Public Pressure Reverses Adverse ERISA Result for Deborah Shank

As Pro Bono Legal Consultant, Professor Roger Baron Held Ringside Seat to *Wal-Mart v. Shank* Court Bout and Media Coverage

The following article provides additional insight to a case with which many of us have become familiar over the past two years. For many of us, the Shank case has become a terrifying symbol of the nightmare scenario as relates to ERISA healthcare subrogation/reimbursement. Although there appears to be no question that public opinion strongly opposed Wal-Mart's recovery attempts, the 8th Circuit's ruling supported it. The lawyers in this case should be commended for not giving up after they exhausted all legal avenues. They tapped into that public sentiment and stirred up a fire storm that ultimately won the day for Ms. Shank. We should see this case not as a symbol of the nightmare scenario, but as an example of what can happen when we shed light on the atrocities perpetrated against the public by powerful interests. Finally, this case highlights what Andy Busald told a group of lawyers several years ago. "Fifteen years ago, our job was to get the money, but today not only do we have to get the money, we have to figure out how to hold onto it."

—Forward By David H. Abney, II

By Marilyn F. Trefz[1]

"This article was written by Marilyn Trefz as part of her enrollment in Advanced Legal Research. Marilyn was given full access to my files. I fully endorse this paper as an accurate portrayal of the events surrounding my work in the *Wal-Mart v. Shank* litigation. I believe this article is invaluable in that it correctly documents the developments that took place in this case, as it progressed through the appellate court system and accompanying media coverage. I hope Marilyn's article will help bring attention to the *Shank* case and the injustices that occur under ERISA."—Roger M. Baron[2]

Having served as an advisor to both the attorneys and covering press, USD Law Professor Roger Baron has a unique perspective on the much publicized, *Wal-Mart v. Shank* case. He had an unobstructed view of the tenaciously fought court battles and a ringside seat to the multifaceted media coverage that sparked a national outcry for justice on Mrs. Shank's behalf. While Mrs. Shank sadly lost on every judicial level, her ultimate victory resulted from an intervention of the fourth estate—the press. Traditionally acting as a guardian of public interest, the media responded to the Shanks' plight. Professor Baron, with a front row seat to all events, reflects on how this outcome renewed his faith in America.

Baron has served as a consultant on a pro bono basis in many ERISA reimbursement cases, three of which have been taken to the U.S. Supreme Court. This article tells the story of *Wal-Mart v. Shank* as seen and experienced by Professor Baron in his unique consulting role to the attorneys representing Mrs. Shank and to the press covering her story.

The Shank Situation

As a recognized authority, author, and national speaker in insurance law and ERISA[3] subrogation, Baron stays connected with attorneys across the nation, serving as a valuable resource for those fighting to defeat and minimize ERISA subrogation claims within medical benefit plans. His ERISA email list keeps plaintiff's attorneys apprised of the latest cases and developments. So upon learning of the trial court's decision in *Wal-Mart v. Shank* through a Westlaw key cite notification for the U.S. Supreme Court case *Sereboff v. Mid Atlantic Medical Services, Inc.*,[4] Baron quickly became both intrigued and concerned by the facts of this case.[5]

In May 2000, Deborah Shank, 52, was out visiting yard sales with a friend when a semi-trailer truck smashed into her minivan, causing serious brain injuries that sent her to the intensive care unit for several weeks.[6] Ultimately, the accident left her permanently brain-damaged, in a wheelchair, and requiring 24-hour a day care in a nursing home. Two years later, despite having well over $12 million in actual damages, Ms. Shank was required to settle her claim for $700,000. After payment of attorney fees and costs, Ms. Shank re-

ceived $417,477.00, all of which was placed in a special needs trust.[7]

Three years later,3

Wal-Mart said that it was entitled to the money, due to a subrogation provision in its medical coverage's summary plan description. The Shanks' attorneys—Maurice Graham, partner with Gray, Ritter & Graham in St. Louis, and associate Erica Airsman of the same firm[8]—reached out to Wal-Mart's attorneys, hoping that a compromise could be reached. However, the retail giant's attorneys shrugged their offer, professing that they planned to see them in court.[9]

There, U.S. District Judge Lewis Blanton sided with Wal-Mart granting the plan's motion for summary judgment and imposing a lien of $469,216, an amount exceeding the total in Ms. Shank's special needs trust. The court noted, "It is settled that ERISA plan participants have an obligation to reimburse the plan when a recovery is made from a third party responsible for the injuries and the plan terms require reimbursement."[10] The court further stated that the Wal-Mart plan's reimbursement provision provides the plan with a "first priority right to reimbursement" from the proceeds of a settlement.[11]

Upon reading this disturbing trial court opinion, Baron quickly contacted Graham and Airsman, to offer assistance.[12] Baron hoped that his recent experience with the *Sereboff* case— in which he was present in the courtroom and assisted a team of lawyers prepare the briefs and oral argument—could help the Shank team.[13]

Legal Theories

In the discussions that ensued, it became clear to Baron that Graham had set up a special needs trust, as had been done in *Great-West Life & Annuity Insurance Company v. Knudson*,[14] in an attempt to preserve the settlement money sorely needed for Deborah Shank's continued level of care. In *Knudson*, the settlement funds were held in a special needs trust rather than by the beneficiary, Janette Knudson, directly. The Supreme Court reasoned, in this suit which sought relief under section 502(a)(3) of ERISA, that the plan was not authorized by ERISA's catch-all provision granting "appropriate equitable relief" because the claim was for a legal remedy, or monetary damages, not an equitable one.[15] Graham had hoped that the same would be found true for Debbie Shank. However, the majority opinion in *Knudson* also indicates that in order to fit the definition of "equitable relief" a plan can seek reimbursement "in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff clearly could be traced to particular funds or property in the defendant's possession."[16] Thus, in *Knudson*, had the trustee (i.e., the individual in possession and control of the money) been a named defendant, as was done in *Wal-Mart v. Shank*, Janette Knudson's outcome may have been different. The Circuit Courts of Appeal were divided on this issue, however.[17] It was not until the Supreme Court's 2006 decision in *Sereboff*, that Graham's strategy was authoritatively rejected as a method of insulating an injured beneficiary's recovery against an ERISA reimbursement claim.

In *Sereboff*, the Supreme Court reexamined the phrase "equitable relief" and held that an ERISA plan can use the constructive trust or equitable lien approach to enforce a reimbursement right as a lien arising out of a contract. The Court determined that the plan's reimbursement provision created an equitable lien by agreement, stressing that the plan provision specifically identified a particular fund to which the plan was entitled.[18] Unfortunately, in Mrs. Shank's case, with the *Sereboff* holding at hand, the trial court also determined that her funds were identifiable, had not been dissipated, were still essentially in participant's control, and so belonged to the Wal-Mart plan administrator.

But Graham did not contend that Wal-Mart wasn't entitled to a payment; he in fact noted that it was "entitled to one based on equity."[19] Graham's argument hinged on the concept of equitable apportionment and "appropriate equitable relief." He asserted that since Mrs. Shank wasn't fully compensated for her damages in the first place, Wal-Mart should also expect only partial reimbursement. Baron, on the heels of the *Sereboff* oral arguments, also felt strongly that equitable principles should control. In some of his first email communications with Graham, Baron brought to light the manner in which Justice Stevens had drilled the ERISA Plan's attorney in *Sereboff* about the definition of "equitable" and Justice Stevens' apparent disagreement.[20] Baron further pointed out to Graham that Justice Stevens authored the unanimous opinion of the Supreme Court in *Arkansas Department of Health and Human Services et al v. Ahlborn*, arising in the Eighth Circuit, in which Medicaid was limited to a pro-rata share of the settlement monies relating to medical bills.[21] It was clear to Baron, that the Court was in the process of deciding what was "equitable" in the *Ahlborn* case at the same time the Court was entertaining oral arguments in *Sereboff*. He further expressed to Graham, "I am convinced today that the high Court is interested in an equitable result in these cases, given the equitable analysis in *Ahlborn*

Continued on following page

Continued from previous page

and Justice Stevens' concerns expressed in oral argument. *Sereboff* only decided whether or not the plaintiff's claim was equitable - it didn't rule on equitable defenses or principles that would govern the resolution of that claim."[22]

Appeal to the 8th Circuit

The Shanks and their legal team pressed forward in their appeal to the Eighth Circuit. Now armed with the resources of Professor Baron's ERISA expertise and insights, they began the next bout. The team believed their arguments for equity could overcome the heavyweight retailer's unilaterally drafted plan language.

Unfortunately, several disheartening setbacks developed for the Shank family and Mrs. Shank's legal team. First, the Shanks' middle son, Jeremy (18), was killed while on a security patrol after having been deployed to Iraq only three weeks prior. Sadly, due to short-term memory loss resulting from her injuries, Debbie Shank relives this tragic news every time she hears it.[23]

Further, on the advice of a health care administrator, it became necessary for Jim Shank to obtain a divorce from Debbie—a recommendation made with the expectation that Debbie would be more eligible for public aid as a single woman while her own monetary resources were tied up in court proceedings. Though a formality to which Debbie was not informed, the divorce was one more emotional hit on the Shank family.[24]

Additionally, the Eighth Circuit overturned *Wal-Mart v. Gamboa*, a favorable trial court decision which had supported the Shanks' position, by giving deference to more favorable language in the Plan Document (Plan Wrap) than to the less favorable language found in the Summary Plan Description (SPD).[25] In both the *Gamboa* and *Shank* cases, application of the language in the Plan Document itself would result in a denial of reimbursement, whereas application of the language in the SPD was supportive of the reimbursement claims.

Nonetheless, the team put together a convincing Appellate brief, written by Airsman with input from Graham and Baron, calling upon the court to find Wal-Mart entitled to only "appropriate equitable relief." Since Debbie Shank "settled her claims for only a small portion of her actual non-economic and economic damages due to the limited liability insurance of the tortfeasors in her underlying personal injury," this should be all that Wal-Mart was afforded. The brief further noted, "the amount the Shanks are required to reimburse Wal-Mart should be reduced according to the portion of the settlement that represented payments made by Wal-Mart for Debbie's medical expenses."[26]

Working together, the team also prepared Maurice Graham, lead attorney, for oral argument taking place on April 13, 2007, in front of the three judge panel: Judge Wollman, Judge Beam, and Judge Colloton.[27] Hopes were high, particularly with Professor Baron's finding that in 1995 Judge Beam had ruled favorably for a beneficiary in a case that paralleled the outcome hoped for by the Shanks. However, the 1995 case was limited to an interpretation of plan documents and correspondence. Baron also assisted Graham in preparing an outline of the major points to be covered during his 15 minutes of oral argument before the court.[28] Besides encouraging reference to *Ahlborn,* an opinion coincidentally authored in the eighth circuit by Judge Colloton (also on the *Shank* panel), Baron also suggested emphasizing the ERISA statute itself. Section 502(a)(3) of ERISA limits an action by a fiduciary to one for "appropriate equitable relief." Wal-Mart's claim is one which is *only* authorized to receive "appropriate" relief. Baron noted, "the *Sereboff* decision itself did not purport to address what might constitute appropriate equitable relief," citing Footnote 2 of *Sereboff.* "At this point in time, it is for the lower federal courts to decide what constitutes 'appropriate' equitable relief."[29] The Shank team looked forward to having *this case* in *this lower court* address what is "appropriate" in a catastrophic injury case, such as Mrs. Shank's.

The questions raised by the panel of judges in the oral argument itself seemed efficacious for the Shank side. The team continued to sense a chance for a positive outcome. In particular, one of the judges expressed concern in his questions to Wal-Mart's attorney about the "conscionability" of a subrogation claim in which the insured would essentially lose all settlement benefits. The judge noted that Wal-Mart's "gloss" on the term "appropriate" as found in the ERISA statute, "doesn't run both ways to benefit the injured party, only to benefit Wal-Mart."[30]

Baron recollects, "Maurice telephoned me after the oral argument. We had a long conversation and he was upbeat."[31] From Graham's perspective, Judge Wollman left him with a positive last impression as the former South Dakota Supreme Court Justice expressed his pleasure that the Shank brief had cited "University of South Dakota Law Professor, Roger Baron" as a secondary authority.[32]

Yet, on August 31, 2007, the U.S. Court of Appeals for the Eighth Circuit rejected the Shanks' request to apply the "make-whole" rule, as well as the common fund doctrine.[33] In a unanimous decision for the

Court, Judge Colloton expressed, "We acknowledge the difficulty of the Shanks' personal situation, but we believe the purposes of ERISA are best served by enforcing the Plan as written."[34] While the Court acknowledged that Debbie Shank's damages far exceeded her tort settlement, Debbie and Wal-Mart had "reached a different bargain" in their dealings with each other. The Court ruled that regardless of Deborah Shank's catastrophic injuries, Wal-Mart was entitled to complete reimbursement of its medical expenses based on its benefit plan language. The Court also denied the Shanks' request that Wal-Mart pay anything toward the attorney fees and costs incurred in obtaining Debbie's settlement. Essentially, Mrs. Shank was left penniless after the Court's ruling.[35]

Motion for Rehearing in the 8th Circuit

Messages from attorneys on Professor Baron's ERISA email list began to roll in. A strong sense of outrage became immediately evident. Graham and Airsman received similar feedback touting the injustice of the *Shank* decision. Fueled by the dismay among legal circles, the group decided to submit a Motion for Rehearing en banc, with the thought that if the motion was denied, they would continue their fight for the Shanks by submitting a Petition for Writ of Certiorari to the U.S. Supreme Court.[36]

Their petition for rehearing reminded the court that its decision was the first post-*Sereboff* circuit court of appeals case to address the issue of what is "appropriate equitable relief" under ERISA – a question specifically reserved by the United States Supreme Court in *Sereboff*. Further, the decision permitting plan fiduciaries to include provisions that authorize reimbursement of all medical expenses paid on a beneficiary's behalf out of legitimate personal injury settlements would greatly deter catastrophic injury victims from seeking any recovery for their injuries from third parties. Finally, the Shank team indicated that the Panel's decision fell contrary to Appellants' arguments and the suggestions made by Justice Stevens at the *Sereboff* oral argument, thereby rejecting the "pro rata" loss sharing rationale of *Ahlborn*.[37] Waiting for a response to their motion, Graham, Airsman and Baron clung to the conception that the Shank case presented the ideal fact scenario to resolve these issues before the Court.

Inquiry by Wall Street Journal (WSJ) – September 27, 2007

On September 27, 2007, Staff Reporter Vanessa Fuhrmans, assigned to write an article about ERISA Health Benefit Plans, contacted Virginia Attorney Benjamin Glass. The journalist's hope was to find and connect an illustrative "human interest" subrogation story to her piece. Glass, knowing of Professor Baron's connection to ERISA plaintiff's attorneys and their clients, immediately contacted him asking for a lead. Baron, who along with the rest of the Shank team was anxiously awaiting notice regarding the petition for rehearing, directed Fuhrmans, via Glass, to the Shank's attorneys, prophetically expressing, "She should talk to the Shanks . . . This case needs to be on the *front page* of the Wall Street Journal."[38]

Baron also connected directly with Fuhrmans and began to educate her, through email messages and phone calls, regarding the truth about ERISA reimbursement from his perspective. Baron shared legal concepts and a multitude of tragic cases similar to Mrs. Shank's.[39] Included in the messages to her, he explained that ERISA plans and related insurers are collecting close to $1 billion per year through the seizure of tort recoveries or other contractual payments received by insured personal injury victims. These plans aggressively pursue reimbursement on a "first dollar priority" basis with absolutely no consideration of the impact reimbursement leaves upon the insured.[40] However, to round out her knowledge and present a balanced view of the subject, Fuhrmans also sought out information and education from the ERISA Plan's prospective.

Denial of Rehearing in 8th Circuit – October 29, 2007

Meanwhile, the Shank's Motion for Rehearing was denied. Three Eighth Circuit Judges –Judge Diana E. Murphy, Judge Kermit E. Bye, and Judge Michael J. Melloy– voted to grant the Petition for Rehearing en banc. Yet, the three affirmative votes were not sufficient and the denial was entered on October 29, 2007.[41]

WSJ Publishes Front Page Story – November 20, 2007

Riveted by the injustice of the Shank case and the recent court events, Fuhrmans decided to make an in-person visit to interview and photograph the Shank family and their attorneys. Eventually, following Fuhrman's seven-week "training" in health care law, her story came to fruition. What started out as a piece for the Wall Street Journal's Marketplace section, blossomed into a front-page article, *Accident Victims Face Grab for Legal Winnings – Wal-Mart Paid Bills For Mrs. Shank, Then Sued for Money Back.*[42]

Other Media Attention

Soon, Fuhrmans was not the only reporter riveted by the Shank tragedy

Continued on following page

Continued from previous page

as a feature story. A multitude of on-line, print and media sources began to do their own investigative reporting to unearth the details of Wal-Mart's "so-called" victory. Major news networks contacted Baron, including a producer from CNN.[43] Baron was also asked to participate in a special "ERISA subrogation" episode of Radio Health Journal, a nationally syndicated radio show broadcast by about 440 radio stations nationwide. Additionally, a number of on-line journals, newsletter publications, and blogs interviewed Baron. Jim Shank and his son appeared on Fox news in New York City—a segment eventually picked up in a number of Fox affiliates in major cities across the country.[44] NBC's Today show also made a special visit to Jackson, Missouri, producing a piece on the Shank family and their attorneys.[45] Fuhrmans, too, appeared as a guest of Glenn Beck on his national television show.[46] The life that had been so cruelly sucked from the Shank family was slowly being restored by the outcries of the public. Furhmans wrote in an email to Baron about Jim Shank's visit to New York, "He seems to feel reinvigorated by all the attention the story has reignited," adding, "Mr. Shank was really moved and grateful about everything, especially the outpouring of help and well wishes from people around the country. Thank you so much for telling me about the Shanks in the first place."[47]

The Supreme Court

The critical question still remained: Would the Supreme Court take note of the public's outcry for justice on the Shank's behalf and grant Certiorari? The Shank attorney team hoped so, meticulously crafting the Petition for Cert to present the precise question that the Court would agree to answer. After dialogue and input from Baron, Graham and Airsman arrived at the question to present before the Court.[48]

Whether it is both "equitable" and "appropriate" to require a catastrophically injured individual to reimburse an ERISA plan when the reimbursement leaves the individual penniless, gives absolute priority to the reimbursement claim without regard to the full extent of injuries and damages sustained, and must be made out of a recovery obtained for damages other than medical expenses.[49]

If permitted, the Shanks wanted to convince the Court that Wal-Mart's purported claim for equitable relief was not "appropriate" under section 502(a)(3) of ERISA and that it strains credulity to suggest that it is "appropriate" to require Debbie to be left with nothing to pay the expenses for her future care.[50]

Knowing that less than 1% of Supreme Court Petitions for Writ are granted, the Shanks filed their Petition for Writ of Certiorari on December 12, 2007, hoping to fall into this minority category. Wal-Mart initially attempted to waive its right to respond by filing its "Waiver to Respond" on December 26, 2007. However, the high Court ordered Wal-Mart to file a written response on January 11, 2008. The Court's ruling in this regard gave renewed hope to the Shank team of attorneys. Wal-Mart's Brief of Respondent in Opposition to Mrs. Shank's petition for writ was filed on February 11, 2008.[51] Appellants, attorneys, reporters, and the incensed public patiently awaited the Court's determination, only to learn of a negative outcome on March 17, 2008 when the Supreme Court denied the petition.[52]

Renewed Media Attention

The following day, the media joined forces with the disheartened Shank family again, as a major segment aired on CNN and NBC, generating a large viewer response.[53] This time, however, the momentum, which previously rallied support for the Shanks, began to kick up an outrage towards America's largest retailer, Wal-Mart. Immediately, Wal-Mart spokesman John Simley, who called Debbie Shank's case "unbelievably sad," said in a statement, "Wal-Mart's plan is bound by very specific rules. ... We wish it could be more flexible in Mrs. Shank's case since her circumstances are clearly extraordinary, but this is done out of fairness to all associates who contribute to, and benefit from, the plan."[54] But the public wasn't buying it, nor was MSNBC's Keith Olbermann, who began a campaign against Wal-Mart. He tagged the company one of his "Worst Persons in the World" for four straight nights. Olbermann indicated that he would keep reminding people of "what they're supporting when they go to Wal-Mart. And we'll do it nightly, and indefinitely" until the retailer recants.[55] In the end, his media frenzy created the desired effect.[56]

Wal-Mart Reconsiders

In a press release to the Associated Press on April 1, 2008, following a personal conference call to Jim Shank and his Attorney Maurice Graham, Wal-Mart chose to back down—at last. "We have decided to modify our plan to allow us more discretion for individual cases, and are in the final stages of working out the details," Wal-Mart's statement read. The announcement further noted, "Wal-Mart will not seek any reimbursement for the money already spent on Ms. Shank's care, and we will work with the family to ensure the remaining amounts in the trust can be used for her ongoing care." Wal-Mart ended its statement with an apology "for any additional stress this has put on the Shank family."[57]

Because of the date on which the announcement fell, Jim Shank initially thought Wal-Mart's pledge to cease collection of the reimbursement was

a bad April Fool's Day joke. However, after learning of its authenticity, he released a statement in response: "I am grateful that Wal-Mart has seen their error and decided to rectify it. I just wish it hadn't taken them so long, this never should have happened. I sincerely hope no other family ever has to go through this."[58]

Epilogue

Unfortunately, based on current Eight Circuit law, Jim Shank's hope that this case will help other families will not likely be fulfilled. The Eighth Circuit's interpretation of "appropriate equitable relief" and its rejection of the make-whole, "pro-rata" loss sharing, and common fund doctrines in the *Shank* case is not good news for other ERISA beneficiaries who are also tort victims.[59] Baron expresses that while the *Shank* case put a spotlight on the growing use of reimbursement claims by medical plans and the inherent injustice in the process, the sad reality is that not every catastrophic injury victim can be saved by the power of the press. Many will be required to face similar negative trial outcomes due to the trail of "bad law" that remains in the 8th Circuit. In an interview about the *Shank* case in *Lawyer's Weekly*, Baron shared, "The prospect of reimbursement in a personal injury setting transforms the traditional notion of knowing you are covered by insurance into the idea that you are covered only if you can't get the money elsewhere. If you get any money whatsoever, you have to pass it back to the insurer."[60] Baron, realizing this is the reality of the Eighth Circuit, continues to be grateful for his involvement and the ultimate positive outcome in the Shank case.

Baron is also quick to point out that the other circuits are not bound by the *Shank* ruling. They may render a different interpretation as to what "appropriate" means in the statutory context of "*appropriate* equitable relief."

In an email message to Baron, Graham described the final conference call between himself, Jim Shank and Wal-Mart, writing, "It was an emotional time for me. Everyone took the high road. Jim expressed his appreciation for their change in position, also said that he was very pleased that plan modifications were underway . . . he concluded by wishing everyone at Wal-Mart the best, said he harbored no hard feelings and that he was just tired and very pleased to have this behind him and his family. Pat [Curran, Executive Vice President, People Division, Wal-Mart] pointed out that she was a 24-year employee of the company and regretted any actions that inferred that the company did not have concern for its employees. She said that Jim's case had caused them to, albeit a bit late, reexamine this issue."[61]

Baron, in reply to Graham's e-mail, shared his view, "Thank you so much for telling me about this . . . I can get emotional about the whole thing even now . . . I may have lost some faith in the [court system], but I haven't lost faith in America."[62]

---

1 Marilyn, currently a 2nd year law student at the University of South Dakota School of Law, has worked in the field of Human Resources in excess of 18 years. She is a certified Senior Professional in Human Resources (SPHR). Marilyn also works with Professor Roger Baron in his efforts to help correct the injustices that currently exist under ERISA. Marilyn wishes to thank Erica L. Airsman, Sarah E. Baron Houy, and Robert L. Fix for their assistance and input in reviewing this paper. Marilyn may be reached at marilyntrefz19@gmail.com.

2 Professor of Law, University of South Dakota. Prof. Baron may be reached at Roger.Baron@usd.edu.

3 United States Department of Labor, Health Benefit Plans, ERISA http://www.dol.gov/dol/topic/health-plans/erisa.htm. (last visited 7-30-09). States are not permitted to regulate most self-funded plans under terms of the Employee Retirement Income Security Act (ERISA). These plans are regulated by the U.S. Department of Labor.Self-funded plans fall under the regulatory authority of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). ERISA protects the benefits of employees and retired employees in private-sector pension and welfare benefit plans. ERISA sets minimum standards these plans must meet, but the Department of Labor's EBSA does not interpret plan documents or determine if individuals are entitled to benefits.

4 547 U.S. 356 (2006).

5 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (Sept. 8, 2006, 19:54:08 CST) (on file with author).

6 Michelle Andrews, *Wal-Mart Rethinks Its Move on Deborah Shank*, U.S. News and World Report, April 3, 2008, http://health.usnews.com/blogs/on-health-and-money/2008/04/03/wal-mart-rethinks-its-move-on-deborah-shank.html.

7 *Admin. Comm. of Wal-Mart Stores, Inc. Assocs' Health & Welfare Plan v. Shank*, 2006 WL 2546797 at *1 (E.D.Mo. August 31, 2006).

8 *Id.*

9 Oral Argument for *Admin. Comm. of Wal-Mart Stores, Inc. Assoc.s' Health & Welfare Plan v. Shank* available at http://www.ca8.uscourts.gov/oralargs/oaFrame.html, argued April 13, 2007, (Case number 06-3531).

10 *See Waller v. Hormel Foods Corp* 120 F.3d 138, 140 (8th Cir. 1997) in *Shank*, 2006 WL 2546797 at *4.

11 *Shank*, 2006 WL 2546797 at *6.

12 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (Sept. 8, 2006, 19:54:08 CST) (on file with author).

13 Roger M. Baron, *The Evolution and Current State of ERISA Subrogation Law*, presentation given at The State Bar of South Dakota 77th Annual Meeting, Sioux Falls (June 17, 2009).

14 534 U.S. 204 (2002).

15 *Id.*

16 *Id.* at 213.

17 Andrew H. Koslow, *"Appropriate Equitable Relief" in Wal-Mart V. Shank: Justice for Whom?* 12 Quinnipiac Health L.J. 277 (2008-2009).

18 *Sereboff v. Mid Atl. Med. Services, Inc.*, 547 U.S. 356, 364 (2006).

19 Vanessa Fuhrmans, *Accident Victims Face Grab for Legal Winnings – Wal-Mart Paid Bills for Mrs. Shank, Then Sued for Money Back*, Wall Street Journal, November 20, 2007, at A1.

20 Oral Argument for *Sereboff v. Mid Atl. Med. Services, Inc.*, 547 U.S. 356, 364 (2006) available at http://supremecourtus.gov/oral_arguments/argument_transcripts.html, argued on March 28, 2006, (No. 05-260).

21 547 U.S. 268 (2006).

Continued on following page

Continued from previous page

22 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (Sept. 8, 2006, 19:54:08 CST) (on file with author).
23 Randi Kaye, *Brain Damaged Woman at Center of Wal-Mart Suit*, CNN.com/US, available at http://www.cnn.com/2008/US/03/25/walmart.insurance.battle/index.html?iref=mpstoryview.
24 Fuhrmans, *supra* at A1.
25 *Admin. Comm. of Wal-Mart Stores, Inc. Assoc. s' Health & Welfare Plan v. Gamboa*, 2007 WL 2021966 (W.D.Ark, July 9, 2007).
26 Brief of Petitioner-Appellant, *Admin. Comm. of Wal-Mart Stores, Inc. Assoc.s' Health & Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007).
27 *Shank*, 500 F. 3d 834 (8th Cir. 2007).
28 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham, Gray, Ritter & Graham with copy to Erica L. Airsman, Gray, Ritter & Graham (April 12, 2007 8:41 AM CST) (on file with author).
29 *Id.*
30 Oral Argument for ***Shank*** at http://www.ca8.uscourts.gov/oralargs/oaFrame.html, argued April 13, 2007, (Case number 06-3531).
31 Email from Roger Baron, Professor of Law, University of South Dakota to Marilyn Trefz, Law Student, University of South Dakota (August 2, 2009 8:29:28 PM CST) (on file with author).
32 Oral Argument for ***Shank*** at http://www.ca8.uscourts.gov/oralargs/oaFrame.html, argued April 13, 2007, (Case number 06-3531).
33 Brian King, *Comments at the Utah Trial Lawyers Association Annual Meeting*, ERISA Law Blog, September 14, 2007, http://www.erisa-claims.com
34 *Shank*, at 838.
35 King, *supra*, at 2.
36 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (September 18, 2007 4:51 PM CST) (on file with author); Email from Maurice B. Graham, Gray, Ritter & Graham to Roger Baron, Professor of Law, University of South Dakota (September 18, 2007 6:46 PM CST) (on file with author).
37 Petition for Rehearing. *Shank*, 500 F.3d 834.
38 Email from Benjamin W. Glass, III, Benjamin W. Glass, III & Assoc. PC to Roger M. Baron, Professor of Law, University of South Dakota (September 27, 2007 10:34 AM CST) (on file with author); Email from Roger M. Baron, Professor of Law, University of South Dakota to Benjamin W. Glass, III, Benjamin W. Glass, III & Assoc. PC with copy to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (September 27, 2007 10:37 AM) (on file with author); Email from Benjamin W. Glass, III, Benjamin W. Glass, III & Assoc. PC to Roger M. Baron, Professor of Law, University of South Dakota (September 27, 2007 10:42 AMCST) (on file with author); Email from Benjamin W. Glass, III, Benjamin W. Glass, III & Assoc. PC to Roger M. Baron, Professor of Law, University of South Dakota (September 27, 2007 10:48 AM CST) (on file with author); Email from Roger M. Baron, Professor of Law, University of South Dakota to Benjamin W. Glass, III, Benjamin W. Glass, III & Assoc. PC with copy to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (September 27, 2007 11:38 AM) (on file with author); Email from Roger M. Baron, Professor of Law, University of South Dakota to Benjamin W. Glass, III, Benjamin W. Glass, III & Assoc. PC (September 27, 2007 11:40 AM) (on file with author).
39 Roger Baron, *The Evolution and Current State of ERISA Subrogation Law* (2009). (In his presentation, Professor Roger Baron, Law Professor, University of South Dakota, describes his correspondence via email (19 messages) and telephone (weekly calls) with Vanessa Fuhrmans, Staff Reporter, Wall Street Journal, during the seven week period between September 27 – November 20, 2007.)
40 *Id.*
41 Motion for Rehearing denied. *Shank*, 500 F.3d 834.
42 Fuhrmans, *supra* at A1.
43 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham and Erica L. Airsman, Gray, Ritter & Graham (January 03, 2008 12:58 PM CST) (on file with author).
44 Email from Vanessa Fuhrmans, Staff Reporter, Wall Street Journal to Roger Baron, Professor of Law, University of South Dakota (November 27, 2007 2:10 PM CST) (on file with author).
45 *Id.*
46 Email from Vanessa Fuhrmans, Staff Reporter, Wall Street Journal to Roger Baron, Professor of Law, University of South Dakota (April 04, 2008 10:13 AM CST) (on file with author).
47 *Id.*
48 Email from Erica L. Airsman, Gray, Ritter & Graham to Roger Baron, Professor of Law, University of South Dakota (November 07, 2007 9:59 AM CST) (on file with author); Email from Roger Baron, Professor of Law, University of South Dakota to Erica L. Airsman, Gray, Ritter & Graham (November 07, 2007 10:11 AM CST) (on file with author);
49 Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 8th Circuit, *Shank v. Admin. Comm. of the Wal-Mart Stores, Inc. Assoc.s' Health & Welfare Plan*, 2008 WL 378898 (2008) (No. 07-791).
50 *Id.*
51 On-line Docket Sheet, *Shank v. Admin. Comm. of the Wal-Mart Stores, Inc. Assoc. s' Health & Welfare Plan*, 2008 WL 378898 (2008) (No. 07-791).
52 Denial of writ of certiorari, *Shank v. Walmart*, 128 S.Ct. 1651 (March 17, 2008).
53 Rich Gardella and Lisa Myers, *Update: Wal-Mart no longer seeks money from disabled worker*, NBC News, Deep Background NBC News Investigates (April 1, 2008) http://deepbackground.msnbc.msn.com/archive/2008/04/01/848981.aspx.
54 Kaye, *supra* at 1.
55 *Countdown with Keith Olbermann*, (MSNBC broadcast March 26-31, 2008).
56 Stephanie D. Smith, *Keith Olbermann Continues Feud Agasinst Wal-Mart, Wal-Mart Responds*, The Huffington Post (April 1, 2008) http://www.huffingtonpost.com/2008/04/01/keith-olbermann-continues_n_94409.html.
57 Vanessa Fuhrmans, *Wal-Mart Surrenders on Accident Settlement*, Health Blog, WSJ's Blog on health and the business of health, 4-1-08, http://blogs.wsj.com/health/2008/04/01/wal-mart-surrenders-on-accident-settlement/.
58 Gardella and Myers, *supra at 1.*
59 Linda Magruder, *Did Someone Say Appropriate Equitable Relief? I Think Not*, The Advocate. Volume 36, Number 3, May/June 2008, at 12.
60 Nora Lockwood Tooher, *ERISA plans target tort claims*, Lawyers Weekly, Inc. Thursday, January 3, 2008, www.lawyerusaonline.com.
61 Email from Maurice B. Graham, Gray, Ritter & Graham to Roger Baron, Professor of Law, University of South Dakota (April 03, 2008 9:05 AM CST) (on file with author).
62 Email from Roger Baron, Professor of Law, University of South Dakota to Maurice B. Graham, Gray, Ritter & Graham (April 03, 2008 9:20:51 AM CST) (on file with author).