidelines (MRGs). The policies recognized alcohol and substance abuse could result in dangers, such as sexual assaults or harassment, and indicated that the national organization would not tolerate such behavior. The court found Brown’s assault foreseeable because of the policies Delta Tau Delta established for its members.

Second, examining the principle of control, the court found the national organization of Delta Tau Delta had the authority to control, and actually controlled, its members. Delta Tau Delta exercised “significant control over its individual members,” evidenced by its constitution and bylaws, administrative connection to the local chapter’s day-to-day activities, and its “broad authority to impose sanctions.” Considering Delta Tau Delta’s constitution and bylaws, the court found persuasive that local chapters were required to adopt local bylaws consistent with the national organization’s constitution and bylaws. The local bylaws were “expected to address local risk management plans that supplement[ed] the national MRGs” and to implement Delta Tau Delta’s alcohol programming. Additionally, local chapter bylaws were expected to require chapter members to sign the national code of conduct and the local chapter had to send a certified copy of its bylaws to the national central office. Further, the local chapter had to present the MRGs to members and pledges “[a]s part of the chapter accreditation process.” The MRGs described specific rules and regulations regarding member conduct at social events, and the national code of conduct described general behavioral standards members had to follow. Next, considering the administrative connection between the national organization and local chapter, the court found the alumni advisors and chapter consultant visits persuasive in establishing such connection. The duty of the local chapter alumni advisor was to oversee the local chapter’s compliance with national rules and

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78 Id. at 793.
79 Id. at 793–94.
80 Id. at 794.
81 Id.
82 Id. at 794–95.
83 Id. at 794.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id. at 795.
regulations and to report its compliance to the national organization.\textsuperscript{89} Similarly, the chapter consultant was responsible for meeting with “local fraternity leadership and alumni advisors” at least once per semester about the chapter’s operations, to suggest possible improvements, and to inform Delta Tau Delta about the visit.\textsuperscript{90} Lastly, the court found persuasive that the national organization had “broad authority” to discipline local chapter members who violated rules and regulations.\textsuperscript{91} Delta Tau Delta’s “comprehensive process for disciplining members” included different categories of MRG violations and consequences.\textsuperscript{92} The court stated, “the national fraternity does more than simply suggest that its members conform to certain norms; it enforces its rules, regulations, and codes of conduct through constant monitoring, oversight, and intervention.”\textsuperscript{93} Delta Tau Delta’s constitution and bylaws, administrative connection, and ability to discipline local chapter members indicated the national organization had control over the members of its local chapters.

Finally, examining the relationship of the parties, the court found that the Delta Tau Delta national organization had a close relationship with its local chapters and members because of its control.\textsuperscript{94} Through its “hierarchy of rules and regulations” and its constitution, the national organization established a “clear command structure” for local chapter adherence.\textsuperscript{95} The national organization’s constitution provided for a chapter advisor and assistant chapter advisors who were “a direct link between the national fraternity and each local chapter.”\textsuperscript{96} The chapter advisor’s “full-time job [was] to monitor and provide oversight of the functioning of the local chapter, to ‘assist the local chapter in understanding and living the Mission and Values of the Fraternity,’ and to report” regularly to the national organization.\textsuperscript{97} “Through its comprehensive articles and clearly defined power structure, [Delta Tau Delta] expressly reaches into the day-to-day affairs of its local chapters and creates a close, mutually beneficial relationship with its individual members.”\textsuperscript{98}

\begin{flushleft}
\textsuperscript{89} Id.
\textsuperscript{90} Id. The consultants also inform Delta Tau Delta supervisors of potential rule violations by local chapters, and the supervisors then investigate as necessary. Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\end{flushleft}
Consequently, the Supreme Judicial Court of Maine held the national organization of Delta Tau Delta had a duty to the social invitees of its local chapters. The national organization, “which provided its name, its credibility, its corporate structure, and its code of conduct” to a local chapter, “should have anticipated that alcohol-related parties on the premises would follow, as could the social problems that accompany such activities.”

B. Examining National Organization Liability Under the Theory of Vicarious Liability

Vicarious liability is the second theory of liability that can be asserted against a national organization to hold it liable for a fraternity incident. A form of vicarious liability is a “master-servant theory” in which “[t]he master-servant relationship is an extension of the principal-agent relationship, in that the principal has the right to control the details of the physical conduct of the agent while the agent is performing services within the scope of the agency.”

Courts do not always impose vicarious liability to national organizations. However, this section discusses a case where the court held imposing vicarious liability, in the context of a fraternity party, may be appropriate.

In *Marshall v. Delaware University*, the court considered whether to impose vicarious liability on the national organizations of Sigma Nu and

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99 Id.
100 Id. at 795–96.
101 LeFlore, *supra* note 13, at 206.
102 See, e.g., *Smith v. Delta Tau Delta, Inc.*, 9 N.E.3d 154, 164–65 (Ind. 2014) (finding the national organization was not vicariously liable because its power over the local chapter was remedial and no agency relationship existed); *Yost v. Wabash Coll.*, 3 N.E.3d 509, 521–22 (Ind. 2014) (holding the national organization of Phi Kappa Psi could not be vicariously liable for the actions of its local chapters because there was no evidence the local chapter controlled its members at the “direction of” or “on behalf of” the national organization); *Rogers v. Sigma Chi Int’l Fraternity*, 9 N.E.3d 755, 764–65 (Ind. Ct. App. 2014) (discussing the vicarious liability claim and concluding that Sigma Chi International Fraternity “was not vicariously liable for the acts of the persons at the premises because it had no actual or apparent authority over them”); *Wehner v. Weinstein*, 444 S.E.2d 27, 35 (W. Va. 1994) (“[W]e find that the evidence decidedly preponderates against the jury’s conclusion that the [Sigma Phi Epsilon] Fraternity and the [Sigma Phi Epsilon Building] Association were directly negligent and the proximate cause of the accident, or that they are vicariously liable for the acts of their alleged agent, Mr. Kiser, a fraternity pledge.”).

103 But see LeFlore, *supra* note 12, at 236 (“Courts should be consistent with college and fraternity cases across the board, and should not misapply vicarious . . . liability to national fraternity organizations by attempting to create control where, in reality, it does not exist.”).
Kappa Alpha Order for an incident arising from a fraternity party.\(^{104}\) In
Marshall, a third party was injured when a fight between Sigma Nu and Kappa
Alpha members occurred because Sigma Nus tried to enter Kappa Alpha’s
party without paying.\(^{105}\)

In regards to the national organization of Sigma Nu, the court examined
whether the national organization could be held vicariously liable for Sigma
Nu’s alleged misconduct and for the conduct of the members who allegedly
started the fight.\(^{106}\)

The court stated the national organization could be vicariously liable for
Sigma Nu’s alleged misconduct if the local chapter’s conduct “was within the
scope of an agency relationship with” the national organization and it “had a
right to control Sigma Nu’s day-to-day activities.”\(^{107}\) The court found that one
purpose of a fraternity “is to provide an opportunity for the members of the
organization to associate ‘in a responsible fashion.’”\(^{108}\) The court stated “[a]n
concomitant of responsible association is some system of control.”\(^{109}\) Thus, the
court held that it could be concluded “that Sigma Nu’s alleged failure to
control its members was within the scope of its alleged agency with” the
national organization.\(^{110}\) As to whether the national organization had “a right to
control Sigma Nu’s day-to-day activities,” the court found evidence that it
did.\(^{111}\) The court found persuasive that the national organization’s Executive
Director, its “highest ranking executive officer, ha[d] the power ‘to inspect and
supervise’ local chapters,” the Executive Director “ha[d] the power to remove
a local chapter’s officer for failure to perform his duties,” and the national
organization “reserved to itself the right to ‘place [a local chapter] under the
control of the Alumni Board of Receivers.’”\(^{112}\) Consequently, the court held

\(^{104}\) 1986 WL 11566, at *1 (Del. Super. Ct. Oct. 8, 1986). The Delaware Superior Court denied the
summary judgment motions on vicarious liability for both the national organizations of Sigma Nu and Kappa
Alpha Order. Id. at *7, *11.

\(^{105}\) Id. at *1. As the court did, this Comment refers to the local chapters as Kappa Alpha and Sigma Nu.

See id.

\(^{106}\) Id. at *7–8.

\(^{107}\) Id. at *7. Regarding the local chapter, the court stated it “has already found that one could reasonably
hold Sigma Nu liable for negligently failing to control the conduct of those members who allegedly started the
fight at the election eve party.” Id.

\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Id.

\(^{112}\) Id.
that it could be concluded “that [the national organization] had the right to control Sigma Nu’s day-to-day activities.”  

As to whether the national organization of Sigma Nu could be vicariously liable for the members’ conduct who allegedly started the fight, the court reiterated that the national organization may be vicariously liable if the conduct “was within the scope of an agency relationship” and the national organization “had the right to control the day-to-day activities of those members.”114 Examining whether the local chapter members’ attendance at the party was within the scope of an agency relationship with the national organization, the court found evidence that one goal of a fraternity “is to encourage the development of relationships of fellowship and friendship among its members.”115 The court held that it could be concluded that the Sigma Nu members who attended the party acted “within the scope of that goal,” because “by attending a social event together, [they] were likely to develop the kind of brotherhood which [the national organization] was seeking to develop in members of its locals.”116 Examining whether the national organization had a “right to control day-to-day activities of the Sigma Nu membership,” the court again looked to the “provisions of the ‘Law of Sigma Nu Fraternity.’”117 The court found that the national organization may have had the power to control the local chapter members and the local chapter because the Executive Director had the power to inspect and supervise the local chapters.118 Additionally, the

113 Id. The court denied the national organization’s motion for summary judgment as to the vicarious liability claim for the local chapter’s alleged misconduct. Id.

114 Id. The court began by stating that it “ha[d] already held that a jury could reasonably conclude that those Sigma Nus were negligent and that their negligence actually and proximately caused the plaintiff’s injuries.” Id.

115 Id. at *8. The South Carolina Court of Appeals made a similar finding in Ballou v. Sigma Nu Gen. Fraternity, 352 S.E.2d 488 (S.C. Ct. App. 1986), where a local Sigma Nu chapter required members to participate in a “hell night” that included excessive drinking. Id. at 491–92. The court looked to the theory of agency, rather than vicarious liability expressly, to determine if the national organization could be liable for the local chapters' actions. Id. at 496. During his efforts to join the local chapter, Ballou participated in the hell night and died. Id. at 492. “Sigma Nu concede[d] that an agency relationship existed between it and the local chapter,” and the court looked to whether the local chapter conducted the hell night within the scope of the agency relationship. Id. at 495–96. The court found the local chapter’s hell night was within the scope of the agency relationship with the national organization because the Sigma Nu bylaws did not prohibit a local chapter from requiring additional initiation activities. Id. at 496. Additionally, adding new members to the fraternity accomplished the purpose and was the business of Sigma Nu. Id. The local chapter’s actions bound the national organization because the local chapter performed in the apparent scope of authority. Id. For further discussion of Ballou and a survey of commentary on the case, see Sunshine, supra note 64, at 120–29.

116 Id. at *8.

117 Id.

118 Id.
court found that the national organization may have had a right to control local chapter members because a provision of the Law of Sigma Nu Fraternity gave the Executive Director the power “to prescribe disciplinary measures for local members who violate[d] Chapter House rules contained in the Laws of Sigma Nu Fraternity.”

Consequently, the court denied the national organization’s motion for summary judgment as to the vicarious liability claim for Sigma Nu’s alleged misconduct and for the members’ conduct who allegedly started the fight at the party.

Further, the court examined Kappa Alpha Order’s motion for summary judgment in which it argued that Kappa Alpha’s conduct was not “within the scope of any agency relationship” and it had no right to control Kappa Alpha’s day-to-day activities. The court stated an agency relationship is “entered into to accomplish some constitutive end, the accomplishment of which actually requires the accomplishment of various derivative ends.” The court looked to whether there was an agency relationship with respect to a constitutive end in which holding the party was a derivative act; if the party was such an act, then the national organization “may be liable for any injuries to third persons resulting from the negligent performance of that act by Kappa Alpha.” The court found “that one of the constitutive goals” of the national organization’s and the local chapter’s relationship “was to promote fellowship among men.” The court held that it could be concluded that holding “an open party is an act derivative of that constitutive goal (i.e., within the scope of the agency relationship created to accomplish that goal).”

Next, the court examined whether Kappa Alpha Order “had the right to control the day-to-day activities (i.e., the derivative acts)” of the Kappa Alpha chapter to determine whether the national organization could be liable for the local chapter’s actions. The national organization “contend[ed] that it had no right to control the day-to-day activities of Kappa Alpha” and claimed that it

119 Id.
120 Id. at 7–8. The court also examined whether the national organization of Sigma Nu could be liable under a custodial liability theory and denied its motion for summary judgment as to that claim. Id. at *8–9. But see LeFlore, supra note 12, at 204–05, 227–30 (critiquing Marshall).
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
“seldom, if ever, sought to exercise control over the day-to-day activities of Kappa Alpha.” The court stated this claim indicated that either the national organization did not have a right to control or that it had such right but did not exercise it. Because Kappa Alpha Order moved for summary judgment, the court viewed the evidence in the light most favorable to the plaintiff and inferred that the national organization “may have had a right to control, but simply failed to exercise it.” Additionally, the national organization claimed that Kappa Alpha’s day-to-day activities were subject to the University of Delaware’s control. In this claim, the national organization relied on its “[c]onstitution which require[d] local chapters . . . to comply with the rules and regulations of the institution at which they are located[,] establish[ing] that [the national organization] surrendered all right to control the day-to-day activities of its local chapters to those institutions.” However, the court stated the “adopt[ion] [of] standards external to the principal-agent relationship to govern the conduct of [the] agent hardly establishes that the principal has abandoned [its] right to control his agents’ day-to-day activities.” Rather, the court held that it could be concluded “that such an adoption merely constituted a decision to control the agent in accordance with those external standards.” Accordingly, the court denied Kappa Alpha Order’s motion for summary judgment as to vicarious liability.

In sum, negligence and vicarious liability are theories that may be asserted to hold national organizations liable for local chapter actions and may be successful. However, a fraternity’s essential nature, structure, and oversight are not always accounted for under those theories. Franchise law provides a consistent framework for approaching fraternities that considers their structure and operational control. Before considering the franchise model, an

127 Id.
128 Id. at *11.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id. The court also examined whether Kappa Alpha Order could be liable under the theory of custodial liability and denied its motion for summary judgment. Id. at *11–12.
135 But see Marshlain, supra note 4, at 4 (discussing suits by members against fraternities and sororities seeking to impute the negligence of the local chapter to the national organization using agency and respondeat superior theories and stating “[d]espite being rooted in well-established and frequently applied theories, plaintiffs are often unsuccessful as to proving the national defendant’s liability”); supra notes 66, 102 and accompanying text.
explanation of the fundamental elements and requirements of a franchise is necessary.

III. A PORTRAIT OF FRANCHISES

This Part proceeds in two sections. First, it explains a franchise arrangement by discussing the four elements of a franchise—the grant, the trademark, the marketing or community of interest plan, and the fee—and explaining additional establishment and operational characteristics. Second, it explains franchise liability by discussing the traditional right to control test, which focuses on day-to-day operational control.

A. Independent but Consistent: The Characteristics of a Franchise Arrangement

A franchise is a business relationship where a franchisor grants a franchisee the right to “conduct a business offering goods and services to others.” Generally, “the franchisee’s establishment and operation of the franchised business is closely governed by the terms of a franchise agreement and identified by one or more brands provided by the franchisor.” A franchise consists of four elements: 1) the grant; 2) the trademark; 3) the marketing or community of interest plan; 4) and the franchisee fee. Additionally, franchise agreements have provisions regarding the establishment and daily operation of a franchise. This section considers each element and additional provision in turn.

The first element of a franchise is the grant. The grant refers to when “[o]ne party grants another the right to offer or sell goods or services.” The second element, the trademark, refers to the franchisee “[u]sing the grantor’s brand identification (trade- or servicemark, logo, etc.), trade name, or advertising.” The third element is the marketing or community of interest plan, which is satisfied “[w]here the grantor either imposes significant controls over, or offers significant assistance in respect to, the grantee’s operation of the

137 Id.
138 Id. at xvii–xviii.
139 Id. at xviii.
140 Id. at xvii.
141 Id. “The trademark sections of a franchise agreement are fairly elaborate and prescribe how the franchisee may or may not use the franchisor’s commercial symbols . . . .” Id. at 66.
franchised business.”142 “The key idea behind the ‘marketing plan/community of interest’ element is that the franchisor \textit{controls} at least some dimensions of how the franchisee operates or conducts the franchised business . . . .”143 Lastly, the fourth element, the franchisee fee, requires “[t]he grantee [to] pay[] consideration for the right to enter into or maintain the relationship” with the grantor.144 In addition to the four elements of a franchise, most franchise agreements have provisions that relate to the establishment and daily operation of the franchise.145

Provisions relating to the establishment of a franchise are those regarding a term, reservation of rights, control over the business premises, and aid in developing the business premises.146 A franchisor grants a franchise arrangement for a term, which may or may not be renewed.147 Further, when determining territorial exclusivity, franchisors may reserve for themselves certain types of customers and the right to determine whether to operate comparable businesses in the franchisee’s area.148 Next, franchisors typically include franchise agreement provisions that allow “some form of control over the [franchisee’s] premises.”149 Lastly, franchisors help a franchisee develop its business facility before opening.150

Provisions relating to the daily operation of a franchise are those regarding training, operational assistance, supplying the franchisee, standards, and termination.151 To begin, franchisors normally establish a training program and dictate its content, duration, and location.152 Generally, the purpose of the training program is to teach “skills, knowledge, and management know-how” and to “help align expectations, correct attitudes, create a desire and confidence in the franchisee to succeed, teach entrepreneurial skills, develop a

\begin{footnotes}
\footnote{142}{Id. at xviii.}
\footnote{143}{Id. at xix.}
\footnote{144}{Id. at xviii.}
\footnote{145}{See id. at 59–60. There are several different types of franchise relationships. This Comment discusses the provisions associated with a unit franchise relationship.}
\footnote{146}{See id. at 60–73.}
\footnote{147}{Id. at 60.}
\footnote{148}{Id. at 62.}
\footnote{149}{Id. at 67. The franchisor can acquire the franchisee’s location “by purchase or lease, and [then] lease[] or sublease[] the site to the franchisee.” Id.}
\footnote{150}{Id. at 68. The franchisor’s help varies, ranging from providing a location that is “turnkey” ready, to requiring the franchisee to establish the business facility on its own and the franchisor reserving the right to approve the business location and to provide general plans and specifications. Id.}
\footnote{151}{See id. at 74–78, 87–90.}
\footnote{152}{Id. at 74.}
\end{footnotes}
willingness to cooperate for mutual benefit, and create enthusiasm for the franchise program.”\textsuperscript{153} The training is normally structured and comprised of “a training school, . . . field experience, . . . and training manuals and materials.”\textsuperscript{154} Franchisees “usually must complete the training program satisfactorily” and may be required to complete refresher-training programs.\textsuperscript{155} Additionally, franchisors generally give operational assistance to the franchisee by providing manuals and marketing programs, and franchisor employee assistance.\textsuperscript{156} The operations manual generally details the type and extent of franchisor assistance.\textsuperscript{157} “An effective operations manual aids in maintaining product and service standards and overall uniformity . . . .”\textsuperscript{158} Along with providing an operations manual, some franchisors provide marketing and advertising assistance and franchisor employee assistance.\textsuperscript{159} Franchisors typically send an employee to assist the franchisee in opening the business and then thereafter for periodic inspections and evaluations of the franchisee’s performance.\textsuperscript{160} Similarly, franchisors generally dictate standards for a franchisee to maintain.\textsuperscript{161} These standards help to maintain a “consistent appearance, operation, and array of products and services across numerous independently owned and operated businesses,” which are hallmark characteristics of a franchise arrangement.\textsuperscript{162} In addition to manuals,
employees, and standards, franchisors may also “become involved in supplying goods or services to [the] franchisee[]” once the business is operational.163

Lastly, franchisors generally include termination provisions in the franchise agreement.164 A complete termination provision provides for the franchisor’s and the franchisee’s obligations after termination.165

In sum, franchise agreement provisions regarding the establishment and daily operations of a franchise may indicate franchisor control, which can lead to liability.

B. Holding the Franchisor Liable—The Traditional Right to Control Test

Imposing vicarious liability in a franchise context can be difficult for courts because of the inherent structure and requirements of a franchise arrangement.166 Because a franchisee receives the right to use a franchisor’s trademark, trademark law heavily influences the franchise relationship.167 The Lanham Act imposes a duty on a franchisor to “take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration.”168 As a result, a franchisor must control a franchisee to some extent, but such control is not intended to make a franchisor vicariously liable.169 Thus, when determining whether a franchisor is vicariously liable, courts must consider the control the Lanham Act inherently requires. Consequently, two tests have developed to hold a

staffing levels," record keeping and reporting requirements, required periodic reporting, and maintenance of a computer system. Id. at 79–80.

163 Id. at 76.
164 Id. at 87.
165 See id. at 88–90.
166 See Rainey v. Langen, 998 A.2d 342, 347–48 (Me. 2010); see also Drexel v. Union Prescription Ctrs., 582 F.2d 781, 785–86 (3d Cir. 1978) (“The difficulties are perhaps especially evident where, as here, the alleged master and servant also occupy the status of franchisor and franchisee. Some degree of control . . . would appear to be inherent in the franchise relationship, and may even be mandated by federal law.” (citation omitted)); Font v. Stanley Steemer Int’l, Inc., 849 So. 2d 1214, 1216 (Fla. Dist. Ct. App. 2003) (“Applying the ‘control’ test to a franchise is not an easy task. On the one hand a franchise clearly has an independent aspect to it . . . On the other hand, a franchisor by necessity must retain some control over the use of its names, goods or services.” (emphasis omitted)).
168 Rainey, 998 A.2d at 348 (quoting Dawn Donut Co. v. Hart’s Food Stores, Inc., 267 F.2d 358, 366 (2d Cir. 1959)); see also Flynn, supra note 167, at 101.
169 See Drexel, 582 F.2d at 785–86; Rainey, 998 A.2d at 348; Kerl, 682 N.W.2d at 338; Flynn, supra note 167, at 101–02.
franchisor vicariously liable for a franchisee’s actions: the traditional right to control test and the instrumentality test.170

First, the traditional right to control test seeks to determine whether “the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise.”171 Under the traditional right to control test, the control inquiry is “distinct” from the Lanham Act inquiry.172 While the Lanham Act considers whether the franchisor has maintained sufficient control over the licensee’s end product to ensure the trademark is applied to the same product or to a product with the same quality to which the public is accustomed,173 the traditional “‘right to control’ test focuses on a franchisor’s control over a franchisee’s performance of its day-to-day operations.”174 Second, the instrumentality test is a narrowing of the traditional right to control test.175 The instrumentality test seeks to determine whether “the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee’s business that

170 Rainey, 998 A.2d at 348–49.
171 Miller v. McDonald’s Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (quoting Billops v. Magness Constr. Co., 391 A.2d 196, 197–98 (Del. 1978)). Oregon has adopted and applied the traditional right to control test. See id. at 1110–11 (holding there was sufficient evidence “to raise an issue of actual agency” because “there [was] evidence that [the] defendant had the right to control 3K in the precise part of its business that allegedly resulted in plaintiff’s injuries”); Viado v. Domino’s Pizza, LLC, 217 P.3d 199, 211–12 (Or. Ct. App. 2009) (holding Domino’s Pizza was not vicariously liable for the car accident caused by a franchisee employee because the franchise agreement provided general driving standards and Domino’s Pizza did not retain a “right to control the physical details of the manner of performance of [the employee’s] driving”). However, Oregon’s application of the traditional right to control test may be similar to the instrumentality test. See Kerl, 682 N.W.2d at 341 (stating Miller is consistent with the focus of the instrumentality test “to the extent that it focused on the particular aspect of the franchisee’s business that was alleged to have caused the harm”).
172 See Rainey, 998 A.2d at 348–49.
173 See id. at 349.
174 Id.
175 See Kerl, 682 N.W.2d at 340.
is alleged to have caused the harm.”176 This Comment focuses on the application of the traditional right to control test.177

Maine adopted the traditional right to control test in 2010 when it decided Rainey v. Langen,178 a case of first impression.179 The Rainey case arose from a car accident that occurred when Langen, an employee of a franchised Domino’s Pizza, collided with a motorcycle driven by Paul Rainey.180 The court concluded the traditional right to control test “strikes an appropriate balance” and adopted the traditional test over the instrumentality test.181 The court found “[t]he traditional test allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability.”182 The court indicated that “[i]f a franchisor takes further measures to reserve control over a franchisee’s performance of its day-
to-day operations, . . . the franchisor is no longer merely protecting its mark, and imposing vicarious liability may be appropriate." 183 Applying the traditional test, the Supreme Judicial Court of Maine did not impose vicarious liability to Domino’s Pizza because it found that “the quality, marketing, and operational standards present in the Agreement and Guide [did] not establish the supervisory control or right of control necessary to impose vicarious liability.” 184

The Rainey court began its analysis by looking at the relationship between Domino’s Pizza—the franchisor—and the franchisee. 185 The court indicated that if the franchisee was “an agent-employee of Domino’s Pizza,” then employees of the franchisee were “agent[s]-employee[s] of Domino’s Pizza.” 186 While the franchise agreement indicated that Domino’s Pizza and the franchisee were independent contractors, the court stated that label was relevant but not controlling. 187 For guidance in determining the control included in the franchisor–franchisee relationship, the court looked to the Murray’s Case 188 factors, “particularly the degree of control reserved by Domino’s Pizza, as evidenced by the terms of the [franchise] [a]greement and [manager’s reference] [g]uide.” 189 The court “conclude[d] that, although the quality control requirements and minimum operational standards [were] numerous,” Domino’s Pizza did not “reserv[e] control over the performance of [the franchisee’s] day-to-day operations.” 190

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183 Id.
184 Id. at 350. Consequently, the court affirmed the lower court as it “did not err in granting Domino’s Pizza’s motion for partial summary judgment.” Id. at 351.
185 Id. at 349–50 (noting the employee’s relationship with Domino’s Pizza was not the proper relationship to examine in determining whether to hold Domino’s Pizza liable for the employee’s actions). The court stated this was “a preliminary issue [that] warrants explanation.” Id. at 349.
186 Id. at 349–50.
187 Id. at 350.
188 154 A. 352, 352–54 (Me. 1931) (determining whether a person was an employee or an independent contractor). The court listed the “[c]ommonly recognized tests” to distinguish employees and independent contractors:

(1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Id.
189 Rainey, 998 A.2d at 350.
190 Id.
The court found that the franchise agreement specified that supervision and operation of the franchise store was the franchisee’s responsibility. Additionally, the franchisee had the responsibility and duty to implement employee-training programs, to determine employee wages and employee schedules, and to maintain all day-to-day decisions concerning employee oversight. While “Domino’s Pizza retain[ed] the right to conduct inspections and terminate the franchise relationship, such conditions [did] not constitute sufficient control to impose vicarious liability.” In regard to the manager’s reference guide, the court found the provisions to which the Raineys pointed were included “for informational purposes only.” The court indicated that “recommendations and requirements” are distinct and, generally, courts are “reluctant to impose liability based on mere suggestions.” Other sections of the guide were “comprehensive and detailed” but did not “dictate the precise methods by which [the franchisee was] required to carry out its daily responsibilities.” The Supreme Judicial Court of Maine indicated factors, present in the case, that were “inconsistent with an employer-employee relationship,” such as, franchising generally required “independent businessmen to sell the franchisor’s product or service;” the franchisee was “responsible for purchasing or leasing its own equipment and supplies; and . . . Domino’s Pizza [did] not compensate [the franchisee] as its employee; rather, [the franchisee was] paid by its customers and provide[d] Domino’s Pizza with a royalty fee.” Consequently, relying on the Murray’s Case factors, the court did not find Domino’s Pizza vicariously liable; however, the court outlined a way to evaluate future franchise cases that involve a claim of vicarious liability.

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191 Id.
192 Id.
193 Id.
194 Id. The Raineys pointed to sections 6 and 7 of the guide. Id. However, franchisees were only required to adhere to sections 2, 12, and 15 of the guide; the other sections were for informational purposes only and franchisees were not required to use them. Id. at 345.
195 Id. (emphasis omitted) (quoting Hong Wu v. Dunkin’ Donuts, Inc., 105 F. Supp. 2d 83, 89 (E.D.N.Y. 2000)).
196 Id.
197 Id. (quoting 1 GLADYS GLICKMAN, FRANCHISING § 2.01 (2006)).
198 Id. (citing Legassie v. Bangor Publ’g Co., 741 A.2d 442, 444 (Me. 1999)).
199 The Raineys court provided a framework to evaluate future franchise cases that involve a claim of vicarious liability: first, look to the relationship between the franchisor and franchisee; second, determine if the franchisor has the right to control the franchisee’s day-to-day operations by analyzing the Murray’s Case factors. See id. at 349–50.
Two rationales traditionally support the common law application of vicarious liability. First, vicarious liability is a function of risk allocation, and the predominant idea is that the “master benefits economically from the servant’s activities and can factor . . . insurance and the risk of damage awards” into its business costs. Second, vicarious liability is imposed to motivate the master to control the servant’s conduct to avoid harm. These historical rationales are meant to be upheld when applying vicarious liability, and should be analyzed when applying vicarious liability in new contexts.

IV. ARGUMENT: A FRANCHISE APPROACH TO FRATERNITIES

This Comment proposes the idea of treating fraternities as franchises. Consequently, courts should consider fraternities to be franchise arrangements and look to franchise law when deciding whether a national organization is liable for its local chapter’s actions. As Caitlin Flanagan said, “[a] fraternity, it’s almost as though it’s a franchise operation with terrible quality control.”

Recently, the Court of Appeals of Oregon explored this idea when it looked to franchise case law in Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity. The Scheffel court found its analysis in a past franchise case.
instructive even though it “involved an agency relationship between entities that was based on a franchise agreement.”

Fraternities have learned to insulate themselves from liability, while courts have shielded them from liability. To justify its decision in not holding a national organization liable, one state supreme court stated national organizations 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.” One attorney criticized the court’s reasoning as backwards. The attorney advocated that the best way to encourage national organizations to undertake such programs and “‘discourage . . . undesirable conduct’ is to hold them liable when they fail to take reasonable steps to discourage dangerous conduct. Giving them a free pass just maintains the status quo.”

The franchise model that this Comment proposes provides an alternative way to view fraternities legally, which may cause national organizations to take further action to address the dark side of fraternities that may be affecting their local chapters. Although the outcome of any particular case ultimately

Halloween party hosted by the local chapter at its house). The court made no indication that it was shifting to franchise reasoning or case law for future fraternity cases. Id.

207 The court of appeals referenced 


Scheffel, 359 P.3d at 454.

208 Scheffel, 359 P.3d at 455. The court of appeals concluded there was no genuine issue of material fact as to whether Phi Kappa Psi “had the right to control the physical details of hosting and monitoring the [local chapter’s] Halloween party.” Id. The court stated that while Phi Kappa Psi had the “right to control intake, to suspend or expel members, to revoke charters, and to impose fraternity-wide policies aimed at curbing alcohol abuse and preventing sexual assaults,” the day-to-day control of the fraternity lied with the local chapter. Id.Phi Kappa Psi’s control over day-to-day activities was instead remedial in nature, and the national organization did not have the “right to control the physical details of hosting and monitoring the Halloween Party to the extent necessary” to be found vicariously liable. Id. Scheffel may be an example of the franchise model not imposing liability on the national organization because the requisite control and relationship were not present. However, the court of appeals did not expressly indicate that it was adopting a franchise model or reasoning for future fraternity cases when it decided Scheffel, which may have influenced its considerations of the fraternity in relation to a franchise.


211 Kennerly, supra note 24.

212 Id. (quoting Yost, 3 N.E.3d at 521).

213 The organizations raise millions of dollars for worthy causes, contribute millions of hours in community service, and seek to steer young men toward lives of service and honorable action.
relies on which franchise test is adopted by the state and on a national organization’s relationship with and control over its local chapters, a franchise model provides a consistent framework to analyze fraternities that considers their structure and operation. The model establishes a structured, ready-made approach to fraternities that considers the overall control a national organization has over local chapters, finds liability when the requisite control and relationship is present, and prevents liability when it is absent.214

This argument proceeds in two sections. Section A applies the franchise model to fraternities, specifically using the Delta Tau Delta fraternity discussed in Brown, and demonstrates the structural and operational similarities between fraternities and franchises. Section B, using the findings in Rainey and Brown, applies franchise liability to fraternities, demonstrates the ready-made approach franchise law supplies, and exhibits how liability may be found when there is operational control.

A. An Unofficial Franchise: Applying Franchise Characteristics to Fraternities

Fraternities are essentially unofficial franchise arrangements—a national organization provides use of “its name, its credibility, its corporate structure, and its code of conduct to a local branch on a college campus.” 215 Part A of this section shows a fraternity is an unofficial franchise arrangement by analogizing a fraternity—Delta Tau Delta from the Brown case—and a franchise. A fraternity is similar to a franchise arrangement not only because it

They also have a long, dark history of violence against their own members and visitors to their houses, which makes them in many respects at odds with the core mission of college itself.

Flanagan, supra note 3, at 75; see also The Business of Frats: Shifting Liability for Trauma and Injury, supra note 205 (“If I ran [an] institution ostensibly dedicated to the betterment of young people and my number two source of liability was the rape of young women, I would say something’s seriously wrong.”).

214 A franchise model accounts for the nature, structure, and oversight of a fraternity because fraternities are similar to franchises. See infra Part IV.A. Additionally, a franchise model is relevant to future fraternity law suits as it can be difficult to hold national organizations liable using the theories of negligence and vicarious liability. See, e.g., Brown v. Delta Tau Delta, 118 A.3d 789, 791, 794 (Me. 2015) (rejecting the claim of vicarious liability because nothing indicated the chapter member was an agent of the Delta Tau Delta national organization but finding actual control under a negligence theory); Sunshine, supra note 64, at 119 (discussing the rise and fall of respondeat superior liability in hazing incidents for national fraternities); supra notes 15, 23–24, 65–66, 102 and accompanying text.

215 Brown, 118 A.3d at 795–96. But compare LeFlore, supra note 12, at 205–06 (discussing how “the national office and organization exist[s] for the benefit of the local chapters”), with Sunshine, supra note 64, at 134–35 (discussing “the national as supreme”).
satisfies the four elements of a franchise arrangement, but also because it shares additional franchise characteristics.

1. A Fraternity Satisfies the Four Elements of a Franchise Arrangement

A fraternity is an unofficial franchise arrangement because it satisfies the four elements of a franchise arrangement—the grant, the trademark, the community of interest or marketing plan, and the fee.\textsuperscript{216} Just as a franchisor grants a franchisee the right to develop and operate its business,\textsuperscript{217} a national organization of a fraternity grants local chapters the right to develop and operate by granting a charter.\textsuperscript{218} The process and the requirements to receive a charter are unique to each fraternity.\textsuperscript{219} For example, Delta Tau Delta grants a charter to undergraduates at institutions of higher learning approved by the Arch Chapter and approved and reviewed by the Arch Chapter and the Central Office.\textsuperscript{220} Delta Tau Delta’s chartering process requires undergraduates to petition for a charter, the merits of the petition to be investigated, and the Arch Chapter to vote to approve the charter.\textsuperscript{221} Along with the general chartering process, Delta Tau Delta has standards undergraduates must meet before receiving a charter, such as maintaining specific grade point averages, having enough members, and having local bylaws that do not conflict with Delta Tau Delta’s constitution and bylaws.\textsuperscript{222}

Additionally, a fraternity meets the second element of a franchise arrangement, the trademark,\textsuperscript{223} through allowing local chapters to use national insignia and brands. For example, Delta Tau Delta’s bylaws describe permissive and nonpermissive uses of its insignia and intellectual property.\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{216} See \textsc{Fundamentals of Franchising}, supra note 136, at xvii–xviii; \textit{see also} supra note 138 and accompanying text.
\item \textsuperscript{217} See \textsc{Fundamentals of Franchising}, supra note 136, at xvii–xviii; \textit{see also} supra notes 139–40.
\item \textsuperscript{218} See \textsc{Baird’s Manual}, supra note 30, at 26.
\item \textsuperscript{220} See \textsc{Delta Tau Delta, Constitution and Bylaws of Delta Tau Delta Fraternity 1–2} (2012), https://life.babson.edu/organization/delts/documentlibrary. Delta Tau Delta’s constitution and bylaws outline the details of the review conducted by the Arch Chapter and Central Office. \textit{Id.}
\item \textsuperscript{221} \textit{See id.}
\item \textsuperscript{222} \textit{See id.} at 51.
\item \textsuperscript{223} See \textsc{Fundamentals of Franchising}, supra note 136, at xvii–xviii; \textit{see also} supra note 141 and accompanying text.
\item \textsuperscript{224} See \textsc{Delta Tau Delta, supra} note 220, at 53–54.
\end{itemize}
Delta Tau Delta also requires merchandise bearing the fraternity’s insignia or intellectual property to be purchased from approved vendors.\textsuperscript{225}

Further, a fraternity meets the third element of a franchise arrangement, the community of interest or marketing plan, because it controls local chapter operations through its constitution and bylaws.\textsuperscript{226} “The key idea behind the ‘marketing plan/community of interest’ element is that the franchisor \textit{controls} at least some dimensions of how the franchisee operates or conducts the franchised business . . . .”\textsuperscript{227} For example, Delta Tau Delta controls at least some dimensions of how local chapters operate through their constitution and bylaws.\textsuperscript{228} From dictating local chapter fraternity officer positions, to chapter officer duties, to the member responsibility guidelines, Delta Tau Delta controls how local chapters operate and conduct the fraternity locally.\textsuperscript{229} As the \textit{Brown} court stated, “[t]hrough its constitution, by-laws, and administrative connection to its local chapters’ day-to-day activities, [Delta Tau Delta] \textit{exercises significant control} over its individual members.”\textsuperscript{230}

Lastly, a fraternity meets the fourth element of a franchise arrangement, the fee, by requiring dues and fees. In a franchise arrangement, the franchisee pays a fee to the franchisor to enter into and to maintain the relationship.\textsuperscript{231} Dues and fees are the fraternity equivalent of the franchise fee.\textsuperscript{232} For example, each Delta Tau Delta local chapter pays dues to the national organization by collecting the amount from local members.\textsuperscript{233} Delta Tau Delta then uses the dues to support the fraternity.\textsuperscript{234} Accordingly, a fraternity satisfies all four elements of a franchise arrangement and should be considered an unofficial franchise.

\textsuperscript{225}See \textit{id}.

\textsuperscript{226}See, e.g., \textit{id.} at 1–2, 33; \textit{SIGMA PHI EPSILON FRATERNITY, INC.}, \textit{supra} note 13; \textit{SIGMA CHI FRATERNITY, supra} note 219.

\textsuperscript{227}FUNDAMENTALS OF FRANCHISING, \textit{supra} note 136, at xix; see also \textit{supra} notes 142–43 and accompanying text.

\textsuperscript{228}See \textit{DELTA TAU DELTA, supra} note 220.

\textsuperscript{229}See \textit{id.} at 41, 54; see also \textit{Brown v. Delta Tau Delta}, 118 A.3d 789, 793–95 (Me. 2015).

\textsuperscript{230}\textit{Brown}, 118 A.3d at 794 (emphasis added).

\textsuperscript{231}See FUNDAMENTALS OF FRANCHISING, \textit{supra} note 136, at xviii; see also \textit{supra} note 144 and accompanying text.

\textsuperscript{232}See, e.g., \textit{SIGMA CHI FRATERNITY, supra} note 219, at 16 (discussing the “Pledge Fee,” the “Initiation Fee,” and the “Member Fee”); \textit{SIGMA PHI EPSILON FRATERNITY, INC.}, \textit{supra} note 13, at 42–43 (discussing member registration fees and annual fee).

\textsuperscript{233}See \textit{DELTA TAU DELTA, supra} note 220, at 41–43.

\textsuperscript{234}See \textit{id.} at 21–23; see also \textit{The Business of Frats: Shifting Liability for Trauma and Injury, supra} note 205 (“The most expensive part of joining a fraternity is the portion of your dues that go to fraternity insurance.”).
2. *A Fraternity Has Additional Franchise Characteristics that Further Establish a Franchise Relationship*

Fraternity national organizations provide operational assistance and support that exceed the four elements of a franchise arrangement.235 A franchisor generally helps establish the business premises, provides a training program, provides franchise manuals, organizes compliance visits, maintains a consistent identity nationwide, and outlines termination events and the obligations of both parties if such an event were to occur.236 National organizations provide similar operational assistance and support to local chapters, which helps further establish a relationship similar to a franchise.

As a franchisor helps a franchisee establish its business premises,237 a national organization helps local chapters establish a fraternity house.238 A national organization, a fraternity alumni corporation, or an institution of higher learning may own a fraternity house.239 However, a house corporation comprised of alumni generally owns a fraternity house and helps establish it by raising funds and consulting on plans.240 For example, as described in *Brown*, Delta Tau Delta’s national housing corporation, a separate entity, owned and operated the fraternity house.241

Additionally, a national organization offers training to local chapters to instruct members on fraternity values and history.242 Fraternity education and training holds the same purpose as in a franchise because it explains how to operate the fraternity and builds enthusiasm for the fraternity.243 For example, before a candidate is initiated into Delta Tau Delta, he must complete “a period of pledgeship in which he has successfully demonstrated acquisition of a sound and thorough knowledge of the *Mission and Values* of Delta Tau Delta Fraternity and of the ideals and principles upon which it and college

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235 See *Fundamentals of Franchising*, supra note 136, at 59–60; supra note 145 and accompanying text.
236 See supra Part III.A.
239 See id. at 14; *Fraternity and Sorority*, supra note 1.
240 See *Baird’s Manual*, supra note 30, at 10, 14; *Fraternity and Sorority*, supra note 1.
243 See *Fundamentals of Franchising*, supra note 136, at 74; supra notes 152–50 and accompanying text.
fraternities were founded.” An additional prerequisite for initiation requires “[p]rospective initiates” to pass an exam that demonstrates their knowledge of “the most important points of the Mission and Values, ideals, purposes, history, laws, and customs of the Fraternity,” so that as members they can “contribute effectively to undergraduate chapters and the Fraternity.” Overall, Delta Tau Delta ensures members receive comprehensive fraternity training and education.

Similar to a franchisor, a national organization provides operational assistance to local chapters through its constitution and bylaws. A franchisor provides operational assistance through detailed operation manuals and marketing programs. The operations manual ensures the franchisee maintains product and service standards and overall uniformity. Instead of operation manuals and marketing programs, a national organization provides local chapters with the national constitution and bylaws, which are the manuals of how the fraternity operates and functions. For example, Delta Tau Delta’s constitution and bylaws are comprehensive and discuss many operational aspects, such as disciplining members and local chapters and establishing undergraduate chapter officer positions and their duties. Local chapters are also required to adhere to Delta Tau Delta’s constitution and bylaws and cannot enact contradictory, local bylaws. The standards and requirements outlined in Delta Tau Delta’s constitution and bylaws are mechanisms to help Delta Tau Delta maintain overall uniformity among its chapters.

To help maintain standards and uniformity, fraternities also provide chapter consultants, who perform roles similar to franchisor employees during compliance visits. A franchisor periodically sends an employee to visit a franchisee for inspection and to check business performance. Similarly, a fraternity sends an employee of the national organization, often recently

244 Delta Tau Delta, supra note 220, at 5.
245 Id. at 49. Delta Tau Delta also has an optional education program called “The Road: The Journey to Excellence,” which has four sections: new member education, recruitment, ritual, and member education. The Road, Delta Tau Delta, http://www.delts.org/the-road/ (last visited Feb. 9, 2017).
246 See Fundamentals of Franchising, supra note 136, at 75; supra notes 156-59 and accompanying text.
247 See Fundamentals of Franchising, supra note 136, at 75; supra notes 156-59 and accompanying text.
249 See Delta Tau Delta, supra note 220.
250 See id. at 45.
251 See Fundamentals of Franchising, supra note 136, at 75; supra note 160 and accompanying text.
graduated members, to inspect and check on local chapters.\textsuperscript{252} For example, Delta Tau Delta sends a chapter consultant to visit a local chapter at least once per semester.\textsuperscript{253} The chapter consultant inspects the local chapter’s operations, provides feedback to the local chapter and its leadership, and reports to the central office.\textsuperscript{254} Chapter consultants help Delta Tau Delta establish a command structure and relationship with its local chapters, while ensuring local chapters continue to comply with Delta Tau Delta’s constitution and bylaws.\textsuperscript{255}

Furthermore, a national organization provides standards to maintain “consistent appearance, operation, and . . . services”—the hallmarks of a franchise arrangement—among its chapters.\textsuperscript{256} A fraternity’s standardization through its national constitution and bylaws and its organization under a “grand chapter” maintains a consistent identity despite the existence of numerous local chapters.\textsuperscript{257} For example, Delta Tau Delta’s constitution and bylaws provide a consistent national identity by defining a clear command structure.\textsuperscript{258} Additionally, Delta Tau Delta’s constitution outlines qualifications for membership and initiation, which help to ensure members possess qualities and values consistent with the fraternity.\textsuperscript{259}

Lastly, like a franchise agreement, a national organization’s constitution and bylaws provide termination provisions. A franchise agreement generally outlines events that will cause termination and the obligations of each party in such a situation.\textsuperscript{260} Generally, the constitution and bylaws of a fraternity state when the national organization can revoke a local chapter’s charter and when a


\textsuperscript{253} See Brown v. Delta Tau Delta, 118 A.3d 789, 795 (Me. 2015).

\textsuperscript{254} See id.

\textsuperscript{255} See id.

\textsuperscript{256} FUNDAMENTALS OF FRANCHISING, supra note 136, at 79; see also supra notes 161–62 and accompanying text.

\textsuperscript{257} BAIRD’S MANUAL, supra note 30, at 12, 26. An issue fraternities face today is inconsistency. For example, “you could go to Sigma Chi, the biggest American fraternity on one campus, and those guys are exemplary student leaders. . . . You could go to the next campus over to Sigma Chi and it’s a bunch of thuggish kids who are perpetrating criminal acts and being drunk all the time.” The Business of Frats: Shifting Liability for Trauma and Injury, supra note 205.

\textsuperscript{258} See Brown, 118 A.3d at 795.

\textsuperscript{259} See DELTA TAU DELTA, supra note 220, at 4–8.

\textsuperscript{260} See FUNDAMENTALS OF FRANCHISING, supra note 136, at 87, supra notes 164–65 and accompanying text.
local chapter member can be expelled from the fraternity. For example, Delta Tau Delta “has a comprehensive process for disciplining members who violate its rules or regulations.” The Arch Chapter of Delta Tau Delta may withdraw a local chapter’s charter if the “chapter fails to comply with the requirements of the Constitution, Ritual, or laws of the Fraternity, or if it appears that the interests of the Fraternity will suffer by the continued maintenance and operation of a chapter.” Additionally, the Arch Chapter of Delta Tau Delta may expel a local chapter member for various reasons, such as “[v]iolation of the Fraternity’s Oath or the Chapter’s Code of Conduct where such Code exists,” or for “[c]onduct . . . that renders his membership detrimental to the best interests of the Fraternity.”

Accordingly, a fraternity is an unofficial franchise arrangement because it meets all four elements of a franchise arrangement and shares additional franchise characteristics that further establish a franchise relationship. A franchise model considers fraternity structure and operation, and consequently, it identifies cases where national organization liability is appropriate because of the national organization’s control over and its relationship with local chapters. Thus, courts should consider franchise case law when deciding national organization liability.

B. Applying Franchise Case Law to Fraternities: Rainey Meets Brown

Due to the operational and structural similarities of a fraternity and a franchise arrangement, courts should apply franchise case law when deciding a national organization’s liability. Franchise law provides a ready-made approach to fraternities that finds liability when the requisite relationship and control exists and prevents liability when it is absent. In Rainey, the Supreme Judicial Court of Maine outlined its franchise framework applying the traditional right-to-control test. Part B of this section applies the framework to Delta Tau Delta, the fraternity in Brown, to evidence how it identifies cases where liability may be imposed because the requisite control and relationship exists. The Rainey framework proceeds in two parts. First, as a

\begin{footnotes}
261 See, e.g., Sigma Chi Fraternity, supra note 219, at 19–21; Sigma Phi Epsilon Fraternity, Inc., supra note 13, at 12, 17, 35–37.
262 Brown, 118 A.3d at 795.
263 Delta Tau Delta, supra note 220, at 23.
264 Id. at 26.
265 See supra Part III.B.
266 The Supreme Judicial Court of Maine also decided the Brown case. Brown v. Delta Tau Delta, 118 A.3d 789 (Me. 2015).
\end{footnotes}
threshold issue, a court must identify and examine the proper relationship.\textsuperscript{267} Second, a court must decide whether the national organization has a right to control the daily operations of the local chapter.\textsuperscript{268}

When applying the traditional right-to-control test, a court first must identify and examine the relationship between the franchisor and franchisee.\textsuperscript{269} In \textit{Rainey}, the Supreme Judicial Court of Maine stated the superior court incorrectly looked to the relationship between the franchisor and the employee of the franchisee.\textsuperscript{270} Rather, when determining vicarious liability, the court should examine the relationship between the franchisor and the franchisee.\textsuperscript{271} If a franchisee is “an agent-employee” of the franchisor, then an employee of the franchisee is also “an agent-employee” of the franchisor.\textsuperscript{272} Thus, when a court has a case involving a fraternity national organization, it must identify and examine the relationship between the national organization and the local chapter. If the local chapter is “an agent-employee” of the national organization, then the local chapter member is also “an agent-employee” of the national organization.\textsuperscript{273} Since “[t]he mere existence of a franchise relationship does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such relationship,” the mere action of a national organization chartering a local chapter does not “trigger a master-servant relationship.”\textsuperscript{274} To determine if a master-servant relationship exists and whether imposing vicarious liability is appropriate, a court must examine the second step of the franchise framework.

The second step of the franchise framework requires a court to determine whether a national organization has control over the day-to-day operations of a local chapter. Imposing vicarious liability is only appropriate when further steps to reserve control over franchisee day-to-day operations are taken.\textsuperscript{275} The \textit{Rainey} court determined whether a franchisor had control over the day-to-day

\begin{footnotesize}
\begin{enumerate}
  \item[267] See \textit{Rainey} v. Langen, 998 A.2d 342, 349–50 (Me. 2010).
  \item[268] See id. at 349.
  \item[269] See id.
  \item[270] See id.
  \item[271] See id.
  \item[272] Id. at 349–50.
  \item[273] See Sunshine, \textit{supra} note 64, at 135 (“National fraternities, on the whole, are not so very unlike the traditional employer . . . .”). \textit{But see} \textit{LeFlore}, \textit{supra} note 12, at 231–32 (“Where a national fraternity is involved, the analogy to an employer and employee is not warranted.”).
  \item[274] \textit{Rainey}, 998 A.2d at 349 (quoting \textit{Drexel v. Union Prescription Ctrs.}, 582 F.2d 781, 786 (3d Cir. 1978)).
  \item[275] See id.
\end{enumerate}
\end{footnotesize}
operations of the franchisee by looking to the *Murray’s Case* factors.\(^{276}\) The court did not discuss how to balance the factors but did note that the degree of control reserved by the franchisor, as evidenced in the franchise agreement and manager’s reference guide, was particularly important.\(^{277}\) Each of the eight *Murray’s Case* factors listed below is applied to Delta Tau Delta to demonstrate that it may have had the proper relationship and control over local chapters that was necessary to impose vicarious liability to the national organization:

1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;
2) independent nature of his business or his distinct calling;
3) his employment of assistants with the right to supervise their activities;
4) his obligation to furnish necessary tools, supplies, and materials;
5) his right to control the progress of the work except as to final results;
6) the time for which the workman is employed;
7) the method of payment, whether by time or by job;
8) whether the work is part of the regular business of the employer.\(^{278}\)

The *Murray’s Case* factors that reference “his” right or obligation examine the factor from the perspective of the person claiming to be an employee or independent contractor.\(^{279}\) In the context of a fraternity, those factors would be examined from the perspective of the local chapter.

The first *Murray’s Case* factor is “the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price.”\(^{280}\)

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\(^{276}\) *Id.* at 350. \\
\(^{277}\) *Id.; see also Legassie v. Bangor Publ’g Co., 741 A.2d 442, 444 (Me. 1999)* ("Since our decision in *Murray’s Case*, we have held that control is the most important factor in determining whether an individual is an employee or an independent contractor.” (citation omitted)). The Supreme Judicial Court of Maine did not expressly consider each *Murray’s Case* factor, but stated “the ultimate determination turns on an analysis of the *Murray’s Case* factors.” *Rainey*, 998 A.2d at 350. *Murray’s Case* stated the factors are “not necessarily concurrent or each in itself controlling.” 154 A. 352, 354 (Me. 1931). Thus, this Comment considers and applies each factor in the second part of the franchise framework. \\
\(^{278}\) *Murray’s Case*, 154 A. at 354. \\
\(^{279}\) *Id.* at 355 (“The only fact, in the instant case, which has the slightest tendency to uphold the contention that petitioner was an independent contractor, is the hiring by him of the men who assisted in unloading the coal.” (emphasis added)). \\
\(^{280}\) *Id.* at 354.
this factor: how the franchise agreement defined the franchise relationship, stating this declaration was relevant but not controlling; and to what extent the franchisor retained control over the franchisee in the franchise agreement and manager’s reference guide.281 The court stated, “‘courts typically draw distinctions between recommendations and requirements’ and are reluctant to impose liability based on mere suggestions.”282 When applied to Delta Tau Delta, this factor favors finding control over day-to-day operations. Delta Tau Delta’s constitution and bylaws state that “no chapter, chapter member, [or] chapter advisor . . . has authority to sign a college or university document on behalf of the International Fraternity that would bind the Fraternity.”283 This Comment assumes this statement indicates a chapter, chapter member, or chapter advisor is not an agent of the fraternity; however, while this statement is relevant as an indication of the legal relationship, it is not controlling.284 Additionally, Delta Tau Delta has, and retains, control over its local chapters through the chartering process and its national constitution and bylaws. Without the chartering process, local chapters would not exist or operate as an extension of the fraternity.285 Delta Tau Delta requires “local chapter[s] to adopt local by-laws that do not conflict with the national constitution or by-laws.”286 Delta Tau Delta’s control over local chapters is evidenced by the expectation that local bylaws “address local risk management plans that supplement the national MRGs [and] implement [Delta Tau Delta’s] alcohol education program.”287 Control is also evidenced by the requirements that “all members . . . sign the national code of conduct,” local chapters “provide a certified copy of [their] by-laws, and any amendments thereto, to the national central office,” the local chapters present the MRGs to pledges and members annually for chapter accreditation, and members adhere to the MRGs and sign and conform to the national code of conduct.288 Delta Tau Delta’s constitution and bylaws impose more than mere suggestions and indicate its control over local chapters.

281 See Rainey, 998 A.2d at 350.
282 Id. (quoting Hong Wu v. Dunkin’ Donuts, Inc., 105 F. Supp. 2d 83, 89 (E.D.N.Y. 2000)).
283 DELTA TAU DELTA, supra note 220, at 54 (discussing host indemnification).
284 See Rainey, 998 A.2d at 350.
285 See DELTA TAU DELTA, supra note 220, at 1–2.
286 Brown v. Delta Tau Delta, 118 A.3d 789, 794 (Me. 2015).
287 Id.
288 Id.
The second *Murray’s Case* factor is the “independent nature of his business or his distinct calling.” 289 The distinction between a servant and a contractor “is the power of control, not the fact of control.” 290 This right to control is most evident in the right to terminate or discharge a person from service without liability. 291 Local chapters of Delta Tau Delta are not independent, but rather they are controlled by the national organization, because Delta Tau Delta “has a comprehensive process for disciplining members who violate its rules or regulations.” 292 As the *Brown* court stated, Delta Tau Delta has broad authority to impose sanctions, which may include . . . revoking a chapter’s charter, or suspending or expelling individual members. In short, the national fraternity does more than simply suggest that its members conform to certain norms; it enforces its rules, regulations, and codes of conduct through constant monitoring, oversight, and intervention. 293

The third *Murray’s Case* factor is “his employment of assistants with the right to supervise their activities.” 294 If a person has the right to employ and supervise assistants, that indicates that the person is similar to an independent contractor rather than an employee controlled by an employer. 295 When applied in a fraternity context, this factor looks to whether the local chapter can employ “assistants with the right to supervise their activities.” 296 Generally, national organizations employ and supervise more assistants than local chapters to maintain control over day-to-day operations of local chapters, thus fulfilling the local chapter’s need to employ and supervise assistants. 297 For example, Delta Tau Delta’s chain of command of alumni advisors and consultants establish a close relationship between its national organization and

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289 Murray’s Case, 154 A. 352, 354 (Me. 1931).
290 See *id.* at 355.
291 *Id.* at 354–55 (“The most important point in ‘determining the main question [contractor or employee] is the right of either to terminate the relation without liability.’” (quoting *Indus. Comm’n v. Hammond*, 236 P. 1006 (Colo. 1925))).
292 *Brown*, 118 A.3d at 795.
293 *Id.*
294 Murray’s Case, 154 A. at 354.
295 Legassie v. Bangor Publ’g Co., 741 A.2d 442, 445 (Me. 1999) (listing the fact that “[the worker] was not required to deliver the papers himself, but was free to engage others to carry out the task” indicated an independent contractor relationship).
296 Murray’s Case, 154 A. at 354–55 (stating the fact that the petitioner could hire men to assist in unloading the coal supported the contention that the petitioner was an independent contractor).
297 *See Brown*, 118 A.3d at 794–95 (discussing the close relationship the fraternity chain of command establishes between the national organization and local chapters); *supra* notes 88–90, 96–97, 252–55 and accompanying text; *infra* notes 298–301 and accompanying text.
local chapters and members. The alumni advisor is a “deputy of the Arch Chapter” and the chapter advisor’s “full-time job is to monitor and provide oversight of the functioning of the local chapter, to ‘assist the undergraduate chapter in understanding and living the Mission and Values of the Fraternity,’ and to report to [Delta Tau Delta] on a regular basis.” In addition, a chapter consultant interacts frequently with local chapters by visiting at least once per semester to suggest improvements and check on the chapter’s operations. Chapter consultants are required to report to Delta Tau Delta regarding the visit and inform it of potential rule violations committed by local chapters. Through Delta Tau Delta’s “clearly defined power structure” of alumni advisors and consultants, the national organization maintains supervision and oversight over its local chapters.

The fourth Murray’s Case factor is “his obligation to furnish necessary tools, supplies, and materials.” Delta Tau Delta requires local chapters “to adopt local by-laws that do not conflict with the national constitution or by-laws,” which impose organizational requirements and set standards for local chapters. Delta Tau Delta’s constitution and bylaws describe crucial aspects of the fraternity—its values, mission, purpose, and emblems. Additionally, the constitution and bylaws require local chapters to educate members in the fraternity’s ideals, mission, and values. In essence, because the national organization provides the constitution and bylaws—the fraternity’s foundation and guidebooks—local chapters do not provide the tools, supplies, and training necessary to operate.

The fifth Murray’s Case factor is “his right to control the progress of the work except as to final results.” “The essence of the . . . ‘right to control the progress of the work’ factor[,] is the freedom of the employee or independent contractor to do the work without direction, so long as the work gets done.” The Brown court found Delta Tau Delta had “authority to control its members

298 See Brown, 118 A.3d at 794–95.
299 Id.
300 See id. at 795.
301 See id.
302 See id.
303 Murray’s Case, 154 A. 352, 354 (Me. 1931).
304 See Brown, 118 A.3d at 794.
305 See Delta Tau Delta, supra note 220, at 1, 30–31, 33.
306 See id. at 5, 20, 49.
307 Murray’s Case, 154 A. at 354.
308 Legassie v. Bangor Publ’g Co., 741 A.2d 442, 446 (Me. 1999).
as well as its actual control. Through its constitution, by-laws, and administrative connection to its local chapters’ day-to-day activities, [Delta Tau Delta] exercises significant control over its individual members.”

Delta Tau Delta’s control is evident in the requirements imposed on local chapters, such as ensuring all members sign the national code of conduct, annually presenting the Member Responsibility Guidelines to the chapter to maintain chapter accreditation, and supplying the national central office a certified copy of the local bylaws. Delta Tau Delta’s administrative connection, as well as its constitution and bylaws, ensures it controls local chapter operations, which implies that local chapters must operate under the direction of the national organization.

The sixth Murray’s Case factor is “the time for which the workman is employed.” Delta Tau Delta may satisfy this factor because its constitution outlines membership qualifications and requires exclusivity. After “unit[ing] with Delta Tau Delta Fraternity,” a person is “forever thereafter barred from membership in any other social college fraternity.” Delta Tau Delta’s membership qualifications and exclusivity signal its control over its members and local chapters.

The seventh Murray’s Case factor is “the method of payment, whether by time or by job.” Payment by “time or piece,” for example, “$4.00 per acre,” generally indicates an employee, while payment by “lump sum for the task,” for example, harvesting “twenty acres at $4.00 an acre,” generally indicates an independent contractor relationship. In Rainey, the court found that the franchisor, Domino’s Pizza, did not compensate the franchisee as an employee; rather, the franchisee was paid by customers and provided royalty payments to the franchisor. The court indicated such conduct was “inconsistent with an employer-employee relationship.” In a fraternity context, local chapters collect dues from members and portions of the dues are remitted to the national central office.

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309 Brown, 118 A.3d at 794.
310 See id. Additionally, a local chapter’s bylaws must include several specific policies as outlined in Delta Tau Delta’s constitution and bylaws. Delta Tau Delta, supra note 220, at 45.
311 Murray’s Case, 154 A. at 354.
312 See Delta Tau Delta, supra note 220, at 4–8.
313 Id. at 7.
314 Murray’s Case, 154 A. at 354.
315 See id. (quoting Indus. Comm’n v. Hammond, 236 P. 1006, 1008 (Colo. 1925), Norton v. Day Coal Co., 180 N.W. 905 (Iowa 1920)).
316 Rainey v. Langen, 998 A.2d 342, 350 (Me. 2010).
317 Id.
organization, similar to a royalty agreement. While this factor indicates a lack of control, no single factor is dispositive.

The eighth Murray’s Case factor is “whether the work is part of the regular business of the employer.” Application of this factor to fraternities can be difficult because some conduct by local chapters and members is obviously not regular fraternity business. For example, sexually assaulting a woman at a fraternity party is not the regular business of Delta Tau Delta and does not carry out its purpose, mission, or values. A court would likely conclude that such conduct is not regular fraternity business but that of a rogue member. However, depending on its relationship with the local chapter and constitution and bylaws, the national organization may still be liable because it had the ability to control the local chapter. Additionally, particular conduct by local chapters during parties and initiation activities could be considered regular fraternity business depending on the purposes and goals of fraternities and the national organization’s constitution and bylaws. For example, in Marshall, the court found the party hosted by a local Kappa Alpha chapter could be considered regular fraternity business because it could support a fraternity’s goal of “promot[ing] fellowship among men.” Also, in Marshall, the court stated that Sigma Nu’s attendance at the party could constitute regular fraternity business because it may further the purpose of the fraternal organization—to “encourage the development of relationships of fellowship and friendship among its members.” Courts have also found conduct by local chapter members during initiation activities to be regular fraternity business. For example, in Ballou, the required “hell night” before initiation was considered regular business of Sigma Nu because adding new members accomplished the purpose and was the business of the fraternity. Additionally, the Sigma Nu national bylaws did not prohibit the local chapter from requiring additional initiation activities. Accordingly, when a court

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318 See Delta Tau Delta, supra note 220, at 42 (discussing that joint dues are set by the Arch Chapter and Undergraduate Council); id. at 47 (discussing the payment of fines and penalties); id. at 5 (discussing candidates paying dues before initiation).
319 See Murray’s Case, 154 A. at 354.
320 Id.
321 See Delta Tau Delta, supra note 220, at 1, 33.
322 Cf. Sunshine, supra note 64, at 132–33 (discussing the distinctions between “detours” and “frolics”).
323 See supra notes 115–16, 124–25 and accompanying text.
325 Id. at *8.
327 Id.
applies this factor to a fraternity, the conduct may be regular fraternity business depending on the local chapter’s conduct, the national organization’s constitution and bylaws, and the fraternity relationship.

Applying Maine’s franchise framework to Delta Tau Delta indicates it may have the requisite control and relationship with its local chapters needed under a franchise model. While the Rainey court did not provide express guidance as to how to balance the factors, it did indicate control was important.328 The Murray’s Case factors, when applied to Delta Tau Delta, may weigh in favor of liability and indicate control. The Brown court stated, “[t]hrough its comprehensive articles and clearly defined power structure, [Delta Tau Delta] expressly reaches into the day-to-day affairs of its local chapters and creates a close, mutually beneficial relationship with its individual members.”329 Consequently, the findings in Brown and the application of the Murray’s Case factors to Delta Tau Delta highlight that imposing vicarious liability to Delta Tau Delta under a franchise model may be appropriate because of the extensive control and developed relationship it has with its chapters and members.330 A franchise model provides a consistent, ready-made framework for evaluating fraternities. Because it takes into consideration the variation of control among fraternities and imposes liability when the necessary control and relationship are evident, a franchise model imposes liability on the national organization when it is appropriate.

CONCLUSION

Fraternities are founded on values like leadership, scholarship, and philanthropy, and provide benefits to members like lifelong friendship, community service, and leadership experience.331 However, modern fraternity culture and recent headlines reveal that there can also be a dark side to fraternities.332 While national organizations disclose the positive statistics and

328 Rainey v. Langen, 998 A.2d 342, 350 (Me. 2015); Legassie v. Bangor Publ’g Co., 741 A.2d 442, 444 (Me. 1999).
330 The Brown court dismissed the vicarious liability claim but held Delta Tau Delta could be liable under a negligence theory, specifically premises liability. Id. at 791, 795.
331 See supra notes 1–5 and accompanying text; see also Max Abelson & Zeke Faux, Secret Handshakes Greet Frat Brothers on Wall Street, BLOOMBERG (Dec. 23, 2013, 12:00 AM), http://www.bloomberg.com/news/articles/2013-12-23/secret-handshakes-greet-frat-brothers-on-wall-street (discussing the fraternity connection that helps students obtain internships and jobs on Wall Street).
332 See supra notes 6–9 and accompanying text; see also Peter Jacobs, A Misguided Fraternity Movement Is Revealing the Worst Aspects of Frat Boy Culture, BUS. INSIDER (Aug. 7, 2014, 5:05 PM),
benefits of fraternities, national organizations are less transparent about the measures they take to prevent liability. A fraternity attorney expressed to national organizations that “most state courts won’t hold them liable if they’re ‘predominantly passive’ in their supervision of affiliates’ ‘daily activities.’” The dark side of fraternities will continue until courts view fraternities and their national organizations differently.

The franchise model provides an alternative way to view fraternities and challenges, as described by one attorney, the perception of fraternities dodging responsibility rather than accepting responsibility. A franchise model provides a consistent framework to view fraternities and considers fraternity structure and operation. Under the traditional right to control test, the franchise model considers the relationship between the national organization and local chapter and the overall control a national organization exercises over a local chapter’s day-to-day operations. Consequently, it imposes liability when the required relationship and control elements are satisfied and prevents liability

http://www.businessinsider.com/tfm-fraternity-movement-worst-frat-boy-culture-2014-8 (highlighting Total Frat Move’s “why we need frat” social media campaign). Total Frat Move (TFM) is a website that publishes articles and videos pertaining to fraternities and fraternity life. See TFM: TOTAL FRAT MOVE, http://totalfratmove.com (last visited Feb. 10, 2017). While TFM videos are satirical and are made for entertainment and to be posted online, videos of real fraternity incidents that expose a dark side to fraternities are also online. See, e.g., Gabrielle Russin, UCF’s Sigma Nu Suspended After Video Shows Frat Member Chanting ‘Rape’, ORLANDO SENTINEL (Aug. 14, 2015, 7:11 PM), http://www.orlandosentinel.com/news/breaking-news/ucf-sigma-nu-frat-rape-chant-video-20150814-story.html (discussing the university’s suspension of the Sigma Nu chapter after a video surfaces of members promoting rape); Ray Sanchez, Indiana ATO Frat Shut Down After Sexually Explicit Video Surfaces, CNN (Oct. 10, 2015, 6:04 PM), http://www.cnn.com/2015/10/08/us/indiana-university-fraternity-suspended/ (discussing the video that surfaced of fraternity members encouraging a “brother involved in a sexually explicit act with a woman” and the national organization’s “swift” action of shutting the chapter down and revoking its charter); ABC News, Oklahoma SAE Frat: Two Students Expelled Over Racist Chants, YOUTUBE, (Mar. 11, 2015), https://www.youtube.com/watch?v=nU-ZbjB00k8 (discussing the racist chant by Sigma Alpha Epsilon fraternity members and the university’s and the national organization’s response).

See supra notes 2–5 and accompanying text.

To prevent liability, fraternities have placed insurance with the national organization, developed procedures and policies to transfer liability to outside parties, found creative ways to protect their assets from juries, and found ways to indemnify the national and local organizations for undergraduate member’s conduct. Id.; see also supra notes 23–28 and accompanying text. But see Flanagan, supra note 3, at 85 (“[N]eather the fraternities nor the insurance company are hiding their warnings that a member could lose his coverage if he does anything outside of the policy.”).

National Fraternities Face More Legal Risk After Court Ruling, supra note 27 (quoting a lawyer who represents fraternities).

See id. (noting that “[i]f every court in the country” ruled “that a national fraternity must face a trial for injury or death at a chapter house,” some lawyers believe “it would change the structure of fraternities”); supra notes 6–9 and accompanying text.

Kennerly, supra note 24 (“I suppose we shouldn’t be surprised that the national fraternities responded to a serious issue with fratboy logic: better to dodge responsibility than to be responsible.”).
when the required relationship and control elements are not satisfied. However, national organization liability ultimately relies on the franchise test adopted by a state and a national organization’s relationship with and control over its local chapters.338 A franchise model may make it difficult for fraternities to take the “middle-of-the-road approach” of partial supervision and partial nonsupervision.339 If examined under a franchise model, national organizations may have to decide to supervise local chapters and members fully, which, presumably, would always give them control of day-to-day operations of a local chapter; or not to supervise at all.340 Additionally, a franchise model may encourage fraternities to use arbitration agreements in the future.341 In conclusion, by adopting a franchise model for fraternities, courts can hold national organizations liable for their local chapters’ actions when it is appropriate using a model that accounts for a fraternity’s structure and operation, which may shine a brighter light on the potential dark side of fraternities.

CASSANDRA COOLIDGE*

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338 This Comment applied the franchise model to fraternities using cases in which third parties were injured by a fraternity member and a franchisee employee. This Comment did not explore the application of the franchise model to fraternities in situations where fraternity members are injured and seek to hold the national organization vicariously liable as compared to when franchisee employees are injured and seek to hold the franchisor vicariously liable. Thus, this Comment acknowledges that the application of the franchise model to such situations and other aspects of fraternity life still need to be further explored and considered. This Comment also acknowledges that a more thorough examination of the policy implications of applying a franchise model to fraternities may be necessary.

339 See National Fraternities Face More Legal Risk After Court Ruling, supra note 27.

340 Id. If national organizations chose not to supervise local chapters at all, then members would be supervised at the local level. Id.

341 Cf. Terrell, supra note 60, at 516 (arguing fraternities should use arbitration agreements to settle disputes).

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