UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREAT AMERICAN ASSURANCE COMPANY,

Plaintiff,

v.

No.

THE BIG TEN CONFERENCE, INC.,

Defendant

COMPLAINT FOR REFORMATION AND DECLARATORY JUDGMENT

Great American Assurance Company, for its Complaint for Reformation and Declaratory Judgment, alleges:

INTRODUCTION

1. This is a reformation and declaratory judgment action in which Great American Assurance Company ("Great American"):

(a) Seeks to reform Great American's 8/31/04 – 8/31/05 primary CGL insurance policy to include a Limitation of Coverage to Designated Premises, Activities or Operations endorsement, GAC 33 89 CG (Ed. 07/03), that limits coverage to "bodily injury" arising out of the following activities: Basketball (M&W); Cross Country (M&W); Golf (M&W); Tennis (M&W); Indoor Track & Field (M&W); Swimming & Diving (M&W); Field Hockey; Wrestling; Soccer (M&W); Gymnastics (M&W); Softball; Baseball; Outdoor Track & Field (M&W); and Women's Rowing; and

(b) Seeks a declaratory judgment that Great American has no duty to defend or indemnify The Big Ten Conference, Inc. for the following lawsuits, all of which subsequently

were assigned to the *In Re National Collegiate Athletic Association Student-Athlete Litigation MDL*, No. 2492 ("NCAA Football Concussion MDL") in the United States District Court for the Northern District of Illinois, or in any other case against the Big Ten Conference, Inc. assigned to the NCAA Football Concussion MDL:

(1) *Raymond Griffin v. Big Ten Conference and the National Collegiate Athletic Association ("NCAA"),* Case No.: 16-cv-5986, originally filed in the United States District Court for the Northern District of Illinois, Eastern Division;

(2) *Roger Jerrick v. The Big Ten Conference, Inc., and NCAA*, Case No. 1:16-cv-09485, originally filed in the United States District Court for the Northern District of Illinois, Eastern Division;

(3) *Michael Rose and Timothy Stratton v. NCAA and Big Ten Conference*, Case No. 17-cv-1402, originally filed in the United States District Court for the Northern District of Illinois, Eastern Division;

(4) *Robert Samuels, James Boyd, and Eric Ravotti v. The Pennsylvania State University, Big Ten Conference, and NCAA*, Case No. 16-cv-5270, originally filed in the United States District Court for the Northern District of Illinois, Eastern Division; and

(5) *Steve Strinko v. Big Ten Conference and the NCAA*, Case No. 1:16-cv-5988, originally filed in the United States District Court for the Northern District of Illinois, Eastern Division.

2. Great American Assurance Company ("Great American") is an insurance company incorporated in Ohio, with its principal place of business in Cincinnati, Ohio. Great American accordingly is a citizen of Ohio.

3. The Big Ten Conference, Inc. ("The Big Ten" or "Conference") is an athletic conference incorporated under the laws of the State of Delaware with its principal place of business in Rosemont, Illinois, Cook County. The Big Ten accordingly is a citizen of Delaware and Illinois.

JURISDICTION AND VENUE

4. This Court has federal subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) because there is diversity of citizenship between the plaintiff and the defendant and

the amount in controversy exceeds $75,000. This Court has personal jurisdiction over the defendant because its principal place of business is located in Rosemont, Illinois, and because it transacts business in Illinois.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district; and/or § 1391(b)(3) because the defendant is subject to personal jurisdiction in this district with respect to this action.

FACTS

A. The Parties

6. Great American is an insurance company that, among other things, issues primary and excess Commercial General Liability ("CGL") insurance policies. Great American issued one primary and three excess CGL insurance policies to the Big Ten as follows:

a. Primary Policy, Policy No. PAC0000568865900, effective 8/31/04 – 8/31/05, a true and correct copy of which is attached as Exhibit A ("the Primary Policy");

b. Excess Policy, Policy No. EXC0000591094602, effective 8/31/04 – 8/31/05, a true and correct copy of which is attached as Exhibit B ("the 2004 Excess Policy");

c. Excess Policy, Policy No. EXC0000591094601, effective 8/31/03 – 8/31/04, a true and correct copy of which is attached as Exhibit C ("the 2003 Excess Policy");

d. Excess Policy, Policy No. EXC0000591094600, effective 8/31/02 – 8/31/03, a true and correct copy of which is attached as Exhibit D ("the 2002 Excess Policy") (the 2002, 2003, and 2004 Excess Policies, collectively, "the Excess Policies.")

Exhibits A – D are incorporated herein in their entirety.

7. The Big Ten is a collegiate athletic conference in Division 1 of the NCAA. The University of Iowa, the University of Michigan, The Ohio State University, The Pennsylvania State University, and Purdue University are members of the Big Ten.

B. The Underlying Actions

1. Griffin v. The Big Ten

8. On June 8, 2016, Raymond Griffin filed a putative class action Complaint against the Big Ten Conference and the NCAA in the United States District Court for the Northern District of Illinois ("the Griffin lawsuit"). A true and correct copy of the Griffin Complaint is attached as Exhibit E.

9. The *Griffin* lawsuit subsequently was assigned to the NCAA Football Concussion MDL.

10. Griffin seeks to recover for alleged football concussion-related injuries on his own behalf and on behalf of a class comprised of "all individuals who participated in Ohio State's varsity football program between 1952 and 2010."

11. Griffin alleges that he played football at Ohio State from 1974 to 1977. While playing football there, Griffin claims that he was subjected to repeated impacts to the head and traumatic brain injury ("TBI") in practices and games and that he suffered several concussions. These repeated brain impacts, Griffin alleges, significantly increased his risk of developing neurodegenerative disorders and diseases, including chronic traumatic encephalopathy ("CTE"), Alzheimer's disease, and other cognition-impairing conditions.

12. Griffin claims that he now suffers from severe depression, anxiety, short-term memory loss, impulse problems, and difficulties with anger management, along with other issues. He seeks to recover damages for permanent brain injury, emotional distress, past and future medical expenses, home-care expenses, lost time, lost future earnings, and other damages.

13. The *Griffin* Complaint asserts that Griffin and the putative class members were not made aware of the short-term and long-term health risks associated with TBI and were not furnished with appropriate health and safety protocols.

14. The *Griffin* complaint alleges four causes of action against the Big 10:

a. Negligence;
b. Fraudulent Concealment;
c. Breach of Implied Contract; and
d. Unjust Enrichment.

15. The Negligence claim alleges, *inter alia,* that the NCAA has assumed a duty to protect the safety of all student-athletes at member institutions, including a duty to supervise, regulate, and monitor the rules and to provide appropriate and timely regulations to minimize the risk of short-term and long-term brain damage to football players. It also alleges that the Big Ten shared that duty. The *Griffin* Complaint further asserts that the defendants in that action owed a duty to educate Ohio State and Ohio State football players on the proper evaluation and treatment of TBI during football games and practices and to warn the football players about the attendant danger and risks associated with playing football. The defendants, Griffin alleges, breached those duties and also fraudulently concealed and/or failed to disclose, or were willfully blind to, information regarding the long-term risks and effects of repetitive head trauma, the dangers of concussive and sub-concussive injuries, and the proper way to avoid, evaluate, and treat that trauma.

16. The Fraudulent Concealment count alleges that the Big Ten and the NCAA were aware of medical literature detailing the serious risk of short-term and long-term brain injuries from repeated head trauma and were "willfully blind to and/or knowingly concealed" that information, including the risks associated with premature return to play following a concussive or sub-concussive injury. Had the true facts been known, Griffin claims, he and the class members would not have continued play after injury or would have taken additional time to heal; would have taken additional precautions; or would have stopped playing college football.

17. The Breach of Implied Contract claim alleges that there is an implied contract among Griffin, the putative class members, the NCAA, the Big Ten, and Ohio State under which the student-athletes agreed to be bound by NCAA and Big Ten rules in exchange for their

participation in NCAA- and Big Ten Conference-controlled athletic programs, including the Ohio State football program. As a condition of that contract, the NCAA agreed to abide by, and the Big Ten agreed to implement, the promises set forth in the NCAA's Constitution and By-Laws, including those regarding student-athlete safety. Griffin further alleges that the Big Ten breached the terms of the implied contract by concealing and/or failing to properly educate and warn student-athletes about the symptoms and long-term risks of concussions and concussion-related TBI.

18. The Unjust Enrichment claim, in turn, alleges that the Big Ten and NCAA receive significant revenues from collegiate football and that they should not be permitted to retain the profits they received at the expense of Griffin and the putative class members while refusing to pay for medical expenses incurred as a result of the defendants' unlawful actions. Griffin and the putative class members accordingly seek restitution and/or disgorgement of all monies the defendants have received as a result of their allegedly wrongful conduct.

19. Griffin and the putative class members seek an award of all "economic, monetary, actual, consequential, compensatory, and punitive damages caused by Defendants' conduct, including without limitation damages for past, present, and future medical expenses, other out of pocket expenses, lost time and interest, lost future earnings, and other damages." They also seek attorneys' fees and costs, pre- and post-judgment interest, and injunctive and/or declaratory relief as necessary to protect Griffin's and the putative class members' interests.

2. Jerrick v. The Big Ten Conference and NCAA

20. On October 4, 2016, Roger Jerrick filed a putative class action Complaint against the Big Ten Conference and the NCAA in the United States District Court for the Northern District of Illinois ("the *Jerrick* lawsuit"). A true and correct copy of the *Jerrick* Complaint is attached as

Exhibit F. The *Jerrick* lawsuit subsequently was assigned to the NCAA Football Concussion MDL.

21. Jerrick seeks to recover for alleged football concussion-related injuries on his own behalf and on behalf of a class comprised of "all individuals who participated in [the University of] Iowa's varsity football program between 1952 and 2010."

22. Jerrick alleges that he played football at the University of Iowa from 1970 through 1973. While playing football there, he claims that he sustained repeated concussive and sub-concussive hits to the head.

23. The Complaint alleges that each time Jerrick suffered concussive or sub-concussive hits to the head, he was quickly returned to play, with the NCAA and the Big Ten depriving him of the medical attention and treatment they knew were necessary to monitor, manage, and mitigate risks associated with TBI.

24. Jerrick alleges that he now suffers from a number of debilitating issues, including hydrocephalus status post multiple concussions, and that he has been told he displays certain markers for CTE. He also claims that his football-related injuries give him a significantly increased risk of developing neurodegenerative disorders and diseases, including CTE, Alzheimer's disease, and other similar cognition-impairing conditions.

25. The *Jerrick* Complaint alleges permanent brain damage, emotional distress, past and future medical costs, health care expenses, home-care expenses, other out-of-pocket expenses, lost time, lost future earnings, and other damages.

26. Like the *Griffin* Complaint, the *Jerrick* complaint alleges four causes of action against the Big 10:

a. Negligence;
b. Fraudulent Concealment;
c. Breach of Implied Contract; and
d. Unjust Enrichment.

27. The Negligence, Fraudulent Concealment, Breach of Implied Contract, and Unjust Enrichment claims asserted in the *Jerrick* Complaint generally track those in the *Griffin* Complaint, as summarized above and incorporated herein, except that they relate to the Big Ten's alleged conduct with respect to student-athletes at the University of Iowa.

28. Jerrick seeks to recover, on his own and the putative class members' behalves, "all economic, monetary, actual, consequential, compensatory, and punitive damages caused by Defendants' conduct, including without limitation damages for past, present, and future medical expenses, other out of pocket expenses, lost time and interest, lost future earnings, and other damages." The Complaint also seeks recovery of attorneys-fees and costs and disbursements, pre- and post-judgment interest, and injunctive and/or declaratory relief as necessary to protect named plaintiff's and the putative class-members' interests.

3. Samuels v. The Pennsylvania State University, Big Ten Conference, and NCAA

29. On May 17, 2016, Robert Samuels, James Boyd, and Eric Ravotti filed a Complaint against the Pennsylvania State University ("Penn State"), Big Ten Conference, and the NCAA in the United States District Court for the Northern District of Illinois ("the *Samuels* lawsuit"). A true and correct copy of the *Samuels* Complaint is attached as Exhibit G. The *Samuels* lawsuit, too, subsequently was assigned to the NCAA Football Concussion MDL.

30. Samuels, Boyd, and Ravotti seek to recover for alleged football concussion-related injuries on their own behalves and on behalf of a class comprised of "all individuals who participated in the Pennsylvania State University's varsity football program between 1952 and 2010."

31. Samuels alleges that he played football at Penn State from 1988 – 1991, except for sitting out the 1990 season due to football-related injuries. While playing football at Penn State, Samuels claims he sustained repeated head impacts and TBI in practices and games and suffered numerous concussions each year as a result.

32. Samuels alleges that because the defendants had failed to adopt or implement any concussion-management protocols or return-to-play guidelines, he was immediately returned to play after suffering concussive or sub-concussive hits. He claims that the NCAA and the Big Ten deprived him of the medical attention and treatment that they knew were necessary to monitor, manage, and mitigate risks associated with TBI.

33. Samuels alleges that he now suffers from deficits in cognitive functioning, reduced processing speed, decline in attention and reasoning, loss of memory, sleeplessness, and mood swings, as well as other issues.

34. Boyd alleges that he played football at Penn State from 1997 to 2001, during which he sustained repeated head impacts and TBI in practices and games and suffered numerous concussions. He, too, claims that he was immediately returned to play because of the defendants' failures to adopt or implement appropriate concussion-management protocols or return-to-play guidelines. Boyd asserts that he now suffers from deficits in cognitive functioning, reduced processing speed, decline in attention and reasoning, loss of memory, sleeplessness, and mood swings, among other issues.

35. Ravotti claims that he played football for Penn State between 1990 and 1994. Like the other plaintiffs, he alleges that he was subjected to repeated head impacts and TBI in practices and games and suffered numerous concussions each year. He likewise asserts that he was returned to play immediately after injury due to the Big Ten's and NCAA's failures to establish

appropriate protocols and guidelines. His alleged injuries include deficits in cognitive functioning, reduced processing speed, decline in attention and reasoning, loss of memory, sleeplessness, and mood swings, as well as other issues.

36. The legal claims asserted against the Big Ten in the *Samuels* Complaint for Negligence, Fraudulent Concealment, Breach of Implied Contract, and Unjust Enrichment mirror those in *Griffin,* as described above and incorporated herein, except that they relate to the Big Ten's alleged conduct with respect to student-athletes at Penn State.

37. As with the *Griffin* and *Jerrick* Complaints, the *Samuels* Complaint seeks to recover, on the named plaintiffs' and the putative class members' behalves, "all economic, monetary, actual, consequential, compensatory, and punitive damages caused by Defendants' conduct, including without limitation damages for past, present, and future medical expenses, other out of pocket expenses, lost time and interest, lost future earnings, and other damages." The Complaint also seeks recovery of attorneys-fees and costs and disbursements, pre- and post-judgment interest, and injunctive and/or declaratory relief as necessary to protect plaintiff's and the putative class-members' interests.

4. Strinko v. Big Ten Conference and NCAA

38. On June 8, 2016, Steve Strinko filed a Complaint against the Big Ten Conference, and the NCAA in the United States District Court for the Northern District of Illinois ("the *Strinko* lawsuit"). A true and correct copy of the *Strinko* Complaint is attached as Exhibit H. The *Strinko* lawsuit subsequently was assigned to the NCAA Football Concussion MDL.

39. Strinko seeks to recover for alleged football concussion-related injuries on his own behalf and on behalf of a class comprised of "all individuals who participated in [the University of] Michigan's varsity football program between 1952 and 2010."

40. Strinko alleges that he played football at the University of Michigan from 1971 to 1974. He claims that he was subjected to repeated head impacts at practices and games and suffered numerous concussions each year as a result. Like the *Griffin*, *Jerrick,* and *Samuels* plaintiffs, Strinko claims that he was immediately returned to play after his injuries due to the NCAA's and the Big Ten's failures to develop appropriate concussion-management protocols and return-to-play guidelines and that he did not receive appropriate medical treatment to monitor, manage, and mitigate risks associated with TBI.

41. According to his Complaint, Strinko now suffers from deficits in cognitive functioning, reduced processing speed, decline in attention and reasoning, loss of memory, depression, sleeplessness, and mood swings, as well as other issues.

42. The legal claims asserted against the Big Ten in the *Strinko* Complaint for Negligence, Fraudulent Concealment, Breach of Implied Contract, and Unjust Enrichment mirror those in *Griffin*, as described above and incorporated herein, except that they relate to the Big Ten's alleged conduct with respect to University of Michigan student-athletes.

43. As with the *Griffin, Jerrick,* and *Samuels* Complaints, the *Strinko* Complaint seeks to recover, on the named plaintiffs' and the putative class members' behalves, "all economic, monetary, actual, consequential, compensatory, and punitive damages caused by Defendants' conduct, including without limitation damages for past, present, and future medical expenses, other out of pocket expenses, lost time and interest, lost future earnings, and other damages." The Complaint also seeks recovery of attorneys-fees and costs and disbursements, pre- and post-judgment interest, and injunctive and/or declaratory relief as necessary to protect the named plaintiff's and the putative class-members' interests.

5. Rose v. NCAA and Big Ten Conference

44. On February 23, 2017. Michael Rose and Timothy Stratton filed a Complaint against the Big Ten Conference and the NCAA in the United States District Court for the Northern District of Illinois ("the *Rose* lawsuit"). A true and correct copy of the *Rose* Complaint is attached as Exhibit I. That suit also has been assigned to the NCAA Football Concussion MDL.

45. Rose and Stratton seek to recover for football-related injuries on their own behalves and on behalf "all individuals who participated in Purdue University's NCAA-sanctioned football program between 1952 and 2010 and experienced head trauma due to their play in said program."

46. Rose alleges that he played football at Purdue from 1996 – 1999. During that time, he claims, he was subjected to repeated head impacts and suffered numerous concussive and sub-concussive injuries each year as a result.

47. Rose alleges that over time, he began to experience the consequences of those concussions and today struggles with ringing in the ears, memory loss, depression, abrupt and uncontrollable changes in mood, and a "cluster of other debilitating symptoms" related to the long-term effects of repetitive head trauma.

48. Stratton alleges that he played football at Purdue from 1998 – 2001. During that time, he claims that he experienced repeated impacts to the head in practices and games and suffered numerous concussive and sub-concussive injuries each year. He alleges that he currently struggles with headaches, migraines, ringing in the ears, memory loss, depression, anxiety, anger, and a cluster of other debilitating symptoms related to the long-term effects of repetitive head trauma.

49. Rose and Stratton assert that during their collegiate football careers, the NCAA and the Big Ten did not provide any concussion-management protocols or return-to-play guidelines to

Purdue, despite having an overwhelming amount of medical evidence about the effects of repetitive head trauma in their possession. The plaintiffs claim that they were not aware of the short- and long-term health risks associated with repetitive head trauma, were not provided with appropriate protocols for monitoring, managing, and mitigating the risks associated with repetitive head trauma, and were not provided with the information necessary to make an informed decision about whether, or how, they would play football.

50. The *Rose* Complaint similarly asserts four causes of action against the Big Ten, for Negligence, Fraudulent Concealment, Breach of Implied Contract, and Unjust Enrichment.

51. The Negligence claim alleges that the NCAA assumed a duty to protect the health and safety of student-athletes at member institutions and that the Big Ten shared the NCAA's duty to supervise, regulate, and monitor the rules and to provide appropriate regulations and guidance to minimize the risk of injury to football players. It also alleges that the NCAA and the Big Ten had a duty to educate Purdue and its football players about the proper ways to evaluate and treat TBI during practice and football games and a duty to warn about the dangers of concussive and sub-concussive injuries and the risks associated with playing football.

52. According to the Complaint, the defendants also concealed material information about these risks. Had Rose, Stratton, and the putative class members known the true facts, they allege, they: (i) would not have continued to play after an injury, (ii) would have taken additional time to allow their brain injuries to heal before returning to play, (iii) would have taken additional precautions while playing football, or (iv) would not have continued to play college football at all.

53. Among other things, the plaintiffs allege that they sustained repeated head injury, which significantly increased their risk of developing neurodegenerative disorders and diseases, including CTE and Alzheimer's disease.

54. The Fraudulent Concealment claim alleges that the NCAA and the Big Ten knew that repetitive head impacts during football games and full-contract practices created a risk of harm to football players similar to that faced by boxers, were aware of published medical literature describing the serious risks presented by those events, and were "willfully blind to and/or knowingly concealed" the risks of TBI in NCAA football games and practices from the named plaintiffs and putative class members. The NCAA and the Big Ten, the Complaint alleges, "intended to induce a false belief" that Rose, Stratton, and the class members should continue to play football after a concussion or series of concussions.

55. The *Rose* Complaint alleges that due to the alleged knowing concealment or willful blindness, Rose, Stratton, and the putative class members suffered and will continue to suffer ongoing and continuing "substantial injuries, emotional distress, pain and suffering, and economic and non-economic damages." They also seek, to the extent permitted by applicable law, exemplary damages.

56. The Implied Contract cause of action alleges that there is an implied contract between the named plaintiffs, on the one hand, and the NCAA and the Big Ten, on the other, that the student-athletes would be bound by NCAA and Big Ten rules in exchange for their participation in the NCAA- and Big Ten-controlled athletic programs and that, as a condition of that implied contract, the NCAA agreed to abide by, and the Big Ten agreed to implement, the promises in the NCAA's Constitution and Bylaws regarding player health and safety.

57. The defendants, plaintiffs allege, breached the implied contract by failing to ensure that football players were provided with a safe environment while playing their sport and for concealing or failing to warn and educate players about the symptoms and long-term risks of concussions and concussion-related TBI. They seek to recover damages in the form of past, continuing, and future medical expenses, other out-of-pocket expenses, lost time, lost future earnings, and other damages.

58. The final count, Unjust Enrichment, mirrors the claim asserted in the *Griffin*, *Jerrick, Strinko,* and *Samuels* Complaints, as described above and incorporated herein, except that it relates to the Big Ten's conduct with respect to football players at Purdue. Rose, Stratton, and the putative class members similarly seek restitution and/or disgorgement of the funds they claim the Big Ten unjustly received as a result of its conduct.

THE POLICIES

A. The Primary Policy

1. The LLP Endorsement

59. Great American's Primary Policy contains a Legal Liability to Participants endorsement (Form GAC 33 41 CG IL (Ed. 07 03)("LLP endorsement"), which provides as follows, in relevant part:

ILLINOIS LEGAL LIABILITY TO PARTICIPANTS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Additional Exclusions.

1. The following is added to SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions:

   This insurance does not apply to:

"Bodily injury" to a participant."

2. The following is added to SECTION I – COVERAGES, COVERAGE C MEDICAL PAYMENTS:

   This insurance does not apply to:

   "Bodily injury" to a "participant".

B. Insuring Agreement

   The following is added to SECTION I – COVERAGES:

   COVERAGE D - LIABILITY TO "PARTICIPANTS"

   1. Insuring Agreement.

      a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" to any "participant" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

         But:

         (1) The amount we will pay for damages is limited as described in Section C - Limits of Insurance in this endorsement: and

         (2) Our right and duty to defend end when we have used up the applicable Limit of Insurance in the payment of judgments or settlements.

         (3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for in this endorsement.

      b. This insurance applies to "bodily injury" only if:

         (1) The "bodily injury" is caused by an "occurrence" …; and
         (2) The "bodily injury" occurs during the policy period.

      ***

   2. Exclusions

      This insurance does not apply to:

a. “Bodily injury” that is excluded under SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions. Paragraphs a., …

***

[That exclusion states, in pertinent part:

This insurance does not apply to:

a. Expected or Intended Injury

“Bodily injury” … expected or intended from the standpoint of the insured.…]

C. Limits of Insurance

…

2. The following is added to SECTION III--LIMITS OF INSURANCE:

8. Subject to 2. above, the Liability to “Participants” Limit shown in the Declarations is the most we will pay for the sum of all damages under Coverage D because of all "bodily injury" to "participants" arising out of any one "occurrence".

D. Conditions

For purposes of this endorsement, all of the provisions within SECTION IV – CONDITIONS are incorporated herein by reference and apply to this endorsement except to the extent any conditions below differ.

A. 1. Participant Legal Liability coverage of $1,000,000 is contingent upon a $25,000 Participant Accident policy limit being carried by, or on behalf of those participating in the activities of the Named Insured and/or $1,000,000 Catastrophic Coverage.

E. Definitions

For purposes of this endorsement, all of the provisions within SECTION V - DEFINITIONS incorporated herein by reference and apply to this endorsement except to the extent any definitions below differ.

a. “Participant” means:

"[P]layers", …

b. "[P]layer" is defined as a Basketball (M&W); Cross Country (M&W); Golf (M&W); Tennis (M&W); Indoor Track & Field (M&W); Swimming & Diving (M&W); Field Hockey; Wrestling; Soccer (M&W) Gymnastics (M&W); Softball; Baseball; Outdoor Track & Field (M&W); Women's Rowing player, whether or not registered with the Named Insured, while participating in "covered activities" as defined by the policy.

A "player's" participation in "covered activities" shall include practices, games, pre- and post-game activities, related non-athletic activities and conduct while on a facility's premises for events and activities approved, sanctioned, organized or supervised by the insured.

c. "[P]articipant accident insurance" means an insurance contract which provides medical expense coverage in the amount of at least $ 25,000 to each "participant" injury incurred during "covered activities".

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60. The Primary Policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Pursuant to the Commercial General Liability Broadened Coverage endorsement, the Primary Policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person [including] mental anguish, mental injury, shock, fright, humiliation, emotional distress or death resulting from bodily injury, sickness or disease."

2. The Missing Designated Activities Endorsement In The Primary Policy

61. The Big Ten's 8/31/03 – 8/31/04 primary policy was written by Virginia Surety Company, policy no. T7 0000001190600 ("the Virginia Surety policy"). The Virginia Surety policy included a Limitation of Coverage to Designated Premises, Activities or Operations endorsement. A true and correct copy of the Virginia Surety policy is attached as Exhibit J.

62. The Limitation of Coverage to Designated Premises, Activities or Operations endorsement on the Virginia Surety policy provided that the insurance applied only to "bodily injury … arising out of … 2. The activities or operations shown in the Schedule." The Schedule, in turn, identified "Activities or Operations" as: "Cross Country, Field Hockey, W&M Soccer,

W&M Swimming & Diving, W&M Indoor Track, W&M Basketball, Wrestling, W&M Gymnastics, W&M Tennis, W&M Golf, Rowing, Softball, Baseball, [and] Outdoor Track."

63. On or about April 26, 2004, K&K Insurance Group, Inc. sent the Big Ten Conference's insurance broker a renewal letter for the August 31, 2004 policy period, a true and correct copy of which is attached as Exhibit K. It enclosed the applications necessary "to provide the same coverage as the expiring policy." Among other things, the application package requested a list of events and the number of participants and spectators for each event.

64. The General Application submitted by the Big Ten identified the number of events to be covered as 21.

65. The Big Ten also provided a list of the 21 events to be covered, as well as the attendance information for each such event. The events for which the Big Ten requested coverage were:

Event	**Attendance**
Cross Country	400
Field Hockey	1,422
Women's Soccer	1,290
Men's Soccer	3,320
Women's Swimming & Diving	2,363
Men's Swimming & Diving	3,472
Women's Indoor Track	857
Men's Indoor Track	1,857
Women's Basketball	37,635
Men's Basketball	77,012
Wrestling	7,795
Women's Gymnastics	2,156
Men's Gymnastics	2,338
Women's Tennis	100 (est.)
Men's Tennis	100
Women's Golf	100 (est.).
Men's Golf	100 (est.)
Rowing	100 (est.)
Softball	687
Baseball	2,842
Outdoor Track	2,648
TOTAL:	148,594

66. On or about August 2, 2004, Great American made an offer of primary insurance coverage for the 8/31/04 – 8/31/05 policy period to the Big Ten ("the Offer") through K&K Insurance Group, Inc. A true and correct copy of the Offer is attached as Exhibit L.

67. The Offer specifically identified the Covered Exposures as:

> Your concessions; Reported Additional Insureds of Landlords; Landowners, Sponsors, Volunteers and Co-Promoters; Reported and Approved collegiate championship athletic events under the Named Insured's supervision or those events promoted by the Named Insured, or over which it governs or officiates, or for which it sponsors or otherwise: lends its name to, to the extent of the coverages provided by this policy; Ancillary Events held in conjunction with Championship Events(excluding those that require a separate entry fee or ticket); Set-up and Tear-down days; Office Premises Liability[.]

68. The Offer further defined "Covered Intercollegiate Sports" as:

> Basketball(M&W); Cross Country(M&W); Golf (M&W); Tennis (M&W); Indoor Track &Field (M&W); Swimming & Diving (M&W); Field Hockey; Wrestling; Soccer (M&W); Gymnastics (M&W); Softball; Baseball; Outdoor Track & Field (M&W); Women's Rowing and All approved activities and events under the direction and scope of the named insured.

69. The Offer further expressly provided:

> A schedule of events will be endorsed onto the policy. **Coverage has been contemplated only for those championship events of the reported sports above.** All other events and activities will need to be reported prior to taking place - and will be subject. to underwriting approval and rating. [Emphasis added].

70. The Offer provided that "A Broker's request to K&K to bind insurance shall constitute [sic] acceptance of all of the terms and conditions contained in this quotation."

71. On August 18, 2004, the Big Ten, though an email from Brad Traviolia, and via its broker, accepted Great American's Offer for the policy period commencing August 31, 2004.

72. The Big Ten did not request, and Great American did not agree to provide, coverage for the sport of football under the Primary Policy.

73. The premium for the Primary Policy was calculated based on the number of spectators reported by the Big Ten for the 21 sports identified above for which it had requested coverage, a

total attendance of 148,594. Accordingly, the Big Ten did not pay any premium for football coverage.

74. As noted above, the LLP endorsement to the Primary Policy stated that a player was defined as one of the identified-sport players "while participating in 'covered activities' as defined by the policy."

75. The terms of the "player" definition in the policy as issued and the terms of the Offer indicate that the policy was intended to include a Designated Activities endorsement, Form GAC 33 89 CG, that defined the "covered activities" as the particular sports for which the Big Ten had requested coverage.

76. The Primary Policy as issued mistakenly did not include a Designated Activities endorsement, Form GAC 33 89 CG as intended. Great American discovered the mistake after the above-described lawsuits were tendered to it by the Big Ten.

77. In order to accurately reflect the Big Ten's and Great American's actual agreement, the Primary Policy should have included a Designated Activities endorsement, form GAC 33 89 CG, that provided as follows:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATION OF COVERAGE TO DESIGNATED PREMISES,
ACTIVITIES OR OPERATIONS

This insurance applies only to "bodily injury," "property damage," "personal and advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or

2. The activities or operations shown in the Schedule.

SCHEDULE

Premises:

Activities or Operations:

Cross Country
Field Hockey
Women's Soccer
Men's Soccer
Women's Swimming & Diving
Men's Swimming & Diving
Women's Indoor Track
Men's Indoor Track
Women's Basketball
Men's Basketball
Wrestling
Women's Gymnastics
Men's Gymnastics
Women's Tennis
Men's Tennis
Women's Golf
Men's Golf
Rowing
Softball
Baseball
Outdoor Track

B. The Excess Policies

78. The 2002, 2003, and 2004 Excess Policies generally follow form to the underlying primary insurance policy, except that they do not include a duty to defend and require exhaustion of the underlying primary policies by payment of judgments or agreed settlements before coverage incepts. They provide, in part:

> **III. DEFENSE**
>
> A. We will not be required to assume charge of the investigation of any claim or defense of any suit against you.
>
> ***

79. The underlying primary policy to the 2002 Excess Policy was issued by Combined Specialty Insurance Co., Policy No. T7 000000796800 ("the Combined Specialty Policy"). A true and correct copy of that policy is attached as Exhibit M.

80. The Combined Specialty Policy includes a Limited Event Coverage endorsement, which states, in pertinent part:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance applies only to "bodily injury", "property damage" or "personal and advertising injury" arising out of an "occurrence" or offense which takes place during an event shown in the Schedule below. Notwithstanding the specific date(s) shown in the Schedule below, those activities that are part of the setup and teardown required for the event are considered part of the event.

***

SCHEDULE

TYPE OF EVENT	***
Basketball (M&W)	***
Cross Country (M&W)	***
Golf (M&W)	***
Tennis (M&W)	***
Indoor Track & Field (M&W)	***
Swimming & Diving (M&W)	***
Field Hockey (M)	***
Wrestling (M)	***
Soccer (M&W)	***
Gymnastics (M&W)	***
Softball (W)	***
Baseball (M)	***
Outdoor Track & Field (M&W)	***
Rowing (W)	***

81. As noted above, the 2003 Excess Policy is excess to the Virginia Surety Policy, which contains a Designated Activities endorsement that does not include football as a covered activity.

82. The 2004 Excess Policy is excess to Great American's Primary Policy.

COUNT I:
(Reformation of the Primary Policy)

83. Great American re-alleges and incorporates the allegations in Paragraphs 1 through 82 as and for Paragraph 83, as if the same were fully set out herein.

84. The Big Ten and Great American reached an actual agreement with respect to the Primary Policy that the Big Ten would pay for, and Great American would provide, insurance coverage that was limited to the 21 sports identified above. The parties did not intend that the policy would cover "bodily injury" arising from the sport of football.

85. The Big Ten and Great American intended for their actual agreement to be accurately reflected in a written insurance policy.

86. The Primary Policy mistakenly failed to reflect the agreement the Big Ten and Great American actually reached. Specifically, it does not include a Designated Activities endorsement that limits coverage to the 21 sports for which the Big Ten requested coverage and paid a premium. The Big Ten and Great American were mutually mistaken at the time the policy was issued that the written document reflected the actual agreement made.

87. The mistake was a mistake of fact material to the transaction and would result in a windfall to the Big Ten for the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits, or any other claim or suit alleging bodily injury for football-related sports injuries, including but not limited to any other claims or suits that may be asserted against the Big Ten in the NCAA Football Concussion MDL, to the extent the Primary Policy otherwise would provide defense or indemnity coverage for such claims or suits.

88. Great American will be injured if the Primary Policy is not reformed to reflect the parties' actual intent to include a Designated Activities endorsement to the Primary policy restricting coverage to the 21 sports reported to Great American by the Big Ten during the parties' contract negotiations. Among other things, Great American could be required to provide defense and indemnity coverage for the *Griffin, Jerrick, Rose, Strinko,* and *Samuels* lawsuits, and any other claims or suits against the Big Ten in the NCAA Football Concussion MDL, to the

extent the Primary Policy provides coverage for "bodily injury" to student-athletes playing football in the absence of a Designated Activities endorsement. Moreover, the Big Ten paid no premium for such coverage.

89. Accordingly, the Primary Policy must be reformed *ab initio* to include the Designated Activities endorsement described above limiting coverage to the 21 reported sports, as set forth on Exhibit N.

COUNT II:
(Declaratory Judgment, 28 U.S.C. § 2201 –
No Duty To Defend Or To Indemnify)

90. Great American re-alleges and incorporates the allegations in Paragraphs 1 through 82 as and for Paragraph 90, as if the same were fully set out herein.

91. There is an actual controversy between the Big Ten and Great American with respect to whether the Primary Policy provides defense and indemnity coverage to the Big Ten for the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits.

92. Great American accordingly requests that the Court declare its rights and duties under the Primary Policy with respect to the afore-mentioned lawsuits and any other claim or suit against the Big Ten that may be assigned to the NCAA Football Concussion MDL. Specifically, Great American requests the Court to declare that the Primary Policy is reformed to reflect the parties' actual agreement and that Great American has no duty to defend or indemnify the Big Ten under the 2007 Primary Policy in the *Griffin*, *Jerrick*, *Rose*, *Strinko*, and *Stratton* lawsuits or any subsequent lawsuits assigned to the NCAA Football Concussion MDL because the policy as reformed does not provide coverage for alleged "bodily injury" arising from the sport of football. In addition, Great American requests the Court to declare that the Primary Policy provides no

coverage for the *Griffin, Jerrick, Rose, Strinko,* and *Samuels* lawsuits or any other football-related claims or suits for the reasons set forth below.

93. Alternatively, in the event that the Court does not reform the Primary Policy, Great American seeks a declaration of its rights and responsibilities under that policy with respect to defense and indemnity coverage, including but not limited to:

a. The policy does not provide coverage to named plaintiffs or the putative class members in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits for any alleged "bodily injury" that did not occur during the policy period, including but not limited to any "bodily injury" that occurred before or after the policy's effective dates;

b. The policy does not provide coverage to the named plaintiffs or the putative class members in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits for any alleged "bodily injury" that was not caused by an "occurrence," as defined by the policy;

c. The policy does not provide coverage to the named plaintiffs or the putative class members in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits for any alleged "bodily injury" that was expected or intended by the Big Ten pursuant to the policy's Expected or Intended injury exclusion;

d. The policy does not provide coverage to the named plaintiffs or the putative class members in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits for any injury that does not constitute "bodily injury" as defined, including but not limited to any mental anguish, mental injury, shock, fright, humiliation, or emotional distress that did not result from bodily injury, sickness or disease or the increased risk of future injury that has not yet occurred;

e. The policy does not provide coverage for any equitable relief sought in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits, including the claims for restitution or disgorgement of profits, or for the costs associated with any of the requested injunctive or declaratory relief sought, because those amounts are not sums the insured is legally obligated to pay "as damages" within the scope of the insuring agreement;

f. Any punitive or exemplary damages that may be awarded are not covered because they are not payable as compensatory "damages," and/or may be precluded from coverage by public policy.

94. Declare that the 2002, 2003, and 2004 Excess Policies do not include a duty to defend the Big Ten in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits and that no such defense is owed to the Big Ten under those policies.

95. Declare that Great American is not required to indemnify the Big Ten under the 2002, 2003, and 2004 Excess Policies for any judgments or settlements in the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits pursuant to the LLP, Designated Operations, and Limited Event Coverage endorsements and other provisions in the underlying primary policies to which Great American's excess policies follow form, nor is it required to defend or indemnify the Big Ten in accordance with such provisions in the Primary Policy pursuant to the meanings intended by the parties.

96. In addition to the foregoing, Great American requests that the Court declare such further rights as are required to establish that there is no coverage, or alternatively to limit coverage, under the Primary Policy and the 2002, 2003, and 2004 Excess Policies.

CLAIM FOR RELIEF

WHEREFORE, Great American requests that the Court enter judgment in its favor as follows:

1. Reforming the Primary Policy from its inception to include a Designated Activities endorsement that limits coverage to the 21 sports for which the Big Ten requested, and Great American agreed to provide coverage, as listed above and as set forth in Exhibit N;

2 Declaring that the Primary Policy, as reformed, does not provide coverage for the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits or for any other claim or suit assigned to the NCAA Football Concussion MDL because the Primary Policy does not apply to alleged "bodily injury" arising out of the sport of football;

3. In the event the Primary Policy is not reformed, declaring in the alternative that coverage is limited or precluded on the additional bases outlined above;

4. Declaring that the 2002, 2003, and 2004 Excess Policies do not provide defense or indemnity coverage for the *Griffin, Jerrick, Rose, Strinko*, and *Samuels* lawsuits or for any other claim or suit assigned to the NCAA Football Concussion MDL;

5. Making such further declarations as may be required to fully determine Great American's rights with respect to the Primary Policy and 2002, 2003, and 2004 Excess Policies and resolving any disagreement between the parties thereto;

5. Awarding Great American its costs and disbursements herein; and

6. Affording Great American such further relief as may be available in law or equity.

Dated: April 12, 2017

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NOTIFICATION AS TO AFFILIATES

Pursuant to Local Rule 3.2 and Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiff Great American Assurance Company states that it is a wholly-owned subsidiary of Great American Insurance Company, which in turn is a wholly-owned subsidiary of American Financial Group, Inc., which is publicly traded on the New York Stock Exchange.