



AIG Domestic Claims, Inc.
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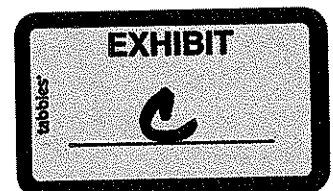
April 23, 2008

Re: Insured: Duke University
Matter: Duke Lacrosse Team
Letter Dated 3/30/06
Policy No.: 625-03-42
AIGDC Claim No.: 371-041106

As you know, AIG Domestic Claims, Inc. has been engaged to act on behalf of National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") in relation to the above Matter. We have received and reviewed the Complaint filed by thirty-eight members of the Duke Lacrosse team and nine of their parents in a civil action styled, *Edward Carrington, et al. v. Duke University, et al.*, Case No. 1:08-cv-00119, filed on or about February 21, 2008 in the United States District Court for the Middle District of North Carolina (hereinafter the "*Carrington Action*"). The purpose of this letter is to set forth National Union's preliminary position as to coverage under the above Policy for the *Carrington Action*.

At this time, for the reasons stated herein, National Union acknowledges potential coverage for the allegations set forth in Counts 6 through 23 of the *Carrington Action* Complaint against Duke University ("Duke") and against the individual defendants Richard Brodhead, Peter Lange, Larry Moneta, John Burness, Tallman Trask, Suzanne Wasiolek, Matthew Drummond, Aaron Graves, Robert Dean and Kate Hendricks, subject to a full and complete reservation of rights. National Union further acknowledges potential coverage for the allegations of Counts 6 through 23 of the *Carrington Action* Complaint against the defendant Victor Dzau, but only with respect to Wrongful Acts in his capacity as an officer or employee of Duke University, and not in his capacity as an officer or employee of Duke University Health System, Inc. ("DUHS"), again subject to a full and complete reservation of rights. National Union denies coverage for the *Carrington Action* allegations against DUHS, Tara Levcy and Theresa Arico. None of the other defendants named in the *Carrington Action* are Insureds under the Policy. Potential coverage is under the above Policy, because the *Carrington Action* Claim arises out of circumstances first reported to National Union by letter dated March 30, 2006. 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

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allocation of Defense Costs or other Loss between covered and uncovered parties and allegations.

The *Carrington Action* Claim arises out of a March 13, 2006 alleged rape at a residence occupied by several members of the Duke Lacrosse team. The *Carrington Action* Claim is asserted by thirty-eight members of the team other than the three students who were charged with the alleged rape, together with nine of their parents. 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 letter dated December 3, 2007, you further advised National Union that in or about February 2007

asked Duke to waive the statute of limitations as to future Claims by members of the team (the "*Waiver Request*"). 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 *Carrington Action* was commenced on February 21, 2008 and reported to National Union at or about that time. The plaintiffs in the *Carrington Action* who were specifically referenced in the *Waiver Request*.

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 Carrington Action

The named plaintiffs are thirty-eight members of the 2006 Duke Lacrosse team, plus nine of their parents. In a 225 page Complaint with 31 Counts, they allege that the defendants violated numerous common law duties and conspired to violate their constitutional rights. The plaintiffs allege that they were wrongfully implicated as suspects in the alleged rape and thereafter subjected to public vilification, abuse and other retaliation. The first 23 Counts of the Complaint are against Duke, DUHS and their respective officers and employees. The Counts against Duke, DUHS and their officers and employees include intentional and negligent infliction of emotional distress (Counts 1, 2, 6 and 7), negligent supervision (Counts 3 and 19), negligent conduct and reporting of medical examination (Count 4), duty to warn and protect against known danger (Counts 5 and 14), breach of duty based on voluntary undertaking and special relationship (Counts 12 and 13), fraud and misrepresentation (Counts 8, 9 and 11), abuse of process (Count 10), breach of express and implied contract (Counts 15, 16 and 17), invasion of privacy (Count 18), violation of constitutional rights by unlawful search and seizure and malicious investigation (Counts 20, 21 and 22) and obstruction of justice (Count 23). The *Carrington Action* Complaint also names as defendants the City of Durham, twelve of its employees and J. Wesley Covington.

The City of Durham, its employees and Mr. Covington are not Insureds under the Policy, so no coverage is available for them.

The *Carrington Action* was filed in court on February 21, 2008. Like the 2007 *Waiver Request*, however, the *Carrington Action* arises out of circumstances which are the same as or related to those reported to National Union by your letter dated March 30, 2006 as a Notice of Circumstances under Section 7(c) of the Policy. Therefore, potential coverage for the *Carrington Action* 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 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 given.

Because the *Carrington Action* arises out of circumstances which are the same as or related to those reported in your letter of March 30, 2006, the *Carrington Action* Claim will be considered to have been made as of March 30, 2006.¹

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 *Carrington Action* Complaint include Duke, which is the Named Organization designated in the Declarations and Duke University Health System, Inc., which is listed as an insured Affiliate in Endorsement #12. Therefore, Duke and DUHS are Insureds under the Policy. The defendants Richard Brodhead, Peter Lange, Larry Moneta, John Burness, Tallman Trask, Suzanne Wasiolek, Matthew Drummond, Aaron Graves, Robert Dean, Tara Levicy, Theresa Arico, Kate Hendricks and Victor Dzau are Individual Insureds in their capacities as officers or employees of Duke or DUHS.

¹ 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.

Although DUHS is an Insured under the Policy, the Policy provides no coverage for DUHS or its employees with respect to the allegations against them in the *Carrington 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 render medical or other professional services or treatments for others . . .

The *Carrington Action* allegations against DUHS and its employees arise out of the performance of medical or other professional services allegedly rendered in connection with the investigation of the alleged rape. The substantive allegations against DUHS and its employees all arise out of the medical examination and analysis services provided by DUHS in the early hours of March 14, 2006. [See, Complaint, ¶¶112-129] Count 4 is specifically for breach of duty of care in conducting and reporting the forensic medical examination. Therefore, Exclusion 4(o) precludes coverage for the *Carrington Action* allegations against DUHS and its employees, including Tara Levicy, Theresa Arico and Victor Dzau, in his capacity as a DUHS employee.

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. To the extent Duke and its employees also are named as defendants in Count 4 coverage is precluded by Exclusion 4(o). In addition, Counts 1 and 2 are for intentional and negligent infliction of emotional distress arising out of the conduct and reporting of the March 14, 2006 medical examination. Count 3 is for negligent supervision of the DUHS employees involved in the conduct and reporting of the medical examination and Count 5 is for failure to warn and protect the plaintiffs against a hazard created by the conduct and reporting of the medical examination. Therefore, the allegations of Counts 1, 2, 3, and 5 all arise out of the medical examination and coverage is precluded by Exclusion 4(o).

National Union does not wish at this time to take any position as to the merits or truth of the *Carrington 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 *Carrington Action* Complaint alleges numerous false statements by the defendants [See, e.g., ¶¶152, 185, 192, 206, 211, 232, 237, 245-248, 286-291, 333-338, 400 and 436-439]. In addition, Counts 8 and 11 assert causes of action for actual and constructive fraud. 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 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 *Carrington Action* Complaint alleges numerous acts which may not have been committed by the Individual Insureds in their official capacities. In addition, Victor Dzau is alleged to have had a dual capacity, as an employee of both Duke and DUHS. To the extent the plaintiffs' causes of action arise out of 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. To the extent the *Carrington Action* asserts 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. Count 15 of the *Carrington Action* Complaint is for breach of express or implied contract and Count 16 is for tortious breach of express or implied contract. To the extent the alleged liability of any party arises out of an express contract or agreement, 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 *Carrington 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 *Carrington 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 *Carrington 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.

Many of the causes of action set forth in the *Carrington 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 *Carrington Action* Complaint 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 *Carrington 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 in connection with the *Carrington Action*, copies of the United Educators' coverage analysis with regard to the *Carrington Action*, 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 *Carrington Action*. I look forward to working with you.