

ALERT

Judgment Creditor Collaterally Estopped By Default Judgment Against Insured

May 20, 2013

The United States District Court for the Northern District of Georgia, applying Georgia law, has held that a default judgment against an insured in a rescission action precluded any subsequent recovery under the policy by a judgment creditor of the insured. *Old Republic Nat'l Title Ins. Co. v. Hartford Accident & Indem. Co.*, 2013 WL 1943427 (N.D. Ga. May 9, 2013).

An insurer issued a professional liability policy to insureds that served as title issuing agents for insurance companies for several consecutive claims-made-and-reported policy periods. The insureds applied for the initial policy in August 2008 and stated on the application that they were not aware of any acts, errors, or omissions that could lead to a professional liability claim being made. The insureds made similar statements on renewal applications.

In August 2010, a company for which the insureds served as the title issuing agent sued the insureds for the alleged misuse of funds and professional negligence. The insureds sought coverage under their current policy, and the insurer retained defense counsel while investigating the claim for coverage. In 2011, following the insurer's investigation of the claim and discovery in the underlying action against the insureds, the insurer tendered the policy premium to the insureds and filed a declaratory judgment action seeking to rescind the policy. In support of rescission, the insurer argued that the insureds were involved with multiple instances of professional negligence as a title issuing agent prior to 2008 and that the insureds did not report knowledge of these potential claims on the initial application for the policy. The insureds did not respond to the insurer's complaint, and the court entered a default judgment against the insureds. The defense counsel appointed by the insurer then

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withdrew as counsel in the underlying professional negligence action, and the claimant against the insureds obtained a consent order and final judgment against the insureds.

In this action, the claimant, as judgment creditor, sought to recover the amount of the consent judgment under the policy. The court agreed with the insurer that the claimant's action against the insurer was barred by collateral estoppel because the court had already ruled that the policy afforded no coverage for the underlying action and that the policy was rescinded. In doing so, the court rejected three arguments raised by the claimant. First, the court disagreed that instant action and prior coverage action did not raise identical issues and noted that the claimant cited no authority to support this argument. Second, the court noted that, under Georgia law, a default judgment was a judgment on the merits for purposes of collateral estoppel and rejected the claimant's reliance on a federal bankruptcy case to argue that the default judgment was not a final judgment on the merits. Third, the court decided that, contrary to the claimant's argument, there was privity between the claimant and the insureds because the claimant derived its rights under the policy through the insureds. Accordingly, the requirements for collateral estoppel were met.

The court therefore decided that the policy had been rescinded in the prior coverage action, there were no remaining obligations or rights under the policy, and, as a matter of law, the claimant could not recover the consent judgment under the policy.