

Excess Insurer Allowed Post-Award Coverage Action

Recently, the 8th Circuit addressed allocation issues between covered and non-covered claims under a general liability policy. While allocation is a common issue raised by insurers, this case involved allocation raised by an excess carrier who did not participate in the defense of the underlying action. The court found that pursuant to Minnesota law, an excess liability insurer who did not control the defense of the underlying suit must be afforded an opportunity to prove that the jury award included damages for uncovered and covered claims.

New Horizon Kids Quest, Inc. ("New Horizon"), as the operator of a childcare facility, faced claims that a three-year-old child under its care had suffered physical and sexual assault from another nine-year-old child at the facility resulting from negligent employee training and supervision.

At the time, New Horizon was insured by Travelers Property Casualty Company of America ("Travelers") who provided a primary commercial general liability policy with limits of \$3 million per occurrence and by RSUI Indemnity Company, Inc. ("RSUI") who provided an excess liability policy with limits of up to \$8 million per occurrence. Relevantly, the RSUI policy included a sexual abuse or molestation exclusion. Travelers defended the suit against New Horizon brought by the guardian of the three-year-old child (the "Underlying Suit"). The Underlying Suit concluded with a jury trial that awarded approximately \$6 million in damages to the plaintiff. The jury did not determine whether the 3-year-old had suffered sexual as well as physical abuse.

Travelers paid its policy limits, leaving New Horizon with the remainder of the jury award. New Horizon demanded indemnity from RSUI to cover the remaining amount. RSUI took the position that its sexual abuse or molestation exclusion operated to bar coverage for that part of the award in excess of Travelers' limits and brought a declaratory judgment action. The district court found in favor of New Horizon, holding that RSUI could not prove that the jury's unallocated award was subject to the exclusion; RSUI appealed.

The circuit court remanded, finding that RSUI was entitled to a post-award coverage action because it did not participate in the defense.¹ RSUI is entitled to "an opportunity to establish that the jury's unallocated damages award included uncovered as well as covered claims"² The court determined that the burden rests with RSUI to prove that the award included an uncovered claim. If RSUI prevails in showing that the jury award included both covered and non-covered claims, then the total award must be allocated.

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¹The RSUI policy provided that RSUI had a right to participate in the defense of claims, but no duty to defend unless the underlying limits were exhausted.

²RSUI Indem. Co. v. New Horizon Kids Quest, Inc., 933 F.3d 960 (8th Cir. 2019).