

Appellate Jurisdiction, Notice Coverage Update

September 5, 2023

Appellate Jurisdiction – Third Circuit (Pennsylvania Law)

Zenith Ins. Co. v. Newell

--- F.4th ---, No. 21-1748, 2023 WL 4004766 (3rd Cir. Aug. 24, 2023)

The U.S. Court of Appeals for the Third Circuit dismissed an appeal by Zenith Insurance Company (Zenith) from the district court for lack of appellate jurisdiction. Zenith had issued three insurance policies to M.P.N., Inc. (MPN), which covered damages incurred because of bodily injury to employees arising out of and in the course of the injured employee's employment. In 2019, an employee sued MPN in Pennsylvania state court claiming that the company had concealed blood test results showing that he had dangerously high levels of zinc and lead after exposure to lead and cadmium on the job.

MPN tendered the lawsuit to Zenith, which declined coverage under the intentional injury and workers compensation exclusions. Zenith also filed a declaratory judgment action in the U.S. District Court for the Eastern District of Pennsylvania seeking a declaration that it did not have a duty to defend or indemnify MPN in the lawsuit. MPN responded and filed a motion for partial summary judgment seeking a declaration that Zenith did have a duty to defend. The district court granted MPN's motion in an order and held that "Zenith has a duty to defend [MPN] in connection with the underlying action." Zenith appealed.

On appeal, Zenith argued that the district court's order was an appealable order as of right under 28 U.S.C. § 1292(a)(1), which gives appellate courts jurisdiction over orders expressly granting or refusing injunctions. According to the appellate court, an order is effectively injunctive if it can be enforced by contempt. Zenith asserted that the order was appealable under this provision because it could face contempt if it failed to comply with the order and did not defend MPN. The appellate court disagreed and explained that the order did not direct Zenith to begin defending or to advance any costs. It only announced that Zenith had a duty to defend under the policies, and "orders declaring the meaning of a contract are not enforceable by contempt unless the district court explicitly provides as much or mandates, in text of the order, that some action be taken to effectuate the declaratory relief." The appellate court, therefore, held that "[b]ecause 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."

By: Joshua LaBar

Notice – Fifth Circuit (Texas Law)

O'Donnell v. Avis Rent A Car System, LLC

No. 22-109972023 WL 5236797 (5th Cir. Aug. 15, 2023)

The U.S. Court of Appeals for the Fifth Circuit, applying Texas law, affirmed the district court's order granting summary judgment in favor of Ace American Insurance Company (Ace). The appellate court held that the insured failed to give notice of the claim as required by the policy conditions and that failure prejudiced Ace. Accordingly, Ace was not required to cover a \$2 million judgment awarded to the plaintiff, David O'Donnell (O'Donnell) for injuries sustained in a January 2015 motor vehicle accident caused by Juan Pablo Zavala Diaz (Diaz).

At the time of the accident, Diaz, a citizen of Spain, traveled to Dallas, Texas on business. While in Dallas, Diaz rented a car from Avis. Per the rental agreement, Avis agreed to provide liability coverage up to \$30,000 and Diaz paid an extra premium to purchase an optional \$2 million in Additional Liability Insurance (ALI). Ace issued this additional coverage. While driving the rental, Diaz collided with another vehicle in which O'Donnell was a passenger. O'Donnell claimed to have suffered injuries to his brain as a result of the collision. Diaz cooperated with law enforcement and Avis at the time of the accident but eventually returned to Spain.

O'Donnell sued Diaz and Avis seeking compensation for his injuries. O'Donnell was unable to locate and serve Diaz but was ultimately granted leave to serve him via email. Diaz, however, did not appear and did not file an answer, resulting in the trial court entering a default judgment against him for \$2 million plus interest.

Subsequently, O'Donnell sued Avis and Ace claiming that as Diaz's judgment creditor, Avis breached the rental agreement with Diaz, and, alternatively, that Diaz's election of ALI created an additional insurance contract (the ALI policy) that Avis and ACE breached. The court granted summary judgment in favor of Avis and ACE on the basis that Diaz's suit was barred because Diaz prejudiced Avis and Ace when he failed to comply with the ALI policy's notice requirements, which were conditions precedent to coverage.

On appeal, the appellate court upheld the district court's decision and noted that Avis offered Diaz the option to purchase ALI coverage and that Diaz paid an additional premium for it. As such, the appellate court concluded that the ALI policy was incorporated into the rental agreement by reference such that the ALI policy's terms controlled whether ALI coverage was available to the insured seeking coverage.

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The appellate court next noted that the ALI policy's "notice of loss" provision required the insured, or someone on his behalf, to give written notice to ACE as soon as an event causing injury that is reasonably likely to lead to a claim takes place. The loss provision also required the insured to "give like notice of any claim or suit on account of such event" and forward "every demand, notice, summons or other process received by him or his representative."

O'Donnell claimed that Avis gave Ace notice of the matter on Diaz's behalf because Avis was Diaz's agent for the purpose of the ALI policy. The appellate court disagreed on the basis that there was no evidence in the record that Avis or anyone else gave notice to Ace of O'Donnell's lawsuit on behalf of Diaz. The appellate court noted that Avis's notice to Ace never mentioned Diaz and did not request a defense for Diaz. As such, the notice of the suit condition was not satisfied by the insured, Diaz, or anyone acting on Diaz's behalf.

The appellate court also disagreed with O'Donnell's claim that Avis and Ace could not have been prejudiced because they knew that O'Donnell sued Diaz based on Avis's participation in the lawsuit and Avis's agency relationship with Ace. The appellate court noted that, under Texas law, an insurer's duty to provide a defense arises only after the insurer knows that the insured is subject to a default and the insured expects the insurer to provide a defense as "an insured may opt out of seeking a defense from his insurer and insurers need not subject themselves to gratuitous coverage and defense liability." Applying Texas law, the appellate court ruled that Avis and Ace were prejudiced by Diaz's failure to comply with the ALI policy's notice requirements, which were conditions precedent to coverage, and Ace "acted within its rights in denying coverage."

By: Amy Diviney