



November 21, 2007

As President of the National Association of Subrogation Professionals, the country's largest non-profit association for insurance, legal and service providers working on behalf of the subrogation interests of the insurance industry, I am writing to offer an alternative perspective in response to your headline article on November 20 entitled "Accident Victims Face Grab For Legal Winnings."

Our Association has no involvement in the Wal-Mart vs. Shank case, and indeed, we do not know the facts sufficiently to provide any judgment regarding the propriety of the actions undertaken by the parties, or any resulting legal ruling. Your article cites the U.S. Supreme Court's Sereboff decision, with which we are very familiar. It stands for the unadulterated proposition that health insurers, including self-funded plans, are entitled to obtain reimbursement for health insurance proceeds paid to insureds from settlements or verdicts funded by responsible third-party tortfeasors. This ruling is consistent with the centuries-old principle of subrogation (extending back to a ruling by Lord Chadwicke of England's Equity Court in the 1700's): after making payment to its insured, an insurer stands in the shoes of the insured with respect to claims against those companies or individuals who are legally responsible for having caused harm or damage to the insured. To the extent of its payment, the insurer is entitled to secure reimbursement.

The rationale for judicial enforcement of subrogation rights is clear: otherwise, the ultimately responsible person or company evades such responsibility simply because the victim of his or her misconduct had insurance coverage.

Pursuit of subrogation claims advances the broadest societal interests by ensuring that all actors within a society – ranging from the largest corporations to mom and pop shops – behave responsibly and conduct their businesses so as to avoid harming others by exercising "reasonable care." However, most subrogation claims are not perfected for a variety of reasons, including lack of or inadequate liability insurance coverage or insubstantial assets on the part of the responsible third-party tortfeasor. Under these circumstances, the insureds, of course, retain the insurance proceeds paid to them, and the insurer obtains no reimbursement at all for its payment of policy proceeds to its insureds.

Every insurer in every line of business – health, property, automobile and workers' compensation, among others – has contractual as well as equitable subrogation rights. Enforcement of these rights is a vital underpinning to the financial stability of the insurance industry. Moreover, subrogation claims frequently are pursued in tandem with claims by the insured to recover for uninsured losses, generally with the insurer advancing the costs of litigation. When, as occurred in the tragic situation described in your article, there are insufficient insurance proceeds or assets on the part of the responsible tortfeasor to satisfy both the subrogation interests of the insurer, as well as claims by the insured for

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uncompensated economic or non-economic damages, then the courts enforce the potentially competing rights of the claimants by reference to policy provisions, as well as state statutory and decisional law.

While it is easy to point a finger at the insurer, or a self-insurer like Wal-Mart, for rightfully exercising its subrogation rights under circumstances when there are insufficient assets to compensate both the insurer and its insured for their respective damages, the true responsibility for this extremely unfortunate result rests with the responsible third party which exacerbated its negligence in having caused injuries to the Shanks and Wal-Mart by also exercising financial irresponsibility by failing to secure ample liability insurance coverage.

Your article overlooks the commercial and societal importance of this legal structure, instead opting for a semi-sensational headline in conjunction with a less than objective slant to the story content. This was disappointing to our Association, and frankly was less than what we have come to expect from a publication with your reputation and tradition of reporting issues of interest from the perspective of the business community as well as other constituencies.

Very truly yours,

A handwritten signature in black ink, appearing to read "Elliott R. Feldman". The signature is fluid and cursive, with the first name being the most prominent.

Elliott R. Feldman
President, NASP