"What The Heck?!?" – Mediation Confidentiality Bars Equitable Subrogation Claim

In *Essex Ins. Co. v. Heck* (2010) 186 Cal. App. 4th 1513, 2010 Cal. App. LEXIS 1256 (Cal. App. 5th Dist. 2010) the rule of mediation confidentiality was applied as part of the reasoning to bar testimony regarding the allocation of the settlement proceeds at mediation. As a result, summary judgment was entered against the insurer on its equitable subrogation claim against a concurrent tortfeasor.

In Essex Ins., an insurer issued a general liability policy for a restaurant. A patron brought suit for a personal injury on the premises, and the insurer provided a defense under a reservation of rights. A judgment for $700,000 was awarded, but the named defendant turned out to be the insured father, not the insured. The insurer refused to pay the judgment, and a bad faith lawsuit was filed by the insured. Ultimately, as settlement was reach in an agreement that was made between the insurer, the named insured, his father, and the insured's attorneys. The settlement agreement did not break down how the payment was allocated among the claims, parties, and damages. The insurer then brought an equitable subrogation claim against the doctor who had treated the personal injury plaintiff, seeking an award for the doctor's proportion fault in causing the original plaintiff's injury. The doctor filed a summary judgment motion in the equitable subrogation action, which was granted. Among the reasons for granting the motion was that testimony of the insurer's unexpressed intent, to the effect that it had allocated the entire $700,000 settlement to claims against the insured, could not be rebutted by the doctor, because the mediated settlement communications were privileged. This case underscores the need to have everything you will ever need, such as allocation, in the settlement writing, and to included a waiver of mediation confidentiality in that writing.

This case is noteworthy not only for its rules of law on equitable subrogation and mediation confidentiality, but also because of the court's use of the vernacular and it's apparent attempt to be amusing. The court of appeals starts its opinion with: "What the heck?!?" and continues: "At one point, the trial court commented, "This is one of the most screwed up cases I've ever seen." We heartily agree." Sometimes a court's prose has limited appeal.