

## 3rd Circ. Says Insurer Can't Appeal Order To Defend

By **Jennifer Mandato**

Law360 (August 24, 2023, 7:35 PM EDT) -- The Third Circuit on Thursday dismissed an insurer's appeal of its duty to defend a radiator manufacturer in an underlying lawsuit brought by an injured employee, finding an order does not direct the insurer to take action and thus the court lacks jurisdiction over the appeal.

In a **published opinion**, a three-judge panel determined that a lower court's order stating that Zenith Insurance Co. has a duty to defend M.P.N. Inc. in the underlying suit was not a final order and, therefore, isn't appealable.

The Third Circuit held that Zenith was not at risk of facing contempt for failing to comply with the lower court's order stating that the insurer owes a duty to defend the underlying suit because it potentially falls under the scope of M.P.N.'s workers' compensation and employers' liability insurance policy. According to the appellate court, a lower court order declaring the meaning of a contract isn't enforceable by contempt unless the order expressly states so or directs that an action be taken.

The order "announces that Zenith has a 'duty to defend' under the policy it issued M.P.N., but it does not direct Zenith to begin defending or to advance any costs," the panel said.

According to court records, M.P.N. employee Jerry Mercer Jr. sued the radiator manufacturer in 2019. He accused M.P.N. of concealing blood test results that showed he had dangerously high levels of zinc and lead in his system after he was exposed to lead and cadmium on the job.

Mercer argued that a physician advised M.P.N. to remove him from work on account of his results, but the manufacturer did not. As a result, he said, he spent another year working at the plant and suffered permanent brain damage.

When M.P.N. requested coverage, Zenith declined on the grounds that policy provisions excluded coverage for bodily injury intentionally caused or aggravated by the insured and for claims payable under the Pennsylvania Workers' Compensation Act.

M.P.N. disagreed with the insurer's finding, and Zenith subsequently filed suit, requesting a declaration that it didn't have to defend or indemnify the manufacturer in the underlying suit.

Following the lower court's order that coverage potentially exists, Zenith appealed.

The Third Circuit, however, said that "because Zenith seeks to challenge an order that did not direct it to undertake a defense, advance or reimburse costs, or do anything at all, we lack appellate jurisdiction."

Representatives of Zenith and M.P.N. did not respond to requests for comment Thursday.

U.S. Circuit Judges David J. Porter, Arianna J. Freeman and D. Michael Fisher sat on the panel for the Third Circuit.

Zenith is represented by Sharon F. McKee and Ronald P. Schiller of Hanglely Aronchick Segal Pudlin & Schiller.

M.P.N. is represented by Jeffrey J. Vita and Rachel S. Pearson of Saxe Doernberger & Vita PC.

The case is Zenith Insurance Co. v. Martin Newell Jr. et al., case number 21-1748, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Nick Petruncio.