



Weekly Law Resume

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Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

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Subrogation - Right of Recovery

Essex Insurance Company v. Richard Heck, M.D.
Court of Appeal, Fifth District (July 29, 2010)

In order to maintain an action for equitable subrogation, an insurance carrier must be able to clearly show a right to recovery. In this case, that was not done.

John Dompeling was injured while working at a construction site when he stepped on a nail. He sought treatment from his physician, Dr. Richard Heck. He developed an infection which led to the amputation of his leg below the knee.

Dompeling sued the premises owner, Robert Abraham. Abraham tendered defense of the matter to Essex Insurance Company. Essex defended him. However, in his deposition, Robert Abraham testified that he did not own the property; rather, his son was on the property's title. No effort was made to substitute his son into the case.

Abraham filed a cross-complaint against Dr. Heck for implied equitable indemnity and contribution. The cross-complaint was severed from the original action. At trial, Dompeling obtained a verdict against Abraham.

Essex thereafter filed a declaratory relief action against Robert Abraham, contending it had no duty to indemnify him, since he was not the property owner and not their insured. The son was added as a defendant. Dompeling filed an action to recover on the judgment against Essex. This action was combined with the Essex declaratory relief action. Both actions were eventually settled with Dompeling for a lump sum and a release and discharge of Essex and Robert Abraham and his son.

Essex then filed its equitable subrogation action against Dr. Heck. The trial court granted Dr. Heck's motion for summary judgment. Judgment was entered in favor of Dr. Heck. Essex appealed.

The Court of Appeal affirmed. Essex alleged Dr. Heck was liable for a proportionate share of the judgment. The Court of Appeal disagreed. The Court stated that the settlement of the personal injury

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action made it impossible to pursue the equitable subrogation action. This was because it was impossible to prove what portion of the settlement related solely to the personal injury action and what portion related to alleged bad faith conduct on the part of Essex. Essex's settlement agreement with Dompeling released not only Essex, but both Abrahams. This resulted in a dismissal of the personal injury action and all claims arising out of insurance claims pertaining to the way the claim was handled. Thus, the settlement encompassed more than Essex's compensation to Dompeling for his personal injuries.

The settlement agreement did not specify which portion of the settlement was paid to settle the personal injury claims. Without specification, the agreement failed to provide what portion was subject to equitable subrogation. Because Essex failed to resolve the issue regarding the identity of its insured and to apportion the amount paid Dompeling among the various claims, Essex impliedly waived its subrogation rights. Essex failed to enter into separate settlement agreements apportioning the amount paid among these lawsuits. This was an implied waiver of the right to subrogation.

Entering into the settlement without identifying the insured or apportioning the payment was inconsistent with the intent to enforce the right of subrogation. The judgment was therefore affirmed.

COMMENT

The Court of Appeal quoted the trial court at stating, "This is one of most screwed up cases I've ever seen." That comment follows from the failure of the carrier to clearly set forth what it was settling and to clearly preserve its right to subrogation.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/F058139.PDF](http://www.courtinfo.ca.gov/opinions/documents/F058139.pdf)

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