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## Accident Victims Face Grab for Legal Winnings

### Wal-Mart Paid Bills For Mrs. Shank, Then Sued for Money Back

By **VANESSA FUHRMANS**  
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JACKSON, Mo. -- A collision with a semi-trailer truck seven years ago left 52-year-old Deborah Shank permanently brain-damaged and in a wheelchair. Her husband, Jim, and three sons found a small source of solace: a \$700,000 accident settlement from the trucking company involved. After legal fees and other expenses, the remaining \$417,000 was put in a special trust. It was to be used for Mrs. Shank's care.

Instead, all of it is now slated to go to Mrs. Shank's former employer, **Wal-Mart Stores Inc.**

Two years ago, the retail giant's health plan sued the Shanks for the \$470,000 it had spent on her medical care. A federal judge ruled last year in Wal-Mart's favor, backed by an appeals-court decision in August. Now, her family has to rely on Medicaid and Mrs. Shank's social-security payments to keep up her round-the-clock care.

"I don't understand why they need to do this," says Mr. Shank on a recent visit to the nursing home, between shifts as a maintenance worker and running a tanning salon. "This girl needs the money more than they do." Mrs. Shank, who needs help with eating and other basic tasks, spends more time alone since Mr. Shank had to let her private caregiver go. At some point, he says, she may have to be moved from

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Vanessa Fuhrmans, the family

Above, Deborah and Jim Shank. Right, a photo of the family before the accident.

a private to a semi-private room in the nursing home where she lives.

The reason is a clause in Wal-Mart's health plan that Mrs. Shank didn't notice when she started stocking shelves at a nearby store eight years ago. Like most company health plans, Wal-Mart's reserves the right to recoup the medical expenses it paid for someone's treatment if the person also collects damages in an injury suit.

Until recently, many employers didn't vigilantly enforce the provision, and some states and federal courts didn't think the claim held water. But as the cost of covering workers continues to escalate, employers and health plans are getting more aggressive about going after the money. A Supreme Court ruling last year also has given them a clearer legal map to suing employees and winning.

In insurance circles, the recovery practice is called "subrogation." Employers and insurers say it's necessary to ensure that medical expenses aren't paid twice. By recovering those costs from someone who's been compensated elsewhere, they argue, they're saving money for everyone on the plan.

Sharon Weber, a spokeswoman for Wal-Mart, declined to discuss the details of the Shanks' case, but said the company was obliged to act in the interest of the health benefits of its employees as a whole. "While the case involves a tragic situation, our responsibility is to follow the provisions of the [company health] plan which governs the health benefits of our associates," she said.

"Employers are trying to make sure these plans run as efficiently as possible," says Jay Kirschbaum, a senior vice president at global insurance broker Willis Group Holdings. "They also have a fiduciary duty to the plan and the entire group of employees that are covered by it."

## The Recovery Practice

Already, the recovery practice is one of the variables that plaintiffs lawyers are considering as they decide whether it's in their clients' interests to participate in the \$5 billion offered by Merck & Co. to settle lawsuits over its painkiller Vioxx. Health plans recovered sizable amounts for medical expenses from other big product-liability settlements, such as for the "fen-phen" diet-drug combination and Sulzer Orthopedics' hip implants. Many insurers and the employer plans they administer are expected to pursue a piece of the Vioxx settlement.

In cases like the Shanks', where injuries and medical costs are catastrophic, accident victims sometimes can be left with little or none of the money they fought for in court. Health plans are increasingly adopting language such as Wal-Mart's, which dictates that it is to be paid first out of any settlement, regardless of

what remains for the injured person. Moreover, the victim is responsible for all legal costs in pursuing the suit.

"It's especially in the catastrophic cases that people are almost never fully compensated," says Roger Baron, a professor of law at the University of South Dakota and a specialist in health-plan law. "And then their health plan, that's been collecting premiums from them all this time, wants to take it away?"

## **Tempting Savings**

Such recoveries represent a tempting savings for insurers, employers and union-administered plans. The American Benefits Council and America's Health Insurance Plans, the health-insurer lobby, estimate health plans recoup some \$1 billion a year in medical claims from accident settlements and other third parties. A cottage industry of auditing firms, benefit-recovery specialists and subrogation lawyers help them. They estimate that between 1% and 3% of health-care spending is potentially recoverable from such claims.

"In the past, employers used to think of this as an afterthought," says Tom Lawrence, chief executive of Memphis-based Benefit Recovery Inc., whose clients include Southwest Airlines Co. and hospital chain HCA Inc. HCA says it saw annual savings from recouped claims rise to \$1.8 million in 2006 from just under \$800,000 in 2000 after hiring the firm.

Benefit Recovery contracts directly with employers. It says it's able to recover between \$12 and \$15 per health-plan member a year -- up to \$1.5 million for a big plan with 100,000 members -- by recovering medical expenses from injury-suit settlements.

Until recently, employers and insurers generally didn't go after small claims. But more-sophisticated claims tracking has made it easier. Recovery companies systematically search claims for certain medical codes -- say, a sprained ankle or head trauma -- that flag a potential accident. Claims examiners then mail a questionnaire and often follow up with calls. If the injured person confirms it was an accident, the firm tracks whether the patient files an injury suit.

If there is a lawsuit settlement, employers may seek to recoup money they paid for medical expenses. In many cases, it's relatively cut and dried: Often medical expenses are just a portion of the overall damages award, or the accident victim's attorney reaches a compromise with the health plan ahead of any settlement.

Some plans are taking a further step, refusing to pay claims in the first place, unless the person filing the claim signs an additional form promising to reimburse the plan from settlement proceeds.

Don Burgett, an engineer on an offshore oil-drilling ship, from Texas, has been waiting for his health plan to pay \$89,000 in medical claims since his daughter's accident two years ago. Magan Burgett, then 18, was thrown from the back of an all-terrain vehicle in October 2005, tearing her liver, breaking her jaw and fracturing her back.

Soon after Magan's parents submitted the bills for her two-week stay in an intensive-care unit, her father's health plan -- the Maryland-based MEBA Medical and Benefits Plan -- mailed him a reimbursement agreement that restated the plan's rights to a potential settlement.

"To consider claims related to your accident," it said, Mr. Burgett had to sign it first. When he didn't, MEBA stopped paying claims after reimbursing several hundred dollars in Magan's medical expenses.

Neal Korval, MEBA's outside counsel, says that asking a plan member to sign a reimbursement agreement in such cases is standard procedure and a policy outlined in its health plan rules. It helps prevent accident victims and their attorneys from trying to "freeze out" the plan from a potential settlement, he says, and also reminds or advises the plan member of his or her obligations.

In September, the U.S. District Court for the Eastern District of Texas sided with the Burgetts, ruling that MEBA's health plan summary, which it considered the prevailing document, didn't stipulate such conditions to pay a claim. The Burgetts' attorney says they secured a \$75,000 accident settlement -- a net of \$50,000 after legal expenses -- though that isn't enough to cover Magan's medical expenses. Mr. Korval says MEBA has recently reached a settlement with the family over the unpaid medical claims, but declined to disclose terms.

How much power health plans have to enforce subrogation is based on a hodgepodge of federal and state law still being tackled in the courts. A pivotal Supreme Court ruling last year gave health plans a leg up. In that case, a Maryland couple, Joel and Marlene Sereboff, were injured in an accident while returning a rental car to an airport in 2000; they required \$75,000 in medical care. The couple later received a settlement of \$750,000, from various parties, related to the accident.

Mid Atlantic Medical Services, now owned by UnitedHealth Group Inc., administered the health plan of Mrs. Sereboff's employer and sued the couple when they refused to pay the company out of their settlement.

### **Money Set Aside**

In a unanimous decision, the court upheld that Mid Atlantic had the right to enforce its claim, in large part because it could point to the settlement money set aside in an easily identifiable fund. The couple had placed the money in a separate account when the issue went to court. The decision has made it easier for plans to go after settlements, legal experts say.

Few such cases have attracted as much attention in legal circles as the Shanks'. Mrs. Shank took a job in 1999 stocking shelves at a Wal-Mart store in Cape Girardeau, Mo. She jumped at the shift from 11 p.m. to 6 a.m. so that she could spend days at home with her three sons, Mr. Shank says. After a probation period, she qualified for benefits under the Wal-Mart health plan in February 2000.

One day about three months later, as she and a girlfriend were touring local yard sales, a semi-trailer truck plowed into the driver's side of her minivan. Her friend's injuries were minor, but Mrs. Shank suffered major brain trauma and spent the next several weeks in intensive care. She drifted in and out of a coma, and the hospital, for months.

"One doctor didn't give her any chance," says Mr. Shank, a maintenance worker at Southeast Missouri State University. Her medical bills climbed past \$460,000. The health plan paid them promptly. "They were terrific in that respect," he says.

It also sent Mr. Shank several notices that he was to inform Wal-Mart's health plan before he settled any

suit. In 2002, the Shanks did sue and won a settlement from G.E.M. Transportation Inc., owner of the truck. The firm had only \$1 million in liability coverage, though. For his own losses, Mr. Shank received \$200,000, of which \$119,000 remained after legal expenses. He says he spent most of it toward a one-story house fitted with ramps and wider doors, which is more accessible than the family's previous three-level home.

Mrs. Shank's own settlement was \$700,000. After legal expenses and attorney fees, the remaining \$417,477 was placed in a court-created special trust designed specifically for Mrs. Shank's future care. The Shanks' lawyer, Maurice Graham, wrote the Wal-Mart health plan informing them. Mrs. Shank had received no funds directly, he said, and therefore had nothing to pay Wal-Mart back.

Nearly three years went by, Mr. Shank says, before they heard again from Wal-Mart. Mrs. Shank struggled a year rotating in and out of the hospital and rehabilitation programs. She could no longer use her right arm or three fingers on her left hand because of neurological damage. She couldn't feed or dress herself and conversations with her family were limited to all but simple questions. Eventually, her husband moved her to a nursing home for around-the-clock care. Medicare and Medicaid pay for the nursing home. Mr. Shank used some of the trust's proceeds to continue paying a private aide to care for her there.

### **'A Decent Quality of Life'**

"We wanted her to have a decent quality of life, and we still had the money," he says. He hoped he could also use it to pay the roughly \$130,000 in bills for Mrs. Shank's rehabilitation and a return hospital visit after her coverage expired.

But in August 2005, Wal-Mart re-emerged with a lawsuit against the Shanks demanding repayment for \$469,216 in medical costs out of their settlement. It charged that the Shanks had violated the terms of the health plan by not reimbursing it. The company also demanded payment of legal fees and interest for the cost of suing the Shanks for the money.

Mr. Graham, the Shanks' attorney, says he approached Wal-Mart's attorneys about negotiating a compromise, but was told the health plan wanted to proceed with the lawsuit. "We're not contending that Wal-Mart isn't entitled to a payment. We're saying they're entitled to one based on equity," he says. Since Mrs. Shank wasn't fully compensated for her damages in the first place, he argues, Wal-Mart should also expect only partial reimbursement.

Administrators of employer-financed health plans "have an obligation to participants to be impartial," the Wal-Mart spokeswoman says. "Virtually all health plans include subrogation provisions as a way to control health plan costs."

In August last year, U.S. district judge Lewis Blanton sided with Wal-Mart, ruling that when Mrs. Shank signed on to Wal-Mart's health plan she was obligated to abide by its terms.

The ruling came six days before the Shanks' 18-year-old son, Jeremy, was killed in September last year in Iraq shortly after he arrived in the U.S. Army's 25th Infantry Division.

"I wanted to give up at that point, tell Wal-Mart they won," Mr. Shank says, but his lawyer, Mr. Graham,

said he'd continue with appeals.

Mrs. Shank went to Jeremy's funeral. But because of memory problems due to her injuries, she gets confused about what happened. On a recent morning, she cried several times and asked what had happened to her middle son. Mr. Shank says that he obtained a divorce from Mrs. Shank this year, partly because of advice from a health-care administrator that she might be more eligible for public aid as a single woman. Mrs. Shank, who has been declared incompetent by a court, hasn't been informed of the divorce by her family.

The Shanks lost an appeal before a three-judge panel in the 8th Circuit Court of Appeals in August and last month were denied a request for a hearing before the entire court. They plan to appeal to the U.S. Supreme Court, though only a small percentage of cases are chosen to be heard.

"Sometimes I want to tell Wal-Mart, 'Ok, you won on the principle. But just let us keep the money,'" Mr. Shank says.

**Write to** Vanessa Fuhrmans at [vanessa.fuhrmans@wsj.com](mailto:vanessa.fuhrmans@wsj.com)<sup>1</sup>

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