



AIG Domestic Claims, Inc.  
Directors & Officers

175 Water Street  
New York, NY 10038

February 6, 2008

**Re:** *Insured:* **Duke University**  
*Matter:* **Duke Lacrosse Team ("the Duke 40")**  
**Letter Dated 3/30/06**

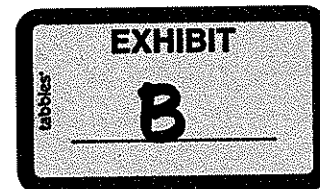
*Policy No.:* **625-03-42**  
*AIGDC Claim No.:* **371-041106**

We have received and reviewed your letter of December 3, 2007, in which you notified National Union of a February 2007 request by the parents of two members of the Duke Lacrosse team that Duke consider waiving the statute of limitations as to potential claims arising out of the events of March 2006 (hereinafter the "*Waiver Request*"). We have also received and reviewed the Complaint filed by three other members of the Duke Lacrosse team in a civil action styled, *Ryan McFadyen, et al. v. Duke University, et al.*, Case No. 1:07-cv-00953, filed on or about December 18, 2007 in the United States District Court for the Middle District of North Carolina (hereinafter the "*McFadyen Action*"). The purpose of this letter is to set forth National Union's preliminary position as to coverage under the above Policy for the *Waiver Request* and for the *McFadyen Action*.

At this time, for the reasons stated herein, National Union continues to acknowledge the February 2007 *Waiver Request* as a Claim under the Policy, with potential coverage subject to a full and complete reservation of rights. As discussed below, National Union confirms that the 2007 *Waiver Request* Claim arises out of the circumstances reported to it by letter dated March 30, 2006. National Union further acknowledges potential coverage for the *McFadyen Action* allegations against Duke University, the Duke Administrator defendants, the Crisis Management Team defendants, the Duke University Police Department and the Duke University Police Department Supervisor and Investigator defendants, again subject to a full and complete reservation of rights. National Union declines coverage for the *McFadyen Action* allegations against Duke University Health Systems, Inc., Theresa Arico and Tara Levicy.<sup>1</sup> National Union also points out that none of the additional matters

<sup>1</sup> Please provide information as to identity of Julie Manley's employer during the relevant time

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referenced in your December 3, 2007 letter appear to constitute Claims under the Policy. National Union reserves the right to modify or supplement this coverage position as warranted by the circumstances and it reserves the right to seek an allocation of Defense Costs or other Loss between covered and uncovered parties and allegations.

The above Matter arises out of a March 13, 2006 alleged rape at a residence occupied by several members of the Duke Lacrosse team. The Matter involves potential Claims by members of the team ("the Duke 40") other than the three students who were charged with the alleged rape. Subsequent to the alleged assault, members of the team were subjected to DNA testing and the remainder of the lacrosse season was cancelled. The circumstances of the alleged rape were first reported to National Union by your letter of March 30, 2006. By letter dated April 25, 2006, National Union acknowledged your March 30, 2006 letter as a Notice of Circumstances pursuant to Section 7(c) of the Policy. By e-mail dated December 3, 2007, National Union acknowledged the February 2007 *Waiver Request* as a Claim under the above Policy, subject to a full and complete reservation of rights. The *McFadyen Action* was commenced on December 18, 2007 and reported to National Union at or about that time.

### The Policy

The above Policy is a Not-For-Profit Individual and Organization Insurance Policy Including Employment Practices Liability Insurance issued by National Union to Duke University with a Policy Period of December 4, 2005 to December 4, 2006. Subject to its terms and conditions, the Policy provides coverage for Claims first made against the Insureds within the Policy Period and reported to National Union pursuant to the requirements of the Policy for any actual or alleged Wrongful Act as defined in the Policy. The coverage provided is subject to an aggregate Limit of Liability of \$5,000,000 and an applicable self-insured Retention amount of \$500,000.

### Coverage for the Waiver Request

The February 2007 *Waiver Request* constitutes a Claim under the Policy and therefore is subject to potential coverage. The Policy specifically defines Claim to include a request for waiver of any statute of limitations. Potential coverage for the *Waiver Request* is under the above Policy, pursuant to Section 7(c), which provides in pertinent part as follows:

If during the Policy Period or during the Discovery period (if applicable) the Insureds shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against the Insureds and shall give written notice to the Insurer of the circumstances and the reasons for anticipating such a Claim, with full particulars as to the dates, persons, and entities involved, then any Claim which is subsequently made against the Insureds and

period. Pending receipt of this information, National Union reserves all of its rights as to potential coverage for Dr. Manley. None of the other defendants named in the *McFadyen Action* appear to be Insureds under the Policy.

reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was give.

Because the February 2007 *Waiver Request* arises out of circumstances which are the same as or related to those reported in your letter of March 30, 2006, the *Waiver Request Claim* will be considered to have been made as of March 30, 2006.2

Although National Union has acknowledged potential coverage for the *Waiver Request* as a Claim under the Policy, the *Waiver Request* does not specify the exact nature of the Claim or the specific Wrongful Acts on which it is based. In these circumstances, National Union must generally reserve all of its rights as to the *Waiver Request*, including the right to supplement its coverage position in the event some or all of the Duke 40 provide further information as to the exact nature of their Claim

National Union does not take any position as to whether or not the *Waiver Request Claim* has any merit.

at certain Policy terms and conditions may limit or exclude entirely any potential coverage. In particular, but without limitation, National Union calls to your attention the potential applicability of Exclusion 4(a) as amended by Endorsement #19 [unlawful profit or advantage], Exclusion 4 (b) as amended by Endorsement #19 [criminal or deliberate fraudulent acts], Exclusion 4(e) [acts not in a covered capacity], Exclusion 4(h) [bodily injury], Exclusion 4(k) as amended by Endorsement #4 [contractual liability], Exclusion 4(l) [civil or criminal fines], Exclusion 4(o) [rendering or failure to render medical or other professional services], Exclusion 4(p) [professional services for which a license is required], the Definition of Claim, the Definition of Insured(s), the Definition of Loss and Section 14 [other insurance].

In addition, potential coverage for Defense Costs relating to the *Waiver Request* is limited to those fees and expenses incurred after the date the *Waiver Request* was reported to National Union by your December 3, 2007 letter. Section 8 of the Policy provides that the Insureds shall not incur any Defense Costs without the prior written consent of National Union and that only those Defense Costs which have been consented to by National Union shall be recoverable as Loss under the Policy. Any legal fees or expenses incurred prior to your letter of December 3, 2007 which first reported the Claim were not consented to in

2 Potential coverage under subsequent policies, including Policy No. 965-76-25, with a Policy Period of December 4, 2006 to December 4, 2007, is precluded by Exclusion 4(c) which provides in pertinent part that the Insurer shall not be liable to make any payment for Loss in connection with a Claim alleging or arising out of any circumstances of which notice has been given under a prior policy. Nothing herein is a waiver of any of National Union's other rights as to coverage under Policy No. 965-76-25 or any other subsequent policy.

advance by National Union and therefore do not constitute Defense Costs potentially recoverable under the Policy.

**Coverage for Other Matters Referenced in the December 3, 2007 Letter**

Other than the February 2007 *Waiver Request*, none of the other circumstances described in your letter of December 3, 2007 constitute Claims under the Policy. The definition of Claim is as follows:

(1) a written demand for monetary relief;  
or

(2) a civil, criminal, regulatory or administrative proceeding for monetary or non-monetary relief which is commenced by:

(i) service of a complaint or similar pleading; or

(ii) return of an indictment (in the case of a criminal proceeding);  
or

(iii) receipt or filing of a notice of charges; or

3) any request to toll or waive any statute of limitations.

**Coverage for the McFadyen Action.**

The *McFadyen Action* was filed in court on or about December 18, 2007. Like the 2007 Waiver Request, the *McFadyen Action* arises out of circumstances reported to National Union, under Section 7(c) of the Policy, by letter dated March 30, 2006. The named plaintiffs are Ryan McFadyen, Matthew Wilson and Breck Archer. The three plaintiffs all were members of the Duke Lacrosse team as of the date of the March 13, 2006 incident and are a part of the Duke 40. In a 446 page Complaint with 35 separate Counts, they allege, *inter alia*, that the defendants conspired to violate their constitutional rights by abuse of process, unlawful search and seizure, false public statements, concealment of exculpatory evidence, manufacture of inculpatory evidence, retaliation, witness tampering, conspiracy and obstruction of justice. They also assert common law causes of action for obstruction of justice, abuse of process, negligence, negligent hiring, negligent infliction of emotional distress and fraud. The *McFadyen Action* Complaint names 52 defendants, of which 27 appear to be Insureds under the Policy. The defendants identified in the Complaint as the City of Durham defendants, the DNA Security, Inc. defendants and Private Diagnostic Clinic PLLC are not Insureds under the Policy, so no coverage is available for them. The plaintiffs allege that they were wrongfully implicated as suspects in the alleged rape and thereafter subjected to public vilification, abuse and other retaliation. McFadyen and Wilson were suspended, but later reinstated by Duke.

As an initial matter, the Policy defines Insured(s) to mean the Organization and all Individual Insureds. The Organization is further defined in Section 2(n) to mean the Named Organization designated in Item 1 of the Declarations, any Subsidiary thereof and any Affiliate listed by endorsement. The defendants in the *McFadyen Action* Complaint include three Duke-related entities and 24 associated individuals. Of the three entity defendants, Duke University ("Duke") is the Named Organization designated in the Declarations and Duke University Health System, Inc. ("DUHS") is listed as an insured Affiliate in Endorsement #12. Therefore, Duke and DUHS are Insureds under the Policy.<sup>3</sup> However, National Union has insufficient information at this time to determine whether the third entity defendant, Duke University Police Department, also qualifies as an Insured under the Policy. Please confirm whether or not the Duke University Police Department is a separate legal entity and, if so, whether it is a Subsidiary of Duke as defined in the Policy. Pending your response on this issue, National Union reserves all of its rights as to potential coverage for the Duke University Police Department and its employees.<sup>4</sup>

In addition, while DUHS is an Insured under the Policy, it is afforded no coverage for the allegations against it in the *McFadyen Action*. Exclusion 4(o), as modified by Endorsement #4, provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an Insured:

alleging, arising out of, based upon or attributable to the Insured's performance or rendering of or failure to perform or

<sup>3</sup> The designated Duke Administrator Defendants (Kernel Dawkins, Suzanne Wasiolek, Stephen Bryan and Matthew Drummond) and members of the Crisis Management Team (Robert Steel, Richard Brodhead, Peter Lange, Tallman Trask, John Burness, Larry Moncia, Victor Dzau and Allison Halton) also are Insureds under the Policy in their capacities as employees of Duke.  
<sup>4</sup> Those parties identified in the Complaint as the Duke Police Supervisor Defendants (Aaron Graves, Robert Dean, Leila Humphries, Phyllis Cooper, William Garber, James Schwab, Joseph Fleming and Jeffrey Best) and Duke Police Investigator Defendants (Gary Smith and Greg Stotsenberg).

render medical or other professional services or treatments for others . . .

The *McFadyen Action* allegations against DUHS all arise out of the performance of medical or other professional services allegedly rendered by it in connection with the investigation of the alleged rape. The Complaint alleges that DUHS was retained to provide such medical and other services in relation to the events giving rise to the plaintiffs' allegations as follows:

*DUHS was retained by the State of North Carolina, the City of Durham, and/or the Durham Police Department, and/or the Duke Police Department to provide forensic medical-evidence collection and analysis services in the investigation of Mangum's false accusations of rape, sexual assault and kidnapping . . .*

[Complaint, ¶45]. The substantive allegations against DUHS and its employees all arise out of the medical examination and analysis services provided by DUHS pursuant to this engagement in the early hours of March 14, 2006. [See, Complaint, ¶249, et seq.] Therefore, Exclusion 4(o) precludes coverage for the *McFadyen Action* allegations against DUHS and its employees.<sup>5</sup> Exclusion 4(o) also precludes potential coverage for any other defendant to the extent the plaintiffs' allegations against them arise out of the alleged medical or other professional services provided by DUHS.

National Union does not wish at this time to take any position as to the merits or truth of the *McFadyen Action* allegations against the Insureds. However, a review of the plaintiffs' allegations indicates that the following additional coverage issues exist:

Exclusion 4(a), as modified by Endorsement #19, provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured arising out of based upon or attributable to the gaining of any profit or advantage to which a final adjudication establishes the Insured was not legally entitled. To the extent it is determined that such a profit or advantage occurred, no coverage will be available.

Exclusion 4(b), as modified by Endorsement #19, provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured arising out of based upon or attributable to the committing of any criminal or deliberate fraudulent act if a final adjudication establishes that such act occurred. The *McFadyen Action* Complaint alleges false statements by the defendants in numerous Counts [See, e.g., ¶418 (false and misleading statements made with intent to conceal), ¶470 (public statements made with deliberate indifference and callous disregard for the truth) and ¶653 (repeated proffer of false testimony)] and it further contains a common law fraud claim in Count XXXV. The alleged violation of the defendants' constitutional rights also could provide criminal sanctions if determined to be true. To the extent it is determined that criminal or deliberate fraudulent acts were committed, no coverage will be available.

Exclusion 4(e) provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured alleging, arising out of, based upon or

<sup>5</sup> DUHS, Arico and Levicy are named as defendants in Counts I, IV, V, XII, XX, XXI, XXX, XXXI and XXXII. Coverage for public statements issued in the aftermath of the events of March 13, 2006 also is barred by Exclusion 4(e) [acts not in a covered capacity].

attributable to any actual or alleged act or omission of an Individual Insured serving in any capacity, other than with the Organization. The Definition of Wrongful Act likewise provides that, with respect to Individual Insured, Wrongful Acts potentially subject to coverage are limited to those acts committed by the Individual Insureds in their capacities as such. The *McFadyen Action* Complaint alleges numerous acts, such as statements to the public, statements to the police and the alteration of evidence, which do not appear to have been committed by the Individual Insureds in their official capacities. To the extent the plaintiffs' causes of action arise out of such alleged acts not in a covered capacity, no coverage is available for either Defense Costs or indemnification.

Exclusion 4(h) provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured for bodily injury, sickness, disease, death or any person. The *McFadyen Action* Complaint contains numerous allegations that the plaintiffs suffered physical injury as a result of the defendants' conduct [See, e.g., ¶¶923, 980 and 989, ¶25 on page 380, ¶31 on page 382, and ¶¶1058 and 1065]. To the extent the *McFadyen Action* Claim is a Claim for bodily injury, no coverage is available.

Exclusion 4(k), as modified by Endorsement #4, provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Organization or any Insured under any express (written or oral) contract or agreement. The plaintiffs' allegations regarding the Duke Police Department's alleged duty to take action are based on a 2003 contract between Duke and the City of Durham [Complaint, ¶95], which is annexed to the Complaint as Attachment 2. The plaintiffs' allegations further are based on a 2006 Police Jurisdiction Allocation Agreement [Complaint ¶96], which is annexed to the Complaint as Attachment 3. To the extent the alleged liability of any party arises out of such written contracts or agreements, no coverage is available for either Defense Costs or indemnification.

Exclusion 4(l) provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured for any civil or criminal fines imposed by law and any taxes. To the extent such remedies are sought in the *McFadyen Action* Complaint, no coverage is available.

Exclusion 4(p), as modified by Endorsement #4, provides that the Insurer shall not be liable to make any payment for Loss in connection with a Claim against an Insured alleging, arising out of, based upon or attributable to or in any way relating to the rendering or failure to render any professional services for which registration or license is required by the federal, state or applicable local government. To the extent the *McFadyen Action* allegations arise out of such alleged services, no coverage is available for either Defense Costs or indemnification.

In addition, the Definition of Loss excludes from coverage any matters which may be deemed uninsurable under the law pursuant to which the Policy is to be construed. To the extent the acts alleged in the *McFadyen Action* Complaint are uninsurable under the law of North Carolina, no coverage is available. The Definition of Loss further provides as follows:

In all events, coverage shall not be provided to any particular Insured who has been adjudicated to have obtained a profit or advantage or committed a fraudulent or

dishonest act or a willful violation of any statute, rule or law.

Most of the causes of action set forth in the *McFadyen Action* Complaint allege that the defendants committed fraudulent or dishonest acts or engaged in a willful violation of the law. In the event of an adjudication that such acts in fact were committed, no coverage will be available under the Policy.

#### Other Insurance and Defense Issues

Section 14 of the Policy [Other Insurance and Indemnification] provides that "such insurance as is provided by this Policy shall apply only as excess over any valid and collectible insurance." The allegations of the *McFadyen Action* Complaint and

your prior correspondence as the basis for the *Waiver Request* appear likely to trigger potential coverage under other insurance policies. In particular, we have reviewed an Excess Liability Insurance Policy issued by United Educators, which provides Bodily Injury coverage and Personal Injury coverage for malicious prosecution, libel and slander. Allegations arising out of medical services rendered by the Duke University Health System likely would trigger coverage under a professional liability policy. In addition, we note that North Carolina law requires campus police departments to file with the Attorney General a policy of liability insurance. Please provide us with a copy of whatever was filed by the Duke Police Department. To the extent you have not already done so, National Union requests that you place any other potentially responsive insurers on notice of the *Waiver Request* and the *McFadyen Action*. Please provide copies of your tender letters and all responses from such other insurers as to potential coverage. To the extent other insurance is available, no coverage is afforded under the National Union Policy until such other insurance has been exhausted.

Finally, Section 8 of the Policy provides that National Union does not assume any duty to defend Claims under the Policy. Section 8 further provides that the Insureds shall not incur any Defense Costs without the prior written consent of National Union and that only those Defense Costs which have been consented to by National Union shall be recoverable as Loss under the Policy. Section 9, as modified by Endorsement #4, provides that with respect to all Claims the Insured or the Insurer shall select a Panel Firm from the list attached to the Policy as Appendix A to defend the Insureds. We understand that the Washington, D.C. office of Wilmer Hale has been engaged to represent Duke's interests in these matters. The District of Columbia office of Wilmer Hale is not an approved Panel Firm. Under the circumstances, however, National Union may be willing to consent to the use of Wilmer Hale as defense counsel. So that National Union can consider whether to consent, we need information from you regarding the scope and date of Wilmer Hale's retention as well as the names, experience and hourly billing rates of the attorneys expected to work on the matter.

Section 8 further provides for repayment of Defense Costs advanced under the Policy as follows:

Such advanced payments by the Insurer shall be repaid by to the Insurer by the Insureds, severally according to their respective interests, in the event and to the extent that the Insureds shall not be



entitled under the terms and conditions of this policy to payment of such Loss.

In the event of an adverse outcome implicating an exclusion from coverage, any Defense Costs advanced by National Union prior to that point must be repaid by the Insureds as provided in this provision.

As a part of National Union's ongoing coverage evaluation, we ask that you provide us with the following: copies of any defense bills for services rendered after December 3, 2007, copies of the United Educators' coverage analysis, the insurance policy for the Duke Police Department, any other potentially responsive insurance policies, and information concerning the rates and experience of defense counsel and the reasons for the selection of Wilmer Hale.

National Union's coverage position as expressed herein is based upon the information submitted to date and subject to modification as further information becomes available relative to the Claim. Nothing herein is a waiver of any additional rights or defenses available to National Union, whether expressly set forth herein or not. If you wish to discuss any of these issues further, please feel free to contact me.

Please keep us informed of any and all developments relating to the *Waiver Request* or the *McFadyen Action*. I look forward to working with you.