

The Legal Fallout of Coeducating a Fraternity

By CHARLES D. RAY and MATTHEW A. WEINER

A college president, tired of the antics of a fraternity whose members refer to him as a “fascist,” shuts it down. A plot line in a John Belushi or Will Farrell movie? Maybe. But also the backdrop for the Supreme Court’s more mundane discussion of the rights and obligations between parties to a contract in *Kent Literary Club of Wesleyan University at Middletown v. Wesleyan University*, ___ Conn. ___ (Mar. 5, 2021).

Kent Literary Club of Wesleyan University at Middletown owns the Delta Kappa Epsilon (DKE) fraternity house, which is in the center of the Wesleyan University campus, directly across from the university president’s house. Kent has owned the house since 1888. DKE is the local chapter of Delta Kappa Epsilon, a fraternity whose charter bars local chapters from admitting women as members. Wesleyan has recognized DKE since 1867.

With few exceptions, Wesleyan requires undergraduate students to live on campus. Students can choose between traditional dormitory life and placement in Wesleyan’s program housing system, which allows students to “live in a theme based house based on shared hobbies, experiences, cultural interests, or identities.” Fraternities are included in Wesleyan’s program housing system.

To participate in program housing—and, therefore, to have students placed in its house and to receive those students’ housing dollars as rent—Kent had to execute, on an annual basis, a Greek Organization Standards Agreement. Under the agreement, either party could terminate the relationship for any reason with 30 days’ notice; Kent had to comply with all Wesleyan rules and policies, which Wesleyan



could modify at any time; and Wesleyan had to apply the provisions of the agreement to Kent in a manner consistent with how it treated other residential Greek organizations.

In September 2014, Wesleyan announced that all residential fraternities on campus would be required to coeducate within three years. At the time, Wesleyan had no sororities and DKE was one of three all-male fraternities. Wesleyan made its decision in response to allegations that female Wesleyan students had been sexually assaulted at fraternity houses other than DKE’s, and after Wesleyan had been sued in connection with those allegations.

Following the announcement, Kent and Wesleyan attempted to negotiate a plan for coeducating the DKE House. When those negotiations failed, Wesleyan terminated the agreement. As a result, Wesleyan students were barred from living at the DKE House, or even using it for nonresidential purposes.

Kent, DKE, and an individual DKE student member sued Wesleyan and its president and vice president for student affairs.

Interestingly, the plaintiffs did not allege that Wesleyan had breached any contractual obligation. Instead, they asserted a host of claims—including promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and violations of the Connecticut Unfair Trade Practices Act—premised on the contention that Wesleyan’s conduct was independently tortious. In support, the plaintiffs contended that Wesleyan: (1) had falsely assured the plaintiffs that DKE members could remain in program housing if the plaintiffs agreed to coeducate at the residential, rather than organizational, level; (2) did not honor a promise it had made to DKE that DKE would have three years to coeducate if it satisfied certain criteria; and (3) broke a promise to future Wesleyan students that they would have the opportunity to reside at the DKE House. In addition to damages, attorney’s fees, and costs, the plaintiffs sought injunctive relief.

After a trial, a jury found in favor of the plaintiffs on all counts and awarded Kent \$386,000 in damages. Though unspecified, the damages award was consistent with Kent’s request for \$216,000 to cover

lost revenues following Wesleyan's termination of the agreement and \$170,000 in costs to maintain the empty DKE House in 2016-2017.

In addition, the trial court awarded the plaintiffs approximately \$411,000 in attorney's fees and costs under CUTPA. It also issued a mandatory injunction that required Wesleyan to reinstate the DKE House as a program housing option, enter into a new contract with Kent and DKE identical to the agreements it has with other fraternities, and give DKE three years to coeducate.

On appeal to the Supreme Court, the defendants made various arguments that could be boiled down to this: because Wesleyan did not breach the agreement, it could not be held liable under any of the plaintiffs' legal theories. Stated another way, because the Agreement gave Wesleyan the right to terminate its relationship with Kent for any reason, its decision to terminate it based on Wesleyan's residential housing policy shift and the parties' failure to reach a new agreement was unassailable. In a unanimous opinion authored by Justice Palmer, the Supreme Court mostly agreed.

The Court tackled the broad legal question of whether the terms of the agreement, in effect, granted Wesleyan immunity through the lens of instructional error. Specifically, the Court framed the issues as whether the trial court had improperly denied the defendant's request to instruct the jury that "[w]hen a party acts consistently with its rights under a contract, its conduct cannot violate CUTPA," as well as the defendant's proposed instructions that "[t]he principle of promissory estoppel applies only when there is no enforceable contract" and a "party cannot prevail on a claim for promissory estoppel based on alleged promises that contradict the terms of a written contract." Although the Court ultimately determined that the defendants' requests to charge overstated the strength of their legal position, it concluded that the trial court's failure to direct the jury to consider the terms of the Agreement when eval-

uating the plaintiffs' legal claims constituted reversible error.

Beginning with the plaintiffs' promissory estoppel theory, the Court observed the well-established principle that when a written contract exists, the parties cannot succeed on a promissory estoppel theory that relies on promises that contradict the terms of the contract. The trial court, therefore, should have given that portion of the defendant's charge that accurately set forth that principle. However, the defendant's proposed instruction that promissory estoppel only applies "when there is no enforceable contract between the parties" was incorrect. Here, the plaintiffs alleged that the defendants had made promises—such as that DKE could participate in the housing program if it took good faith steps to develop a residential coeducation plan—that did not alter or contradict the terms of the agreement. Accordingly, the plaintiffs could have succeeded on their promissory estoppel theory even though they had an enforceable contract with the defendants.

Similarly, even though the defendants' requested CUTPA instruction also overshot the mark, the Court concluded that the jury charge's failure to address the significance of the agreement in relation to the CUTPA claim constituted reversible error. Because bad faith efforts to modify an existing contract effort can implicate CUTPA, it is not true that a party immunizes itself against a CUTPA claim by acting consistently with a contract to which it is a party. Nevertheless, by failing to instruct the jury that it had to take into account the terms of the Agreement when assessing whether the defendants had committed an unfair act or practice, the jury was left without "sufficient guidance as to a central legal issue."

Having concluded that the trial court committed reversible error with respect to the plaintiffs' promissory estoppel and

CUTPA claims, the Court next addressed whether the damages award nevertheless could be upheld by the jury's findings with respect to tortious interference and negligent misrepresentation. It concluded that additional instructional errors rendered the award unsustainable.

In particular, the Court determined that the general damages instructions that the jury received did not adequately advise them in three respects. First, the instructions did not explain that damages for tortious interference were limited to Kent's anticipated lost revenues minus its costs. Instead, the instruction impermissibly permitted the jury to award gross revenues. Second, the instructions did not explain that compensable losses were limited to those that occurred before June 18, 2015, when Wesleyan exercised its right under the agreement to terminate its commercial relationship with Kent. Third, the instructions failed to provide that, with respect to the negligent misrepresentation claim, Kent could recover only reliance damages, not expectation damages.

The Court also concluded that the trial court's imposition of a mandatory injunction was wholly inappropriate under the circumstances. Even setting aside the stringent standards that govern the "drastic" remedy of a mandatory injunction, the trial court's order could not stand because it either lacked legal effect or sanctioned a result contrary to law. For example, if one read the order as requiring the parties to reach a new agreement identical to the

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Pro Bono

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Incoming President's Speech

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Almost 250 years ago, in 1776, our founders stated a bedrock principle of this country, that equality is a self-evident truth. It was, at the moment of its writing, an ideal that was perfect in its conception, and imperfect in its application. We debated then, and have continued to debate ever since, what those words should mean in application. Ninety-nine years later, in 1875, a group of lawyers formed one of the oldest bar associations in this country—the Connecticut Bar Association—the statewide bar association of lawyers in Connecticut. It was then, as it is now, a perfect vision, imperfect in its application, as is the way of all human endeavors. The common thread of both moments is the creation of an opportunity for togetherness; social contracts that brought people together to advance ideals that are greater than any one individual, the pursuit of which would continue long after them. Today, in 2021, we are no different, we pursue the perfect ideals of our profession imperfectly, but with commitment and dedication to the journey. The challenges facing us may be unprecedented and at times, overwhelming, but we are stronger and more effective when we face them together.

I am honored and humbled by this measure of trust and confidence. I believe that leadership is service, and I will do my utmost to fulfill the trust and

confidence you have placed in me. I am reassured that I will not be alone in that service. The incoming slate of officers of the Connecticut Bar Association is incredibly diverse, with deep experience, from the private and the public sector, representing the richness of our profession, and bringing the strengths of our collective differences to the common issues facing the bar. It is therefore my great privilege to introduce to you the incoming officers of the Connecticut Bar Association: Daniel J. Horgan, president-elect; Margaret I. Castinado, vice president; David M. Moore, treasurer; Sharadchandra Samy, secretary; and Cindy M. Cieslak, assistant secretary-treasurer.

I look forward to working with all of these accomplished individuals, along with Immediate Past President Amy Lin Meyerson, in the year ahead. Together we represent a bar association that is open and inclusive to all lawyers in this great state, unwavering in its commitment to the needs and concerns of our profession, and to advancing the bedrock principle of equality and justice for all. We are all but stewards, who hope to leave the CBA a stronger organization for those that will follow us. We will need your help in this pursuit, as we work Together for Justice, Together for Equity, Together in Service. ■

Supreme Deliberations

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agreements Wesleyan currently has with other fraternities, then nothing would prevent Wesleyan from immediately giving notice of its plan to terminate the agreement. If, on the other hand, one read the order as requiring Wesleyan to reach a new agreement with DKE that impinged on Wesleyan's right to terminate its relationship with the fraternity for any reason, then the order violated established law prohibiting a court from expanding the rights of parties governed by an enforceable contract. (Justice D'Auria authored a concurring opinion that expressed additional concerns regarding the mandatory injunction.)

Finally, resolving an issue with broader implications, the Court concluded that the trial court did at least one thing right: it correctly instructed the jury that the cigarette rule governs a CUTPA claim. The cigarette rule is a test for whether a practice is unfair. It originally was set forth decades ago by the Federal Trade Commission but, after a statutory amendment, is no longer applied by the FTC or by federal courts. The Court concluded that, notwithstanding certain justices' openness to abandoning the rule in Connecticut, it is up to the General Assembly to change the operative standard for unfair trade practices claims under CUTPA.

In the end, what we find most interesting is a big picture observation: the defendants secured a reversal based on claims of instructional error even though the proposed charges they submitted to the trial court were, themselves, legally incorrect. We're curious to see whether Kent is a one-off matter based on how badly the trial court's instructions missed the mark, or whether it signals the Court's openness to consider imperfectly preserved claims of instructional error in civil cases at a level traditionally reserved for criminal cases. ■

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