

AIG Domestic Claims, Inc.  
Directors & Officers175 Water Street  
New York, NY 10038

April 8, 2008

Re: Insured: Duke University  
Matter: Mike Pressler  
AIGDC Claim No.: 371-041106  
Policy No.: 625-03-42

As you know, AIG Domestic Claims, Inc. (AIGDC") has been retained to represent National Union Fire Insurance Company of Pittsburgh, Pa ("National Union") in relation to the above Matter. We have received and reviewed a copy of the Complaint filed in the civil action captioned, *Michael J. Pressler v. Duke University and John F. Burness*, filed on or about January 23, 2008 in the Durham County Superior Court as Case No. 08-CV-001311 (the "*Pressler Action*"). The purpose of this letter is to set forth National Union's preliminary position as to coverage under the above Policy for the *Pressler Action*.

At this time, for the reasons stated herein, National Union acknowledges potential coverage to Duke University ("Duke") and John Burness ("Burness") for the *Pressler Action* allegations against them, subject to a full and complete reservation of rights.

The *Pressler Action* alleges that the plaintiff was employed by Duke as the Head Coach of the men's varsity lacrosse team from July 1990 until April 2006. In March 2006, several members of the lacrosse team were accused of rape. The Complaint alleges that the plaintiff was terminated on April 5, 2006. Thereafter, the Complaint alleges that Duke, through Burness, made false, defamatory and slanderous statements about the plaintiff which were published in Newsday on or about April 9, 2007. In addition, the Complaint alleges that a defamatory press statement was issued by the defendants on or about June 7, 2007. The Complaint alleges that these statements damaged the plaintiff's reputation and earning capacity. The *Pressler Action* asserts the following four causes of action against Duke and Burness: Slander Per Se (Count I); Slander Per Quod (Count II); Libel Per Se (Count III); and Libel Per Quod (Count IV). The plaintiff seeks compensatory damages, punitive damages and attorneys' fees.

The above Policy is a Not-For-Profit Individual and Organization Insurance Policy Including Employment Practices Liability Insurance issued by National Union to Duke

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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.

The *Pressler Action* was filed on or about January 23, 2008. However, the *Pressler 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(e) of the Policy. Therefore, potential coverage for the *Pressler 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 *Pressler Action* arises out of circumstances which are the same as or related to those reported in your letter of March 30, 2006, the *Pressler Action* Claim will be considered to have been made as of March 30, 2006.<sup>1</sup>

As an initial matter, Clause 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 *Pressler Action* appear likely to trigger potential coverage under other insurance policies, including general liability coverage. In particular, we have reviewed an Excess Liability Insurance Policy issued by United Educators, which provides Bodily Injury coverage and Personal Injury coverage for libel and slander. To the extent you have not already done so, National Union requests that you place

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<sup>1</sup> 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.

United Educators and any other potentially responsive insurers on notice of the *Pressler 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.

National Union does not wish to take any position regarding the propriety or merits of the *Pressler Action* allegations. Nevertheless, a review of the *Pressler Action* and of the Policy indicates that the following potential coverage issues exist.

Exclusion 4(e) of the Policy excludes coverage for Claims alleging, arising out of, based upon or attributable to acts not in a covered capacity. The definition of Wrongful Act likewise provides that coverage is afforded only for acts of the Individual Insureds in their respective capacities as such. To the extent the alleged acts of Mr. Burness were not in an official capacity, Exclusion 4(e) will apply to preclude coverage under the Policy.

Exclusion 4(k) of the Policy, amended by Endorsement No. 4, excludes coverage for Claims alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Organization or an Insured under any express contract or agreement. The *Pressler Action* refers to a Confidential Agreement entered into between the plaintiff and Duke. To the extent that Duke's and/or Burness' liability arises out of such contract, Exclusion 4(k) of the Policy, amended by Endorsement No. 4, will apply to exclude coverage.

Exclusion 4(l) of the Policy excludes from coverage any civil or criminal fines imposed by law. In addition, the Policy's definition of Loss excludes employment related benefits. To the extent that Duke or Burness are liable for any civil or criminal fines and the plaintiff is awarded employment related benefits, Exclusion 4(l) and the definition of Loss will operate to exclude coverage.

The *Pressler Action* alleges intentional misconduct. General insurance principles and public policy prohibit insurance coverage for these types of allegations. In addition, the Policy's definition of Loss provides that there is no coverage for matters that may be deemed uninsurable under the law pursuant to which the Policy is construed. To the extent applicable law prohibits coverage for these types of allegations; coverage will not be available under the Policy.

The *Pressler Action* seeks punitive damages. The Policy's definition of Loss includes coverage for punitive damages subject to the availability of such damages under applicable law. In addition, the definition of Loss further provides that in any event coverage shall not be provided to any 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. In the event of such adjudication, no coverage will be afforded.

The foregoing coverage position is based upon the information available to National Union at this time. National Union reserves the right to supplement or amend its coverage position should future developments warrant.

Pursuant to Clause 8 of the Policy, National Union does not assume any duty to defend its Insureds. Clause 9 of the Policy [Panel Counsel Requirement], as amended by Endorsement No. 4, permits the Insureds to select counsel from the Panel Counsel list attached to the Policy. We understand that the defendants have retained the firm of Fulbright

& Jaworski for defense of the *Pressler Action*. Endorsement No. 22 of the Policy adds Fulbright & Jaworski as a Panel Counsel law firm for Employment Practices Liability claims

As part of National Union's ongoing evaluation and monitoring of the captioned matter, we ask that we be provided with the following as soon as possible: (1) an assessment of liability and damages; (2) an estimate of the costs of defending this matter through its conclusion; and (3) copies of all defense bills incurred to date and thereafter on a month by month basis. In addition, we ask that defense counsel provide us with the following documents as the litigation proceeds: (1) copies of all responsive pleadings filed by the defendants; (2) copies of any dispositive motions and oppositions thereto; (3) a copy of the operative scheduling order or, if it is not available, an estimate of when this matter will be reached for trial; and (4) copies of all expert reports when available.

Finally, we remind you and the Insureds that in order to be eligible for coverage, any settlement offer must be consented to by National Union in advance. Should a settlement offer be contemplated or a settlement demand be received, please advise us as soon as possible so that we may discuss issues regarding a settlement.

The above discussion is premised upon the information furnished to date and is by necessity subject to supplementation as additional facts are forthcoming. Please note that no statement herein should be construed as a waiver of any rights, privileges and/or defenses that National Union may have under the Policy, including the right to supplement and/or deny coverage as circumstances warrant. As is customary, all rights should be considered fully and mutually reserved.

If you or the Insureds have any questions about this letter, please do not hesitate to contact me. On behalf of National Union, I look forward to working with you and the Insureds on this matter.