

MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670

(800) 637-9176 (262) 673-7850 Fax (262) 673-3766

<http://www.mwl-law.com>

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

FEBRUARY 2008

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

IN THIS ISSUE

Subrogation Battle Lines Drawn: Gary Wickert Duels With Anti-Subrogation Law Professor On National Radio	1
A War Worth Fighting: The Great Alabama Battle Against Subrogation	3
11 th Circuit Clarifies ERISA Subrogation/Reimbursement Rights and Allows Recovery of Funds in Possession of Third-Party: <i>Administrative Committee for the Wal-Mart Stores, Inc. Associates Health & Welfare Plan v. Horton</i>	9

INSURANCE SUBROGATION

SUBROGATION BATTLE LINES DRAWN

Gary Wickert Duels With Anti-Subrogation Law Professor On National Radio

On February 10, 2008, the first battle was fought in what is certain to be a long war over the very existence of health insurance subrogation. Ironically, this battle didn't take place in a court room, but on public airwaves. Gary Wickert appeared on the national radio program, *Radio Health Journal*, hosted by Reed Pence. The program focused on the battle lines being drawn by trial lawyers and subrogating insurance companies and was broadcasted on more than 425 radio stations nationwide. It can be heard by clicking the button below:



Also appearing on the radio program was noted anti-subrogation law professor Roger Baron. Baron, who has been engaged by Democrat Senators Toricelli and Daschle to draft legislation which would bring the subrogation-killing made-whole doctrine into the ERISA subrogation arena, is the author of a highly publicized law review article entitled, *"Eight Ways to Defeat or Minimize ERISA Reimbursement Claims"*. This article is the "how to" manual for trial lawyers to destroy health insurance subrogation, and has been reproduced by the trial lawyers associations in many states, such as Arizona, Arkansas, Florida, Georgia, Montana, Nebraska, New Mexico, Nevada, Ohio, South Carolina, South Dakota, Texas, and Wisconsin. He has also written articles referring to "double recovery" as a myth, referring to subrogation as a "Pandora's Box", and advocating that public policy demands the denial of subrogation rights. He has received a great deal of press lately and, needless to say, is no friend of subrogation.

Host Reed Pence interviews Gary Wickert and Roger Baron during the radio program, which plays off of a rather slanted November, 2007 *Wall Street Journal* article slamming subrogation and the “grab for legal winnings” emanating from a case involving a brain-damaged woman named Deborah Shank, whose \$700,000 settlement was assailed by her subrogated health insurer. It painted a dark picture of subrogation.

During the program, Baron mistakenly represents that subrogation – other than property subrogation – is a relatively new phenomenon. That isn’t exactly correct, seeing as subrogation in the nature of suretyship goes back to the Magna Carta in 1215, and with regard to creditor/debtor relationships, back to Roman times. He posits that reimbursement rights in health insurance were nonexistent in 1974 when ERISA was passed, and, therefore, Congress has never had an opportunity to address the right of a health insurer to seek reimbursement of its payments.

Gary discusses societal justification and public policies underlying subrogation in not just the health insurance world, but all lines of insurance, including the concept of avoiding a double recovery. In other venues, Baron and anti-subrogation tort lawyers have argued that the double recovery justification is specious at best, because if an insured is required to be “made-whole” before a health insurer is entitled to reimbursement, there will never be a double recovery. Their logic is misleading due to the tortured way in which the made-whole doctrine has evolved across 50 different bodies of law in our country. Most states don’t consider the significant dollars the insured or Plan beneficiary receives from the Plan when determining whether the insured has been made-whole, which often leaves the insured with a double recovery.

The insurance industry is second to none when it comes to lobbying and public relations in many areas. Unfortunately, subrogation is not one of them. Public relations are perhaps the number one responsibility of any organization with a right of subrogation or reimbursement. Current efforts to destroy those rights cry out for industry efforts to appear before legislative bodies, consider opportunities for public education, respond to partisan and slanted pieces like the one in the *Wall Street Journal*, write and submit articles on subrogation to national publications, and generally serve as the sentinel of and advocate for the subrogation and reimbursement rights of our industry.

In the 2009 Congress, there is a very good chance that a bill – which will be introduced by Democrats and no doubt trumpeted by anti-subrogation advocates such as Baron – will pass which effectively destroys the right of reimbursement currently enjoyed by ERISA-covered employee welfare benefit Plans and all other Plans falling under ERISA’s umbrella. It will come in the form of a federal amendment to ERISA implementing the “made-whole doctrine” in all cases involving health insurance reimbursement. The time to act is now – not when the bill is hurrying through the Committee. The fiscal importance of subrogation to insurance companies, health Plans, and the general public, must be stressed within insuring organizations. Then, when the bill does hit the floor of the House and Senate, the insurance industry will be in a position to match the lobby of the trial lawyers seeking to destroy your rights of recovery. Once they’re gone, it will be too late.

On December 12, 2007, a petition for *writ of certiorari* was filed in *Wal-Mart v. Deborah Shank*, after the 8th Circuit Court of Appeals upheld Wal-Mart’s right to reimbursement, despite the fact that the severely injured Shank wasn’t close to being made-whole. Many believe – Reed Pence and Roger Baron among them – that there is a chance the Supreme Court could grant *writ* in this case, and impress a made-whole requirement in ERISA long before Congress has a chance to do so. If so, the decision will cost the health insurance industry more than \$1 billion a year in subrogation and reimbursement recoveries which they currently enjoy and, in the end, the anti-subrogation movement will be reinforced in other lines of coverage. Ultimately, plaintiffs in personal injury cases will be the big winners, and the rest of us will be the losers.

Matthiesen, Wickert & Lehrer, S.C. continues to serve as not only your source of cost-effective and aggressive health insurance subrogation throughout North America (see <http://www.mwl-law.com/PracticeAreas/National-Recovery-Program.asp>), but have also served as one of the sentinels of subrogation and recovery rights since 1983.

A WAR WORTH FIGHTING:

The Great Alabama Battle Against Subrogation

By Gary L. Wickert

Miller & Miller Constr. Co., Inc. v. Madewell, 736 So.2d 1098 (Ala. Civ. App. 1998), rev'd, *Ex parte Miller & Miller Constr. Co., Inc.*, 736 So.2d 1104 (Ala. 1999) ("Miller I"), on remand to Miller & Miller Constr. Co., Inc. v. Madewell, 736 So.2d 1107 (Ala. App. 1999), appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 766 So.2d 855 (Ala. Civ. App. 2000) ("Miller II"), appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 829 So.2d 778 (Ala. Civ. App. 2002) ("Miller III"), appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 878 So.2d 1171 (Ala. App. 2003) ("Miller IV"), appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 901 So.2d 733 (Ala. App. 2004) ("Miller V"), appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 927 So.2d 571 (Ala. App. 2005) ("Miller VI").

It has been described as the subrogation equivalent of the Keystone Cops. Alabama Circuit Court Judge Joseph Battle apparently has a grudge against subrogation. We've all encountered trial court judges who do the easy thing by ignoring established subrogation law and "bend the rules" to provide larger recoveries for injured plaintiffs and concomitant smaller recoveries for deserving subrogated carriers. Judge Battle's "battle" against subrogation in a particular worker's compensation third-party case styled *Miller & Miller v. Madewell* is the stuff of subrogation folklore - enduring more than six long appeals and a legal process than stretched nearly eleven years from November 10, 1994 until July 15, 2005. The nightmare is a story which is worth reviewing for all subrogation professionals, however, because it shows the lengths subrogated carriers must, and should, go to on occasion to stand up for our rights of subrogation. At the same time, the case law which developed as a result is the core of workers' compensation subrogation rights in the State of Alabama, including recovery rights, establishing a future credit, and the responsibility of the carrier to pay attorneys' fees and costs upon resolution of a third-party action.

Gary Wayne Madewell sued his employer, Miller & Miller Construction Company, seeking workers' compensation benefits for injuries he sustained on November 10, 1994, during the course of his employment. Madewell also asserted a products liability claim against various third-party defendants. Madewell subsequently settled the products liability claim against the third-party defendants for \$400,000. The third-party defendants were dismissed with prejudice, pursuant to a *pro tanto* release. Thereafter, Madewell moved for a summary judgment, contending that he was entitled to future medical expenses from Miller. Miller also moved for a summary judgment, contending that it should not be responsible for Madewell's future medical expenses until he had exhausted the proceeds he had received from the third-party defendants. On June 3, 1997, the trial court judge, Hon. Joseph Battle, relying on the 1997 Court of Appeals decision in *Bussen v. B.E. & K.*, 728 So.2d 617 (Ala. App. 1997), sided heavily with the injured worker and against the carrier's rights of subrogation.

At the time, *Bussen* was on appeal to the Alabama Supreme Court. *Bussen* involved a settlement reached with the third-party tortfeasor regarding the employer's subrogation rights. After the settlement, the trial court denied Bussen's claim for future medical expenses and dismissed the case. Bussen appealed and the Court of Appeals reversed, holding that the employer was not entitled to be subrogated as to any medical benefits it might be required to pay in future. On appeal, the Supreme Court held that the statute granting the employer's subrogation rights to claimant's recovery from the third-party tortfeasor applies to future medical benefits that have not been paid, but which the law requires the employer to pay. *Ex parte B.E. & K Const. Co.*, 728 So.2d 621 (Ala. 1998).

Judge Battle entered a summary judgment in favor of Madewell. The court still had before it the issues of loss of earning capacity and permanent partial disability. On September 15, 1997, Battle entered an order finding, among other things, that Miller had paid Madewell \$4,138 in temporary total disability benefits and \$20,494.05 for medical expenses incurred by Madewell. The court recognized that Miller's subrogation claim totaled \$24,632.05 and entered a judgment accordingly. Miller appealed. The sole issue was whether the court erred in entering a summary judgment in favor of Madewell on his claim for future medical benefits. Miller argued that the Alabama Supreme Court should reconsider its holding in *Bussen*. The amount of money involved was not substantial, but the underlying principle over which the battle against Judge Battle was to be fought, was priceless.

To begin with, there has always been a good deal of confusion regarding workers' compensation subrogation rights in Alabama. In no small part, this is due to the usual suspect – legislators who write legislation without fully understanding this area of the law or the ramifications of the laws they are writing. Alabama Stat. § 25-5-11 is the statute which governs workers' compensation subrogation and § 25-5-11(a) states, in part:

“(a) ... If the injured employee ... recovers damages against the other party, the amount of the damages recovered and collected shall be credited upon the liability of the employer for compensation. If the damages recovered and collected are in excess of the compensation payable under this chapter, there shall be no further liability on the employer to pay compensation on account of the injury or death. To the extent of the recovery of damages against the other party, the employer shall be entitled to reimbursement for the amount of the compensation theretofore paid on account of injury or death.... For purposes of this amendatory act, the employer shall be entitled to subrogation for medical and vocational benefits expended by the employer on behalf of the employee....”

Alabama Stat. § 25-5-11(e) provides:

*“(e) In a settlement made under this section with a third-party by the employee ... the employer shall be liable for that part of the attorney's fees incurred in the settlement with the third-party ... in the same proportion that the amount of the reduction in the employer's liability to pay compensation bears to the total recovery had from the third-party. For purposes of the subrogation provisions of this subsection only, 'compensation' includes medical expenses, as defined in Section 25-5-77, if and only if the employer is entitled to subrogation for medical expenses under subsection (a) of this section.” *Id.**

The confusion regarding workers' compensation subrogation in Alabama arises from the underlined portions of the statute above. Miller's appeal of Judge Battle's order in favor of the injured worker, Madewell, brought this confusion into the limelight. The appeal proceeded as follows:

MILLER I. *Miller & Miller Constr. Co., Inc. v. Madewell*, 736 So.2d 1098 (Ala. Civ. App. 1998), *rev'd*, *Ex parte Miller & Miller Constr. Co., Inc.*, 736 So.2d 1104 (Ala. 1999).

The Court of Appeals initially agreed with Judge Battle, and concluded that the carrier was not entitled to subrogate for medical expenses it has not yet made. The carrier appealed that ruling and the Alabama Supreme Court reversed, holding that the carrier was entitled to subrogation as to that portion of Madewell's third-party settlement agreement that was attributable to future medical expenses. They declared that the carrier could suspend payment of future medical benefits until such time as that portion of agreement was exhausted. The court noted that Alabama's subrogation statute is based on the statute in Minnesota (which allows a credit for future medical based on any recovery the worker makes), and suggested that the Alabama legislature follow suit.

MILLER II. On remand to *Miller & Miller Constr. Co., Inc. v. Madewell*, 736 So.2d 1107 (Ala. App. 1999), appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 766 So.2d 855 (Ala. Civ. App. 2000).

The Court of Appeals, on remand, ordered the trial court to conduct a hearing to determine - using equitable principles applicable to general common law subrogation rights (referencing *Powell v. Blue Cross & Blue Shield*, 581 So.2d 772 (Ala. 1990)) - which part of Madewell's settlement was attributable to medical expenses. Judge Battle was further instructed to enter an order allowing Miller to be subrogated to that portion of Madewell's third-party recovery that is attributable to the future medical expenses Miller would be legally required to pay.

Judge Battle reluctantly conducted a hearing in August of 1999 in order to comply with the Court of Appeals' decision. Judge Battle did not give up, however. Relying upon *Powell*, Judge Battle found that the employee's \$400,000 settlement with the third-party defendant did not "equitably or fully compensate [the employee] for the injuries he sustained on November 10, 1994," and that "no portion of the \$400,000 settlement is attributable to future medical costs." The trial court denied the employer's subrogation claim and the employer was forced once again to appeal to the Alabama Court of Appeals.

On appeal, the Court of Appeals noted that *Powell* had recently been overturned and made-whole considerations were clearly held not to apply to workers' compensation subrogation. It remanded the case back to Judge Battle to determine which portion of the settlement was attributable to future medical expenses. Once again, Judge Battle held a hearing. He reviewed the evidence from the prior hearings, and entered a judgment, which stated:

"The [trial court] finds that the settlement of \$400,000 between [the employee] and [the third-party defendant] did not encompass nor did it include any sum attributable to future medical expenses...."

Frustrated, the carrier appealed back up to the Court of Appeals – for the third time!

MILLER III. Appeal after remand, *Miller & Miller Constr. Co., Inc. v. Madewell*, 829 So.2d 778 (Ala. Civ. App. 2002).

Pointing out obvious evidence in the case clearly indicating that future medicals were a certainty, the Court of Appeals reversed Judge Battle for a third time, holding that he erred by finding that none of the third-party settlement was attributable to future medical expenses. They admonished him that such a finding was not supported by the evidence in the record, which included testimony of a nurse that Madewell would have \$5,000 of future medical expenses annually at a minimum. The case was remanded to Judge Battle once again, with instructions for the trial court to reconsider the evidence in the record regarding future medical expenses and apportion a part of the settlement as future medical expenses.

On remand from after *Miller III*, Judge Battle entered a new judgment on September 26, 2002. That judgment awarded the employer a net future medical expenses credit of a paltry \$3,932.82, a figure that appears to have been obtained through a relatively complex mathematical formula that took into account a number of intermediate findings of fact and conclusions of law that the employer thereafter challenged on appeal. Extrapolating from Judge Battle's statement that the employee recovered "only 16% of his actual compensatory damages," the employer suggests, and the employee does not dispute, the formula which Judge Battle came up with to determine the future credit. The formula used by Judge Battle was designed to attempt to delineate the portion of the employee's third-party recovery that is properly attributable to compensation for both the past and future medical expenses the employer has paid or would be legally required to pay to the employee. It consisted of four steps:

(1) Calculate the employee's "net third-party recovery" by subtracting the amount paid to the workers' compensation carrier in reimbursement of its past medical benefit lien from the gross recovery.

(2) Divide this “net third-party recovery” by the amount representing the value of the worker’s “potential third-party damages” in order to obtain a “recovery fraction”. In calculating the value of the worker’s third-party case, the court should review the following five factors:

- (a) lost wages;
- (b) pain and suffering;
- (c) mental anguish;
- (d) permanent injury; and
- (e) worker’s future medical expenses.

(3) Calculate the carrier’s future medical expense credit by multiplying the worker’s actual future medical expenses by the recovery fraction calculated in Step 2. This produces the carrier’s “gross future medical expense credit”.

(4) Add the “gross future medical expense credit” to the money paid by the carrier for “past medical” to get an aggregate amount of the carrier’s credit as to all medical expenses, and multiply by the “recovery fraction”. The result is the carrier’s “net future medical expense credit”.

The carrier once again appealed Judge Battle’s order. It did not dispute the four-step formula the trial court used, but claimed that the trial court erred not only in making its determination as to the employee’s future medical expenses, but also in making its determinations regarding the value of the employee’s potential third-party damages and its treatment of the attorney’s fees and expenses incurred by the employee in the third-party action.

MILLER IV. Appeal after remand, Miller & Miller Constr. Co., Inc. v. Madewell, 878 So.2d 1171 (Ala. App. 2003).

On appeal for the fourth time, the Court of Appeals began to lose what patience it had left. It noted that the trial court was stuck with the 34.7 year life expectancy and the 56% loss of earning capacity it had found earlier. The Court of Appeals held that the trial court, in utilizing the employee’s 1997 medical expenses as its benchmark for calculating the employee’s future medical expenses, did not afford proper consideration to the testimony and exhibits adduced by the parties during the August 1999 hearing, a hearing held after the Supreme Court, in *Miller I*, had instructed the trial court to “conduct a hearing to determine, using equitable principles applicable to subrogation rights, which part of [the employee’s] settlement is attributable to medical expenses.”

Despite the trial court having previously found that future doctor visits would cost \$1,200 to \$2,500 per year, and future medications as much as \$5,000 per year, its most recent order found there was no figure in the testimony as to future medical care. The trial court also found that the employee’s *potential third-party damage* was \$1,581,283.80. The carrier disagreed with this finding. Among those potential damages, according to the trial court, were (a) future lost wages in the amount of \$172,493.78; (b) “past” physical pain and suffering in the amount of \$250,000; (c) “past” mental anguish in the amount of \$250,000; (d) a “permanent injury” item in the amount of \$250,000; (e) “future” pain and suffering and mental anguish in the amount of \$621,920; and (f) \$36,870.12 representing future medical expenses as calculated under paragraph 3 of this procedural abstract. The carrier, noting that the trial court’s March 2001 judgment did not expressly refer to *future* pain and suffering or *future* mental anguish, contended that the trial court could not properly assess, on remand after *Miller III*, an additional \$621,920 specifically for “future” pain and suffering and mental anguish. The carrier contended that “the trial court has made this determination in order to artificially inflate the value of [the employee’s] third-party claim” in order to “severely reduce the employer’s credit.” The Court of Appeals held that the trial court’s assessment of an additional \$621,920 in “future” damages for pain, suffering, and mental anguish in its judgment on remand from this court after *Miller III* was decided was procedurally improper. In a clear sign they were losing their patience, the Court of Appeals said:

“The judgment we today reverse is, notably, the trial court's fourth erroneous judgment in this case. With the expectation that a fifth reversal will not be necessary, but with the realization that the trial court has utilized a formula upon which the parties have, at a fundamental level, accepted, we issue the following instructions...”

The Court of Appeals, in a unique and detailed manner, reminiscent of instructions given to little children in elementary school, laid out a four-step process they ordered Judge Battle to follow:

(1) Calculate the employee's “net third-party recovery” by subtracting the amount paid to the workers' compensation carrier in reimbursement of its past medical benefit lien from the gross recovery.

\$400,000.00	Gross Recovery
- 11,924.60	Past Medical Expenses Paid
\$388,075.40	Net Third-Party Recovery

(2) Calculate the employer's “gross future medical expense credit” by (a) dividing the “net third-party recovery” by the proper amount of the employee's “potential third-party damages” (lost wages, pain and suffering, mental anguish and “permanent injury”) plus (future medical expenses) (NOTE: No future pain and suffering or mental anguish), a figure equaling \$922,493.78 plus the amount of any future medical expenses, which can be obtained by considering “the annual amount of the employee's medical expenses multiplied by his life expectancy” of 34.7 years, and then (b) multiplying the amount of employee's future medical expenses by that quotient (i.e., the “recovery fraction”).

$\$388,075.40 / \$922,493.78$ (plus future medical expenses) = “Recovery Fraction”

(3) Calculate the employer's “net future medical expense credit” by subtracting from the gross future medical expense credit “the employer's pro rata share of the attorney's fees and costs reasonably incurred in the employee's third-party action,” a share that, we said, could be ascertained by determining the variable “X” in the following formula:

$$\frac{\text{Gross Future Medical Credit}}{\text{Third-Party Recovery}} = \frac{X}{\text{Attorney's Fees and Costs}}$$

(4) Add the \$11,924.60 in past medical expenses previously repaid to the employer's insurance carrier to the net future medical expense credit to obtain “the proper aggregate amount of the employer's credit” as to the employee's medical expenses (see Miller IV).

The employer contended that the trial court's method of determining the employee's *net third-party recovery*, as described in the procedural abstract, paragraph 1, was erroneous. The employer argued that the employee's *net third-party recovery* should *include*, rather than *exclude*, the employee's attorney's fees and expenses and that allowing the employee to offset his “collection costs” improperly prevented its subrogation interest from attaching to the entirety of the settlement obtained by the employee. The Court of Appeals agreed, citing *Fitch v. Ins. Co. of N. Am.*, 408 So.2d 1017 (Ala. App. 1981), for the proposition that the carrier's right of reimbursement with respect to benefits paid to an employee for an injury that is compensable under Alabama's workers' compensation laws extends to the entire amount of any judgment or settlement paid by a third-party tortfeasor. The Court of Appeals again scolded Judge Battle, and remanded the case back to him with explicit instructions to use the formula above with the changes it cited.

In response to the Court of Appeals ruling in *Miller IV*, the inexorable Judge Battle entered a judgment on January 21, 2004, that by and large was in conformity with the Court of Appeals' mandate in *Miller IV*. Judge Battle reluctantly determined that the employee's future medical expenses would total \$128,475.01. Adding that figure to the employee's other hypothetical third-party damages of \$922,493.78 indicates that the trial court has now determined the proper amount of the employee's potential third-party damages to be \$1,050,968.79, which is considerably different from the \$1,581,283.80 figure that the Court of Appeals previously concluded to be erroneous. Dividing the \$388,075.40 net recovery from the third-party tortfeasor by the new potential third-party damages figure of \$1,050,968.79 resulted in a "recovery fraction" that, expressed as a percentage, equaled approximately 37 percent, and the trial court computed the employer's gross future medical expense credit to be \$47,535.75.

The carrier again appealed; however, this time it did not challenge the trial court's determinations of the employee's potential third-party damages, "*recovery fraction*," or "*gross future medical expense credit*". The carrier attacked the correctness of the trial court's determination that the employer's "*net future medical expense credit*" amounted to a mere \$2,974.28. Specifically, the carrier alleged that the trial court erred in determining the employer's pro rata share of the attorney's fees reasonably incurred in the employee's third-party action because the trial court inserted \$128,475.01 (employee's anticipated future medical expenses), rather than \$47,535.75 (the "*gross future medical expense credit*"), into the numerator position of the left fraction of the mathematical proportion used for calculating that *pro rata* share, thereby resulting in an improper reduction of the employer's net credit. It's enough to make your head explode – but the carrier, despite the relatively small subrogated amount at stake, stuck to its guns and aggressively took Judge Battle and the plaintiff to the mat.

MILLER V. Appeal after remand, Miller & Miller Constr. Co., Inc. v. Madewell, 901 So.2d 733 (Ala. App. 2004).

The Court of Appeals agreed with the carrier once again, and reversed the trial court's January 21, 2004 order. The Court of Appeals noted that this is the fifth time in more than nine years that it had to correct the trial court below, and so it decided to render and enter the judgment that the trial court below should have entered. The actual net value of the carrier's future medical expense credit is equal to the gross value of that credit (\$47,535.75) minus the amount of the employer's *pro rata* litigation costs (\$16,487.50), which is \$31,048.25. The employer's aggregate medical-expense credit is equal to the net future-medical-expense credit of \$31,048.25 plus the cost of the employee's past medical expenses already paid by the employer (\$11,924.67), which is \$42,972.92. The Court of Appeals held that the carrier would be responsible for payment of the employee's reasonable and necessary medical expenses related to his work-related injury only after the total of those expenses accrues to an extent that the *aggregate* amount, *i.e.*, \$42,972.92, "is exceeded". In other words, the employer's duty to pay for all reasonable and necessary medical treatment for the employee's work-related injury is subject to a sum-certain "deductible" of \$42,972.92, and the employer will be responsible for paying for that treatment only when the total cost of that treatment exceeds that amount (and only to the extent of that excess).

In effect, the Court of Appeals concluded that Judge Battle had once again erred in granting the employee an *additional* attorney's fee award above and beyond that permitted under Alabama Stat. § 25-5-11, which provides that where a tort action against a negligent third-party by the employee is settled, the employer is liable for a proportionate share of the attorney's fees incurred in *obtaining the settlement*. Following this reversal, counsel for the employee filed a motion for an award of an attorney's fee amounting to one-third of the employer's future medical credit of \$42,972.92. The impartial Judge Battle granted that motion on December 30, 2004, without awaiting a response from the carrier – who promptly appealed for the sixth time.

MILLER VI. Appeal after remand, Miller & Miller Constr. Co., Inc. v. Madewell, 927 So.2d 571 (Ala. App. 2005).

The Court of Appeals had reached its limit and quickly reversed the anti-subrogation Judge Battle, declaring that the actions of employee's counsel and the trial court fly in the face of the "law of the case" doctrine. Under the "law of the case" doctrine, whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case. The Court of Appeals noted that no facts had changed in the months since their most recent decision in this case determining that the employer is not responsible for attorney's fees above and beyond those obtained by application of the *Fitch* formula applicable in such third-party actions.

The marathon appeal was over. The subrogated carrier and its subrogation counsel undoubtedly spent significantly more in attorneys' fees, costs, and time in zealously guarding its rights of subrogation than were actually at stake in the case. However, the legacy that it left us, is a favorable one – one that will live on long after the litigants in this case are forgotten. Napoleon once said that "victory is always possible for the person who refuses to stop fighting." The subrogation battle fought in the *Miller* case should serve as the poster child for protecting the rights of subrogation in the 21st Century. The lessons it teaches are timeless and the legacy it leaves us will shape the face of subrogation in Alabama, and perhaps the entire country, for decades.

HEALTH INSURANCE SUBROGATION

11TH CIRCUIT CLARIFIES ERISA SUBROGATION/REIMBURSEMENT RIGHTS AND ALLOWS RECOVERY OF FUNDS IN POSSESSION OF THIRD-PARTY

Admin. Committee For The Wal-Mart Stores, Inc. Associates Health & Welfare Plan v. Horton, 2008 WL 123536 (11th Cir. 2008)

For nearly six years, the 11th Circuit Court of Appeals issued no opinions dealing with a Plan's reimbursement rights or the scope of equitable relief following *Knudson* and *Sereboff*. However, on January 15, 2008, it finally woke up and issued a significant opinion in *Administrative Committee For The Wal-Mart Stores, Inc. Associates Health & Welfare Plan v. Horton*, 2008 WL 123536 (11th Cir. 2008). In that case, the court acknowledged that where a Plan seeks recovery through a constructive trust or equitable lien on a specifically identified fund, in the possession of the Plan beneficiary, and not from the general assets of the Plan beneficiary, such a suit sounds in equity and is cognizable under § 502(a)(3). *Id.* Citing *Sereboff*, the court acknowledged that ERISA provides for equitable remedies to "enforce Plan terms", so the fact that an action in subrogation or reimbursement involves a breach of contract can hardly be enough to prove that the relief sought is not equitable – as that would make § 502(a)(3)(B)(ii) an empty promise. The 11th Circuit specifically applied *Sereboff's* ruling that strict tracing rules need not apply for an equitable lien to properly attach to the settlement funds, and that even though the disputed funds never actually get into the hands of the Plan, the Plan could seek to "recover" property that belonged to it in good conscience under the terms of the Plan.

The *Horton* decision went even further than *Sereboff*, however, and ruled that a Plan can enforce an equitable lien against settlement monies in the hands of a third-party – such as a trust or bank account. The facts in *Horton* were that Joshua Horton was injured at age fourteen, and \$51,446.03 in medical bills were paid for by the Wal-Mart Plan. Joshua recovered \$99,000 from the third-party, which was divided \$1,000 to Joshua's mother as custodial agent, \$33,000 in attorney's fees, and \$65,000 to be deposited into the Hall County Probate Court account for the minor which had been established at Regions Bank, in Joshua's mother's name as conservator. The Plan's terms provided that any covered person who obtains a tort judgment or settlement must reimburse the Plan out of such funds for 100% of any benefits paid. The Plan,

therefore, sued Joshua and his mother to recover \$51,446.03 from the \$66,000 awarded to Joshua and his mother. It sought restitution and imposition of a constructive trust and an equitable lien, and asked that the money remain in Regions Bank until the case was resolved. A preliminary injunction was issued.

The 11th Circuit in *Horton* held that the Plan properly sought equitable restitution of a specifically identifiable fund in the possession of a third-party – the bank. The court noted that the particular funds sought properly belonged to the Plan, and were being held in trust by Joshua and his mother and could be clearly traced to a particular fund in their possession. The fact that Joshua’s mother – a third-party – had possession of the funds in her bank account did not defeat the claim. The court noted that had the Plan solely sued parties who were not in possession of the funds, the claim would have failed. Instead, the Plan sued Joshua’s mother as conservator of Joshua’s special needs trust, seeking restoration of that particular fund in which it asserted a paramount interest.

This electronic newsletter is intended for the clients and friends of Matthiesen, Wickert & Lehrer, S.C. It is designed to keep our clients generally informed about developments in the law relating to this firm’s areas of practice and should not be construed as legal advice concerning any factual situation. Representation of insurance companies and/or individuals by Matthiesen, Wickert & Lehrer, S.C. is based only on specific facts disclosed within the attorney/client relationship. This electronic newsletter is not to be used in lieu thereof in any way.