

## NOVEMBER 2021 SUBROGATION NEWSLETTER

### Washington Court Of Appeals Further Imperils Automobile Subrogation

The Washington Court of Appeals decision in *Kosovan v. Omni Ins. Company* shakes Washington subrogation to its very bedrock. Every insurer or claims/subrogation professional who takes the time to read this newsletter article should immediately take notice that the quality of subrogation vendors/subrogation counsel they utilize could make the difference between being sued for bad faith (or worse) and effecting a subrogation recovery. Because the duty of good faith is non-delegable, Washington subrogation is probably best either left to subrogation lawyers who can navigate the minefield left behind after this decision or give up on subrogation in Washington altogether.



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### Montana Changes Law To Only Allow Recovery Of Medical Expenses Actually Billed: SB 251 Passes Effective April 30, 2021



On April 30, 2021, the Montana legislature passed Senate Bill 251, which fundamentally changed the way that compensatory damages are calculated in personal injury actions, bucking years of settled precedent in the process. In doing so, they provided insurers with a new mechanism to subrogate against a claimant's third-party settlement or award and recover the benefits paid. For the first time, Montana recognizes a contractual right to subrogation for previously unrecoverable amounts paid from a collateral source. However, they also made recovery of a party's subrogation interest more challenging without engaging subrogation counsel to take affirmative legal action.

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### Enforcing Unpaid Arbitration Awards

Most insurance companies in the U.S. are members of Arbitration Forums under one or more of their programs offered. You would be hard pressed to find a subrogation professional who does not have first-hand knowledge and experience in working with Arbitration Forums. Arbitration Forums provides companies with an expedited and efficient way to have disputes submitted, heard, and ultimately decided by an independent arbitrator. Most of the time the process works but, more often than you would think, there are instances where a party who was granted an award by Arbitration Forums does not get paid by the adverse carrier. So, how do you get paid when this occurs?



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#### Webinar | Which Workers' Comp "Benefits" Can Be Subrogated?



In addition to paying for medical expenses, death benefits, funeral costs, and/or indemnity benefits for lost wages resulting from a compensable injury, workers' comp carriers also expend considerable dollars for case management costs, medical bill audit fees, IME fees, expert fees, rehabilitation benefits, third-party vendor costs, nurse case management fees, workers' comp case attorneys' fees, and the like. Which of these benefits are recoverable in workers' comp subrogation remains a point of considerable confusion for subrogation professionals, lawyers, judges.

**Date:** December 2, 2021  
**Time:** 10:00 - 11:00 a.m. (CST)  
**Presenter:** Gary L. Wickert  
**Co-Presenter:** Emily N. Bates  
**Cost:** Complimentary

This webinar walks through the law in an assortment of states regarding whether and when such payments can be recovered. And when there is no law, the attendees will learn how to craft arguments in favor of doing so anyway.

[Click HERE to Register For Webinar](#)

### Verdicts and Settlements



**Ryan L. Woody** recently settled a case involving a fire that broke out at the Westbury Bank on May 30, 2019, in Kewaskum, Wisconsin. The area of origin was in the attic where the north furnace was located and the building was a total loss. Woody spearheaded the investigative team of multiple experts, who ruled out any mechanical defects with the furnace or its electrical wiring. The evidence pointed to the fact that the company that serviced the unit likely double-wrapped the heat tape on the installation. Although the furnace was totally destroyed, Woody and his team inspected other locations serviced by the same company and documented similar installation mistakes. Later a lab examination also determined that the installer utilized a Time Percentage Controller that varies the length of time the heat is in the "on" and "off" heating mode rather than a self-regulating heat tape. Because this type of controller does not use a temperature sensor, the manual stated that its "operation requires occasional supervision under changing load conditions." The manufacturer specifically warned that continuous supervision is required with this type of tape:

**This heater is not equipped with a high temperature safety device and under certain conditions may be able to exceed its maximum rated temperature. Continuous supervision is required when approaching the temperature limit of this device. Do not use a heater that has exceeded its maximum temperature rating.**

1. It is recommended to use a temperature sensing device while operating this heater.

In addition, we determined that it was widely known not to overlap or spiral wrap the heat tape so that it is in contact with itself because this can concentrate enough heat to melt the tape insulation, expose wires inside, and sometimes cause enough sparking to ignite nearby building materials. The CPSC has specifically warned against the danger of heat tape, after finding that the product results in 1,500 fires annually. As a result of these dangers, the manufacturer required that its heat tape be inspected at least every three months during use.

Once we were able to show the installation company's attorney evidence of their improper selection of heat tape as well as a mountain of photographic evidence of prior installation errors on this and other buildings, we were able to secure a significant pre-suit settlement of \$790,000. In addition to returning these funds to the bank and its insurer, we can report that the Kewaskum branch has been rebuilt and is back up and running.

### Time Travel For The Insurance Industry

See [HERE](#) for a provocative 60-second video explaining why Matthesen, Wickert & Lehrer views the handling of your subrogation claims - large and small - as time travel for the insurance industry. We help turn back the hands of time and attack the enemy of our industry - claims - utilizing our experience and expertise. Check it out!



### Join MWL's LinkedIn Subrogation Support Network Group!

We welcome you to join our LinkedIn **Subrogation Support Network** Group! It is a community managed by Matthesen, Wickert & Lehrer, S.C., that offers insurance professionals a place to interact, discuss subrogation insurance-related topics and issues, ask subrogation questions, and keep abreast of new developments and/or changes in the subrogation law for all 50 states. If you would like to join this LinkedIn group, please click [HERE](#).

### We Are Social | Follow Us

We are asking our clients and friends to help us expand our social media presence by following our firm's [LinkedIn](#), [Facebook](#), [Twitter](#), [Instagram](#), and [YouTube](#) pages. The legal face of insurance litigation in our industry seems to change almost daily. Following our social media pages will assist you in keeping up-to-date and informed on developments and changes in the law that effect the industry, which is key to obtaining the best results.

