

MONDAY, FEBRUARY 14, 1994
8:30 - 10:00 a.m.

CONCURRENT SESSION ONE

**Identifying College and University Activities
That Are Most Likely To Cause Injury and
Result in Law Suits: College and University
Claims Data As A Risk Predictive Tool**

Faculty:

**E.T. "Joe" Buchanan
Cary Jensen
George Meeker**

IDENTIFYING COLLEGE AND UNIVERSITY ACTIVITIES THAT ARE MOST LIKELY TO CAUSE INJURY AND RESULT IN LIABILITY

PRESENTER:

CARY M. JENSEN

CLAIMS ATTORNEY

**UNITED EDUCATORS INSURANCE RISK RETENTION GROUP
CHEVY CHASE, MARYLAND**

**Presented by Stetson University
College of Law at the :**

**15th ANNUAL NATIONAL CONFERENCE ON
LAW & HIGHER EDUCATION
Clearwater Beach, Florida
February 13-16, 1994**

**IDENTIFYING COLLEGE AND UNIVERSITY ACTIVITIES
THAT ARE MOST LIKELY TO CAUSE INJURY
AND RESULT IN LIABILITY**

Presented at the Stetson Law and Higher Education Conference
February 14, 1994

Cary M. Jensen, Claims Attorney
United Educators Insurance Risk Retention Group
Chevy Chase, Maryland

I. Background: Policies, Statistics and Claim Trends

1. Insurance: "Wrongful Acts" and "General Excess"
2. Statistics: Who is suing colleges and universities today?

What types of claims are most frequently made?

How do employment-based claims compare to student-related claims?
3. Trends: What are the emerging areas of liability?

What statutes and cases have affected 1993 trends?

II. College and University Activities

In attempting to "Identify College and University Activities That Are Most Likely To Cause Injury And Result In Lawsuits," the first task is to define "College and University Activities."

1. Student-Related vs. Employment-Based Claims

Although most of the claims reported under United Educator's "Wrongful Acts" policy involve employment-based claims, this presentation will focus on the uniquely educational claims, including claims arising from student-related activities.

2. Existing and Implied Duties

While an institution is not normally held responsible for the independent behavior of each student, its responsibilities can be very different when that behavior occurs in the context of an organization or group that carries with it the actual or implied approval, recognition, sponsorship or control of the institution. Under tort law generally there is no duty to control the conduct of a person or to prevent injury to that person or others unless there exists what the law calls a "special relationship." In the past, courts found that a person's status as a student created a special relationship with a university sufficient to impose a general duty to control and protect. While this doctrine of *in loco parentis* has been almost universally rejected under current law, courts have increasingly held colleges and universities liable for student-related activities based on a special relationship arising out of:

- a) the college's status as a property owner or landlord and the student organization's status as a tenant or invitee; and
- b) the involvement of the college in a student organization or activity to the extent that the organization is viewed as an agent acting on behalf of the institution.

In seeking to avoid liability, it is essential to recognize existing agency and landowner duties, to act responsibly in fulfilling these duties (often documenting the action taken) and to be careful not to assume unintended duties.

3. Focus On Avoiding Liability Not Just Lawsuits

While lawsuits are burdensome, expensive and to be avoided at all costs, recent claims activity has shown that anyone can (and will) sue for anything; universities should therefore focus their efforts on limiting liability, as there is often little that can be done to prevent the "crazies" from suing.

4. The Three S's of Student Life: School, Socials and Sports

III. School-Related Activities

The following list represents a rough chronology of the academic life of a student. United Educators has seen lawsuits and other grievances brought by students and others over virtually every aspect of academic life. Each area represents a unique risk management challenge to the institution, often complicated by specific (and sometimes contradictory) regulations and policies.

1. Admission and Enrollment

Delivering the promised goods;
Complications with international students.

2. Financial Aid

Accommodating disabled students with application assistance;
Debt collection and withholding transcripts.

3. Student Records

Campus crime records vs. student judicial proceedings;
Waiver of confidentiality for minimum GPA positions.

4. Classroom Activities and Atmosphere

Course material vs. sexual harassment;
Inherently dangerous activities (labs, shops).

5. Off-Campus Internships and Extensions

Travel-related injuries;
Supervision and third-party injuries.

6. Libraries and Campus Facilities

Public access to a federal depository;
Acquisitions, collections and development issues.

7. Testing

Accommodation for alleged disability;
Psychological and "dueling" disabilities.

8. Grades

Non-justiciable academic decisions vs. factual issues for the jury;

9. Discipline

Following the written policy;
Due process rights at private institutions.

10. Professor/Student Relationships

Sexual harassment developments;
Consensual relations policies.

11. Educational Malpractice

Implied contracts in student handbooks;
Lost wages as a measure of damages.

IV. Social Activities

1. Student Organizations

One fraternity's claim experience demonstrates that 75% of claims against social organizations involve (in descending order) slip and falls, assaults (male organizations), big falls, thrown objects, auto accidents and athletic injuries. Other claims which were not as frequent, but which resulted in large losses included sexual assault and water-related injuries.

a. Alcohol

Loss records show unequivocally that alcohol increases the cost of claims. Liability can result, not only from local dram shop statutes but under several general tort theories.

b. Title IX

Recent legal developments allowing lawsuits for money damages under Title IX have had a dramatic effect on claims activity against single-sex organizations, especially those not covered within Title IX's exclusion for social fraternities and sororities.

c. Sexual Orientation

Sexual orientation discrimination has also become the focus of discussions on campuses allowing student organizations who prohibit (usually for religious reasons) gay and lesbian members or officers. This has created an ironic twist in the development of first amendment law defining freedom of association.

d. Hate Speech Code Fallout

While the RAV decision seems to have quieted the national furor over hate speech issues, there continues to be significant claims activity resulting from hate speech code enforcement on campuses, both public and private.

e. Campus Visitors

Courts have held that a college can be liable for a criminal assault by a third party upon a student or campus visitor under certain circumstances. In cases where there was a repeated course of conduct such as to put the college on notice that it was reasonably foreseeable that harm might occur, or if the past experience is such that the college could reasonably anticipate careless or criminal conduct on the part of third persons, the college has a duty to take precautions against such foreseeable harm. On a college campus, where anything can happen, this issue of "foreseeable harm" becomes a difficult one, not just for judges deciding cases, but in every-day decisions.

2. Transportation

Loaners to students and student organizations;
Driving records and ongoing evaluation of authorized drivers.

3. Large Group Events

Crowd control;
Accommodation and other "ripple effect" claims.

IV. Sports and Recreation

1. Medical History

Athletes with known or unknown conditions;
Outdoor education/recreational course waivers.

2. Water

Diving accidents;
Boating activities and supervision;
"Back to the beach" parties (alcohol and water don't mix).

3. Third Parties

Spectators assuming the risk at track meets and hockey games;
Tickets and other "perks" for boosters and donors.

4. Recruitment of Athletes

The return of *in loco parentis*?

5. Title IX

Impact of Franklin v. Gwinnett County

6. Pick-up Games/Innovative Recreation

Traying and other winter sports
Elevator antics