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June 20, 2008

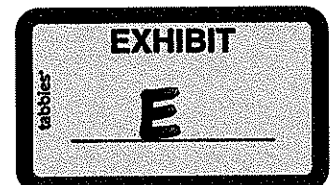
Re: Insured: *Duke University*
Matter: *Duke Lacrosse Team*
Letter Dated 3/30/06
Policy No.: *625-03-42*
AIGDC Claim No.: *371-041106*

We have received and reviewed the First Amended Complaint filed in the civil action styled, *Ryan McFadyen, et al. v. Duke University, et al.*, Case No. 1:07-cv-00953, which originally was commenced 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 supplement National Union's prior position as to coverage available for the *McFadyen Action* under the above Policy in light of the allegations of the First Amended Complaint.

At this time, for the reasons stated herein, National Union continues to acknowledge potential coverage for the *McFadyen Action* allegations against Duke University ("Duke"), the Duke Administrator defendants, the Crisis Management Team defendants, the Duke University Police Department and the Duke University Police Department Supervisor and Investigator defendants, subject to a full and complete reservation of rights. National Union disclaims coverage for the *McFadyen Action* allegations against Duke University Health Systems, Inc., Julie Manley, Theresa Arico and Tara Levicy. None of the other defendants named in the *McFadyen Action* are Insureds 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, as well as between co-insurers.

The factual allegations of the First Amended Complaint are similar in many respects to those set forth in the original Complaint. The 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,

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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. In or about February 2007, Duke asked Duke to waive the statute of limitations with respect to potential claims arising out of the events of March 13, 2006 (the "Waiver Request"). The *Waiver Request* was first reported to National Union on December 3, 2007. 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 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.

The *McFadyen Action* arises out of circumstances reported to National Union under Section 7(c) of the above Policy by your letter of March 30, 2006. The named plaintiffs are Ryan McFadyen, Matthew Wilson and Breck Archer, all of whom 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. The First Amended Complaint is 431 pages long, with 40 separate Causes of Action. In it, the plaintiffs 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, failure to intervene and obstruction of justice. They also assert common law causes of action for obstruction of justice, abuse of process, negligence, negligent hiring, negligent and intentional infliction of emotional distress, invasion of privacy, breach of fiduciary duty, breach of contract and fraud. The First Amended Complaint in the *McFadyen Action* names 52 defendants, of which 28 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. The plaintiffs allege that the defendants intentionally sought to blame them for the alleged rape even though they knew them to be innocent.

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

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.

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 25 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.

In addition, while DUHS is an Insured under the Policy, it is afforded no coverage for the allegations against it in First Amended Complaint filed 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 render medical or other professional services or treatments for others . . .

The allegations against DUHS in the First Amended Complaint in the *McFadyen Action* 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 an independent contractor retained by the City of Durham to provide forensic medical evidence collection and analysis services with respect to the investigation of Mangum's false accusations . . .

[First Amended 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, First Amended Complaint, ¶¶302-311] Therefore, Exclusion 4(o) precludes coverage for the *McFadyen Action* allegations against DUHS and its employees.² Exclusion 4(o) also precludes

² Theresa Arico and Tara Levicy are alleged in ¶¶37 and 38 to be employees of DUHS.

National Union will now consider Dr. Manley to be an Insured under the Policy. However, coverage for the allegations against her is precluded by Exclusion 4(o). To the extent she was acting as an employee of the defendant, Private Diagnostic Clinic, PLLC [First Amended Complaint, ¶36], she is not an Insured under the Policy and coverage also is precluded by Exclusion 4(c) [acts not in a covered capacity]. In addition, the First Amended Complaint alleges that Victor Dzau acted in a dual capacity, as Duke's Chancellor for Health Affairs and also as President and CEO of DUHS. To the extent Mr. Dzau was acting as an officer of DUHS, coverage for the allegations against him is precluded by Exclusion 4(o). Coverage for public statements issued by DUHS employees in the aftermath of the events of March 13, 2006 is barred by Exclusion 4(e) as well as Exclusion 4(o).

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 First Amended Complaint in the *McFadyen Action* alleges false statements by the defendants in numerous Counts [See, e.g., ¶456 (issuing false and misleading reports), ¶¶463-465 (false and misleading statements to public), ¶499 (false representations to players), ¶¶500-501 (conspiracy to issue false claims), ¶¶528-543 (false statements made to stigmatize plaintiffs), ¶¶780-785 (false statements regarding SANE examination and false medical records) and ¶¶787-799 (repeated proffer of false testimony). See also, the Fifth Cause of Action (false public statements in violation of 42 U.S.C. §1983) and the Twenty-Fourth Cause of Action (common law 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 First Amended Complaint in the *McFadyen Action* 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. Julie Manley also is alleged to have acted in part as an employee of Private Diagnostic Clinic, PLLC. 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 First Amended Complaint in the *McFadyen Action* contains numerous allegations that the plaintiffs suffered physical injury as a result of the defendants' conduct [See, e.g., ¶¶917, 928, 940, 968, 977 and similar allegations in other Counts]. To the extent the *McFadyen Action* 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 [First Amended Complaint, ¶94], which is annexed to the Complaint as Attachment 2. The plaintiffs' allegations further are based on a 2006 Police Jurisdiction Allocation Agreement [First Amended Complaint, ¶95], which is annexed to the Complaint as Attachment 3. The Twenty-First Cause of Action also asserts a claim for breach of contract based on the Student Bulletin [See, First Amended Complaint, ¶¶728-745]. 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 First Amended Complaint in the *McFadyen Action*, 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 First Amended Complaint in the *McFadyen Action* 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* 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," and that the Policy is specifically excess of any other policy pursuant to which any other insurer has a duty to defend. The allegations of the First Amended Complaint in the *McFadyen Action* 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 DUHS likely would trigger coverage under a professional liability policy. Please forward a copy of the DUHS professional liability insurance policy. In addition, we have noted previously that North Carolina law requires campus police departments to file with the Attorney General a policy of liability insurance. We renew our request that you 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 again requests that you place any other potentially responsive insurers on notice of the *McFadyen Action*. Please provide copies of your tender letters and all responses from such other insurers as to potential coverage.

In addition, we understand that the Washington, D.C. office of Wilmer Hale has been retained as defense counsel for Duke and its employees. National Union has consented to the use of Wilmer Hale as defense counsel for Duke and its employees. However, it appears from a review of the docket that Wilmer Hale also is acting as defense counsel for DUHS and its employees, for whom no coverage is afforded under the Policy. National Union will require either separate representation for the non-insured defendants or an allocation of Wilmer Hale fees incurred in the joint representation of such parties.

Finally, Section 8 of the Policy 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 copies of any defense bills for services rendered in connection with the *McFadyen Action*. We also renew our prior request for a copy of the United Educators' coverage analysis. Please forward as well any other potentially responsive insurance policies.

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 *McFadyen Action*. I look forward to working with you to resolve this matter.