

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

Civil Action No: 1:08-CV-0854

DUKE UNIVERSITY; DUKE)
UNIVERSITY HEALTH SYSTEM,)
INC.,)

Plaintiffs,)

v.)

NATIONAL UNION FIRE)
INSURANCE COMPANY OF)
PITTSBURGH, PA.,)

Defendant.

**PLAINTIFFS’ MOTION TO
PROCEED WITH DISCOVERY**

NOW COMES Plaintiffs Duke University and Duke University Health System,. Inc. (“Duke”), through counsel and pursuant to Federal Rule of Civil Procedure 26(d), and respectfully moves this Court to proceed with discovery in this action, stating as follows:

1. This is an insurance coverage action brought by Duke against its insurer, National Union Fire Insurance Company of Pittsburgh, P.A (“National Union”). On November 24, 2008, Duke filed its Complaint against National Union, seeking payment of defense and indemnity costs from National Union in connection with certain claims made against Duke by individuals affiliated with the Duke University 2005-2006 Men’s Lacrosse Team.

2. On January 16, 2009, National Union filed an Answer and Counterclaims against Duke. Further, National Union filed a Third-Party Complaint against third party United Educators Insurance (“United Educators”), seeking contribution and/or subrogation from United Educators [Dkt. 8].

3. In March 2009, United Educators filed a Motion to Dismiss the Third-Party Complaint filed against it by National Union, arguing lack of subject matter jurisdiction and/or failure to state a claim under Fed. R. Civ. P. 12(b)(6).

4. Although Duke filed its lawsuit against National Union in November 2008, no discovery in this action has commenced to date, presumably because Third-Party Defendant United Educators has filed a motion to dismiss, which motion has not yet been reached by this Court.

5. Regardless of the outcome of United Educators’ Motion to Dismiss, the underlying claims between Duke and National Union will move forward and will be subject to evidentiary discovery under the Federal Rules. Thus, allowing discovery to move forward between Duke and National Union at present will advance this litigation without posing any risks of inefficiency or unnecessary use of judicial resources.

6. There exists good cause for discovery to proceed forthwith between Duke and National Union.

7. In support of this motion, Duke is submitting herewith a Memorandum of Law in Support of its Motion to Proceed with Discovery.

Respectfully submitted this the 18th day of September, 2009.

KILPATRICK STOCKTON LLP

/s/ Gregg E. McDougal

Gregg E. McDougal

N.C. State Bar No. 27290

gmcdougal@kilpatrickstockton.com

3737 Glenwood Avenue, Suite 400

Raleigh, NC 27612

Phone (919) 420-1800

Fax (919) 420-1700

JENNER & BLOCK LLP

Jerold Oshinsky

joshinsky@jenner.com

633 West 5th Street, Suite 3500

Los Angeles, CA 90071-2054

Phone (213) 239-5100

*Attorneys for Plaintiffs Duke University and
Duke University Health System, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Court using the CM/ECF system which will automatically send notice to the following counsel of record:

BAILEY & DIXON, LLP

David S. Coats
dcoats@bdixon.com

John T. Crook
jcrook@bdixon.com

**SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL,
AND JERNIGAN LLP**

James Kye Dorsett , III
jdorsett@smithlaw.com

Kirk Alan Parry, Jr.
aparry@smithlaw.com

And via first-class mail, postage prepaid, to the following non-CM/ECF participants:

CROWELL & MORING, LLP

Clifton S. Elgarten
Elaine Panagakos
Kathryn Underhill
Michael T. Carolan
1001 Pennsylvania Ave., N.W.
Washington, DC 20004

This 18th day of September, 2009.

/s/ John M. Moye

John M. Moye

KILPATRICK STOCKTON LLP
3737 GLENWOOD AVENUE
SUITE 400
RALEIGH, NC 27612