

Failing to Appeal an Adverse Judgment

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On July 27, 2010, the Indiana Court of Appeals issued a memorandum decision, uncitable as authority under App. R. 65(D), that reminds attorneys that they must appeal adverse final judgments or risk the preclusive effect *res judicata*.

In *Eiteljorg v. Lean*, Case No. 49A05-0912-CV-679, the plaintiff and defendants had all been co-defendants in a prior lawsuit. Two of the co-defendants settled and submitted a proposed order dismissing them from the lawsuit to the trial court. The order contained language setting forth a contribution bar and directing entry of final judgment pursuant to Rule 54(B) as to those co-defendants. The remaining co-defendant, Lean, proceeded with his defense to the action and did not challenge the order dismissing his co-defendants. Eventually, Lean settled with the plaintiffs for \$1.73 million.

After settling the underlying lawsuit, Lean sued his former co-defendants for contribution. They moved for summary judgment, citing the contribution bar in the dismissal order. The trial court denied their motion and they appealed.

On appeal, the Court concluded that Lean's claim for contribution was barred by the doctrine of issue preclusion.

In its April 19 order, the trial court in the Reed/Reinken lawsuit expressly entered a final judgment thereon pursuant to T.R. 54(B). That order was clear in terms of the contribution bar as against the remaining defendants in the action, one of whom was Lean. Although Lean's liability had yet to be determined, the effect of the order as a bar to his potential right of contribution was unmistakable. Indeed, the contribution bar was significant in terms of the multi-party litigation before the court in the Reed/Reinken action and was at the core of the case in terms of facilitating settlement.

Despite the contribution bar contained in the April 19 order and the fact that the court directed entry of final judgment thereon, Lean sought no relief and took no action to challenge the court's judgment through a motion to correct error or a motion for relief from judgment. Further, Lean did not challenge the contribution bar in his appeal to this court or the Supreme Court. Lean sat on his rights to challenge that judgment, choosing instead to rely on his defense

that he should not be liable for the securities violations. Even though Lean was not afforded the opportunity to be heard prior to entry of the final judgment, we cannot sanction his decision to sit silent upon its entry, especially when the effect of the contribution bar was unmistakable. Lean cannot now, over four years later, collaterally attack the trial court's final judgment and contribution bar entered in the Reed/Reinken action, an action in which Lean was a party.

While the Court sought to limit its holding to the facts of the case, calling those facts "unique," this case serves as an important practice tip. One should always consider correcting any error in a final judgment at the earliest possible moment, so as to prevent the application of *res judicata* principals to your particular situation. Failure to do so is a calculated risk that can have large adverse side effects.

Lessons:

1. Consider the significant risks to your client if you choose not to challenge an adverse final judgment at the earliest opportunity.