



# Case Alert

## Minnesota District Court Bars Insurer from Retroactively Allocating Jury Award to Fit Sexual Abuse Exclusion

The District of Minnesota recently held that an excess insurer, who has the opportunity to participate in the defense of an underlying claim, is barred from speculating to the allocation of the jury award to make it fit within a policy exclusion.

In *RSUI Indem. Co. v. New Horizon Kids Quest, Inc.*, Civ. No. 16-28 (D. Minn. 2017), a daycare center was sued for negligent supervision when a three-year-old left at the facility was assaulted by a nine-year-old also at the facility. The parties stipulated to this version of events, but there was also some evidence that the assault may have been sexual in nature. New Horizon was insured by Travelers at the primary level and RSUI at the excess level.

At trial, the jury issued a general award of more than \$13 million reaching well into the RSUI excess layer. The jury did not, and was not asked to, allocate its award between physical and sexual assault. Shortly after the verdict was rendered, RSUI issued a reservation of rights letter raising “serious coverage issues under the policy” based on a sexual abuse exclusion.

New Horizon filed a motion for a new trial, which was granted. At the second trial, RSUI was significantly more active and involved in the defense of the case. The parties again stipulated to the assault and only tried the issue of damages. The second jury awarded more than \$6 million. Again, the jury did not, and was not asked to, allocate the damages award between physical and sexual assault.

Travelers paid its limits and New Horizon sought coverage for the remainder of the award from RSUI. RSUI denied, citing its sexual abuse exclusion and subsequently filed a declaratory judgment against New Horizon. New Horizon counterclaimed, alleging a breach of the policy and bad faith.

The court set forth basic insurance litigation principles that (1) the insured bears the initial burden of proving the policy covers a certain claim and (2) the insurer then has the burden to prove that an exclusion applies. The court explained that, in order for RSUI to succeed, it would need to “put forth evidence that the jury awarded damages for an actual or threatened sexual abuse, as required by the Exclusion’s express terms.”

Because RSUI made no effort at trial to have the jury allocate its award between sexual and physical assault, the court held that “RSUI simply cannot do so.” Citing similar decisions in Delaware, Pennsylvania, Massachusetts, and Vermont, the court noted that RSUI could not assert the exclusion on an ambiguous record where it had “(i) [a] right to participate, (ii) involvement in trial preparation, (iii) consent[ed] to stipulate to an ‘assault,’ (iv) knowledge that a verdict might exceed the limits of New Horizon’s coverage with Travelers, and (v) awareness that the Exclusion could apply.”<sup>1</sup>

For more information about this case contact Will Bennett at [wsb@sdvlaw.com](mailto:wsb@sdvlaw.com) or 951-365-3148.

<sup>1</sup> *TIG Insurance Co. v. Premier Parks, Inc.*, No. CIV.A.02C04126JRS, 2004 WL 728858 (Del. Super. Ct. Mar. 10, 2004); *Pharmacists Mut. Ins. Co. v. Myer*, 993 A.2d 413, 419 (Vt. 2010); *Liquor Liab. Joint Underwriting Ass’n of Mass. v. Hermitage Ins. Co.*, 644 N.E.2d 964, 969 (Mass. 1995); *Butterfield v. Giuntoli*, 670 A.2d 646, 658 (Pa. Super. Ct. 1995).