

Litigating Through Layers of Insurance



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A business concedes that it made a mistake, but pleads for mercy with the jury and asks for a reasonable amount of damages. A jury ultimately awards \$6 million. There are several insurance policies involved. Who is left holding the bag? In an opinion announced this week by the Eighth Circuit Court of Appeals examining these facts, the judges peeled back layers of insurance seeking to determine who would pay what portion of a \$6 million jury verdict.

The business, New Horizon, had three layers of insurance: (1) a commercial general liability policy written by Traveler's, (2) an excess liability policy also written by Traveler's, and (3) an excess liability policy written by RSUI Indemnity Company. Layers (1) & (2) covered the business up to \$3 million, and layer (3) covered the business up to \$8 million. So when the jury came back with a total award of \$6 million, one might conclude, as did the district court, that it would all be covered under the three insurance policies. Maybe not, according to the Eighth Circuit.

The hang up came from an exclusion in the RSUI excess liability policy, as it specifically did not cover sexual abuse or molestation. The underlying injury could have consisted of both physical assault and sexual assault. Phrased another way, the case potentially consisted of injuries covered and uncovered by the RSUI excess insurance carrier. However, the jury did not allocate the \$6 million verdict between those two types of injuries. Applying state law, the Eighth Circuit held that the excess insurance carrier must be afforded an opportunity to show that the \$6 million award might have consisted of covered and uncovered injuries, and if so, then the district judge would have to allocate the award between the covered and uncovered portion.

There were actually two trials here, and RSUI, as the excess insurance carrier, was involved in varying degrees. They did not participate in the first trial. But after that first jury awarded \$13 million, RSUI got more involved in the second trial. They participated in the defense but did not control it. Most importantly, RSUI did not get an opportunity to litigate the issue of whether the award contained covered and uncovered injuries, and the jury did not make any such finding on the issue. For this reason, the Eighth Circuit reversed the case and remanded to the lower court.

This opinion illustrates several important points. First, to the lawyer who litigates in complex cases with multiple levels of insurance coverage: it is crucial to always be mindful about allocation of fault between different claims and injuries. This is especially true when coverage hinges on this distinction even where the plaintiff's legal recovery may not. And second, for the business people out there: it is advisable to work with counsel to devise a strategic litigation plan to anticipate these nuances and control them. In the case of New Horizon identified above, controlling for that variable has turned out to be an approximately \$3 million hot potato that no one wants to be stuck holding.

Case Reference: RSUI Indemnity Company v. New Horizon Kids Quest, Inc., No. 17-3567 (8th Cir. Aug. 12, 2019).

