Appealing An Interlocutory Order On Insurer Duty To Defend

By **Carrie DiCanio and Neil Schur** (February 26, 2025)

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On Dec. 30, the U.S. Court of Appeals for the First Circuit in Federated Mutual Insurance Co. v. Peterson's Oil Service Inc. denied the policyholder's motion to dismiss its insurance company's interlocutory appeal of an order from the U.S. District Court for the District of Massachusetts finding that the insurance company had a duty to defend the policyholder in a class action.

The policyholder argued that the First Circuit did not have jurisdiction over the appeal because, while finding that the insurance company owed a duty to defend, the order did not require it to take any immediate action.

Although the First Circuit reserved decision on the issues raised by the motion to the ultimate merits panel, its decision on the motion to dismiss raises an important consideration for policyholder counsel litigating the duty to defend in federal court: When is an interlocutory order concerning the duty to defend immediately appealable to the circuit court?

The duty to defend is an invaluable part of liability insurance, as is being able to enforce the right to a defense when coverage is wrongfully denied.

When the policyholder is forced to litigate coverage for a lawsuit that is ongoing, a prediscovery motion for partial summary judgment concerning the insurance company's duty to defend is a tool often used to attempt to secure coverage for the defense costs being incurred in the underlying litigation. The insurance company often will cross-move for a ruling that it has no duty to defend.

If the motions are decided in favor of the policyholder, the coverage action against the insurance company will continue for the court to determine questions of indemnity, or the action will be stayed pending resolution of the underlying litigation.

If the motions are decided in favor of the insurance company and the order resolves all the claims asserted in the coverage action, e.g., the court finds that the insurance company does not have a duty to defend or a duty to indemnify, the policyholder can appeal the order to the circuit court pursuant to Title 28 of the U.S. Code, Section 1291, because it is a final judgment.

In certain circumstances, however, the motions may be denied, and the coverage action will continue to discovery. Although some state courts, such as those in New York, permit appeals of interlocutory orders, federal courts only permit the appeal of an interlocutory order in specific circumstances. How then does the policyholder obtain the defense to which it is entitled under its insurance policy while the coverage action remains pending in federal court?

Several circuit courts have concluded that an order compelling, or refusing to compel, an insurance company to defend the policyholder in ongoing underlying litigation is immediately appealable pursuant to Title 28 of the U.S. Code, Section 1292(a)(1), which provides for appellate jurisdiction over orders that have the practical effect of granting or refusing injunctive relief.

Those courts reason that such an order does in fact have the practical effect of granting or refusing injunctive relief because it is forward-looking and effectively mandates, or refuses to mandate, that the insurance company take action by paying an indeterminate amount of money, thereby providing, or refusing to provide, relief that is equitable in nature.

As a result, these courts have concluded they have jurisdiction of an immediate appeal of such an order pursuant to Section 1292(a)(1).

Before discussing these decisions, it is helpful to review the rules that govern whether an order is immediately appealable in federal court. As most litigators know, the first Judiciary Act established in 1789 what is now frequently referred to as the "final judgment rule."[1] It provides that the courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States."[2]

Section 1292, in turn, provides limited exceptions to that general rule. Most relevant here, an interlocutory order may be appealed directly to the circuit court pursuant to Section 1292(a)(1), which authorizes the immediate appeal of "[i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."

Whether a circuit court has jurisdiction over an order under Section 1292(a)(1) turns on whether the order grants or denies an injunction or has the practical effect of doing so. The U.S. Court of Appeals for the Third Circuit, like other circuit courts, applies a functional test to determine whether this is the case, meaning the inquiry is not focused on what the order says or is called, but on what it does.

According to that court's 2016 decision in Ramara Inc. v. Westfield Insurance Co., "In a functional test analysis, an order is injunctive if it: (1) adjudicates 'some of the relief sought in the complaint'; and (2) is 'of such a nature that if it grants relief it could be enforced pendente lite by contempt if necessary.'"[3]

The court also may require the appellant to show that it faces a "serious, perhaps irreparable consequence" — per the language of the U.S. Supreme Court's 1981 ruling in Carson v. American Brands Inc. — without an immediate appeal and that an immediate appeal is the only way to effectively challenge the order.[4]

Pursuant to its functional test, the Third Circuit has determined that it has jurisdiction over the immediate appeal of an interlocutory order deciding a motion on the duty to defend if the order grants or denies injunctive relief or has the practical effect of doing so.

In Ramara, for example, the policyholder and the insurance company filed cross-motions for summary judgment regarding the defense of litigation involving a workplace accident in a parking garage. The U.S. District Court for the Eastern District of Pennsylvania granted partial summary judgment to the policyholder, denied summary judgment to the insurance company, and mandated that the insurance company "prospectively ... provide defense to [policyholder] in the underlying action."[5]

The insurance company appealed the decision.

The Third Circuit concluded the district court's order was an immediately appealable injunctive order because, by ordering the insurance company to defend the policyholder prospectively in the underlying litigation, it granted forward-looking monetary relief of an indeterminate amount.[6] The order also granted Ramara "some of the relief" that it sought in the complaint and was enforceable while the litigation was pending.[7]

As the Ramara court explained, "In a determination of whether an order is injunctive, a district court's characterization of its order is not dispositive…. [W]hat counts is what the court actually did, not what it said it did."[8]

Similarly, in Nautilus Insurance Co. v. 200 Christian Street Partners LLC, the insurance company appealed the Eastern District of Pennsylvania's denial of its motion for judgment on the pleadings concerning its duty to defend the policyholder in construction defect litigation.[9]

As in Ramara, the policyholder argued that the Third Circuit did not have jurisdiction because the order was interlocutory. The Third Circuit found, in its 2020 decision in the case, that it had jurisdiction under Ramara's "functional test" because "the District Court's Orders ... direct Nautilus to prospectively defend the Insureds in the Underlying Actions, grant some relief that the Insureds requested, and could be enforced pendente lite by contempt, if necessary."[10]

In both Ramara and 200 Christian Street, the Third Circuit found that it had jurisdiction over the appeal of orders requiring an insurance company to defend the policyholder in ongoing litigation because the orders were the functional equivalents of an injunction.

Along these lines, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Eleventh Circuit also have found jurisdiction over the appeal of an order denying the policyholder's motion for an order requiring the insurance company to provide a defense in ongoing litigation under Section 1292(a)(1), because such an order refuses a request for what is the functional equivalent of an injunction.[11]

In American International Surplus Lines Insurance Co. v. City of San Diego, the policyholder moved for partial summary judgment on the insurance company's duty to defend it in ongoing nuisance litigation.[12] The policyholder relied on evidence extrinsic to the underlying complaints to prove there was coverage.[13]

After the U.S. District Court for the Southern District of California denied the policyholder's motion for partial summary judgment and motion for reconsideration, the policyholder appealed to the Ninth Circuit. Although not explaining the rationale for its decision, the Ninth Circuit found, in a 2005 ruling, that it had jurisdiction over the order pursuant to Section 1292(a)(1) and reversed the district court's order. The same day, the Ninth Circuit denied the policyholder's petition for a writ of mandamus.[14]

In Pacific Insurance Co. v. General Development Corp., the Eleventh Circuit found, in a 1994 decision, that it could exercise jurisdiction over the district court's order granting partial summary judgment to appellees and directing the appellant insurance company to pay their defense costs pending resolution of its rescission claim because the interlocutory order mandated that the "insurer pay ... defense costs."[15]

Based on these cases, there is a good argument that a circuit court has jurisdiction over the appeal of an order denying a motion for an insurance company to defend the policyholder in ongoing litigation where the order refuses to require the insurance company to pay the policyholder's defense costs prospectively.

In this regard, the Third Circuit's 2023 decision in Zurn Industries LLC v. Allstate Insurance Co. is instructive.[16] There, the parties filed cross-motions for summary judgment. The U.S. District Court for the Western District of Pennsylvania declared that the insurer had a duty to defend but did not mandate any action.

The Third Circuit concluded that the order did not have the practical effect of an injunction because it did not direct the insurance company to pay defense costs going forward. It explained,

> Without a directive, there is no injunction or functional equivalent for us to review. … In short, we decline to extrapolate injunctive-like directives from a district court's summary judgment order that merely interprets parties' rights and duties under a contract in the abstract, nothing more. And unlike an injunction, the District Court's declaration-granting orders cannot be enforced by contempt.[17]

There are several important lessons that a policyholder seeking a ruling on its insurance company's duty to defend can draw from these decisions.

- Where underlying litigation is ongoing, the policyholder should request relief that affirmatively mandates that the insurance company pay defense costs going forward, so that it can later argue the order denied injunctive relief.
- In the event of an adverse decision on the duty to defend, the policyholder should review all options for the reconsideration and appeal of such decision.
- If the policyholder decides to appeal to the circuit court under Section 1292(a)(1), it should bear in mind that, if the underlying litigation is resolved while the appeal is pending, it is possible that the circuit court could find that it no longer has jurisdiction over the appeal.[18]

If the circuit court requires that the policyholder satisfy Carson's additional requirement of showing that the inability to appeal the order at issue might have a serious, perhaps irreparable, consequence and the order may be effectually challenged only by immediate appeal, the policyholder can argue that absent immediate review, the policyholder may face serious and perhaps irreparable consequence — the loss of its important contractual right to a defense in the underlying litigation.

This is particularly true where a policyholder has negotiated and paid for the right to the duty to defend or the advancement of fees so that it does not need to pay such fees, which can be substantial, and then wait for reimbursement at the conclusion of the litigation.

Given the nature of this important defense obligation, unless the policyholder is provided with an immediate and contemporaneous defense as the underlying lawsuit progresses, its right to a defense irretrievably is lost. This is a serious and potentially irreparable consequence because the policyholder may be unable to fund its ongoing substantial defense costs, and its defense may be impaired or reduced in scope.

There is a good argument that such an impairment of a policyholder's defense constitutes irreversible injury warranting immediate appellate review.

The bottom line? Pursuant to Section 1292(a)(1), policyholders may be able to pursue the immediate appeal of an interlocutory order that refuses to mandate that the insurance company provide a defense in ongoing underlying litigation as required by the insurance policy.

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[1] See 28 U.S.C. § 1291.

[2] Id.

[3] Ramara, Inc. v. Westfield Ins. Co., 814 F.3d 660, 670 (3d Cir. 2016).

[4] Carson v. Am. Brands, Inc., 450 U.S. 79, 84-85 (1981).

[5] Ramara, 814 F.3d at 665 (citations omitted).

[6] Ramara, 814 F.3d at 670.

[7] Id.

[8] Id. at 669.

[9] Nautilus Insurance Co. v. 200 Christian Street Partners LLC, 819 Fed. Appx. 87, 88 (3d Cir. 2020).

[10] Id. at 88-89 (citation omitted). See also Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350, 356 (3d Cir. 2014) (concluding that "where an order for the payment of money is forward-looking and involves an amount that cannot be calculated with specificity, it is equitable" and that because the order at issue adjudicated "some of the relief sought in the complaint" and granted relief that "could be enforced pendente lite by contempt if necessary," it was immediately appealable under 28 U.S.C. § 1292(a)(1)"); Abercrombie & Fitch Co. v. Fed. Ins. Co., 370 Fed. Appx. 563, 567-68 (6th Cir. 2010)(holding that the district court's order "enjoining [the insurance company] from failing and refusing to pay" the appellee's defense costs "fit[s] the requirements .... [of] an injunctive order, over which we have jurisdiction under 28 U.S.C. § 1292(a)(1)").

[11] See 28 U.S.C. § 1292(a)(1) (granting U.S. Courts of Appeals jurisdiction over "[i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions...) (emphasis added); see also Carson, 450 U.S. at 84 (concluding order denying motion to approve consent decree requiring employers to give hiring and seniority preferences to qualified back employees "had the practical effect" of refusing an injunction).

[12] American International Surplus Lines Insurance Co. v. City of San Diego, 130 Fed. Appx. 91 (9th Cir. 2005).

[13] Id. at 92-93.

[14] In re City of San Diego, 120 Fed. Appx. 192 (9th Cir. 2005)(unpublished); see also Gon v. First State Ins. Co., 871 F.2d 863, 866 (9th Cir. 1989) (concluding that an order directing an insurance company to pay the policyholder's defense expenses as they were incurred "met the general definition of an injunction" and was immediately appealable).

[15] Pacific Insurance Co. v. General Development Corp., 28 F.3d 1093, 109/1-/26 (11th Cir. 1994).

[16] Zurn Industries LLC v. Allstate Insurance Co., 75 F.4th 321, 328 (3d Cir. 2023).

[17] Zurn, 75 F.4th at 329.

[18] See, e.g., Selective Ins. Co. v. Westfield Ins. Co., 73 F.4th 239, 243 (4th Cir. 2023); Bodell v. Walbrook Ins. Co., 942 F.2d 790, at *3 (9th Cir. 1991).