



ALAN WILSON  
ATTORNEY GENERAL

September 23, 2013

Dr. Larry Barker, Director  
State Office of Victim Assistance  
1205 Pendleton Street, Room 401  
Columbia, South Carolina 29201

Dear Dr. Barker:

Attorney General Alan Wilson has referred your letter of April 15, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

**Issue** (as quoted from your letter): Does the State Office of Victim Assistance (“SOVA”) have “legal authority to offset or recover financial assistance from a victim if they are a passenger of a motor vehicle that has insurance and/or uninsured motorist coverage?”

**Short Answer:** This Office believes a court will likely conclude SOVA has the right to recover the assistance it provided to the Victim of a crime to the full amount over and above the Victim’s recovery of 100% of actual losses and expenses as a direct result of the crime.

**Law/Analysis:**

The South Carolina Code of Laws concerning compensation to Victims of a crime says:

- (A) No award may be made unless:
- (1) **a crime was committed;**
  - (2) the crime directly **resulted in physical or psychic trauma** to the victim;
  - (3) the crime was **promptly reported** to the proper authority and recorded in police records; and
  - (4) the claimant or other award recipient has **fully cooperated with all law enforcement agencies and with the South Carolina Victim's Compensation Fund.**
- (B) For the purposes of item (3) of subsection (A), a crime reported more than forty-eight hours after its occurrence is not “promptly reported”, absent a showing of special circumstances or causes which justify the delay.

S.C. Code § 16-3-1170. For purposes of your question, this Office is going to assume all prerequisites have been met for the award given.<sup>1</sup> As you provided a copy, the highlighted language in SOVA's form that every Victim must sign reads:

**I agree to repay SOVA if I receive money from another source, up to the amount paid on my behalf. This includes any payment I may receive from the offender, any insurance policy or settlements, judgments, or civil law suits.**

As you provide in your letter, South Carolina law states:

- (A) No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the requirements of Section 38-77-140. The uninsured motorist provision must also provide for no less than twenty-five thousand dollars' coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of the loss or damage. The director or his designee may prescribe the form to be used in providing uninsured motorist coverage and when prescribed and promulgated no other form may be used.
- (B) No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record.
- (C) Benefits paid pursuant to this section are subject to subrogation and assignment if an uninsured motorist has selected the option to be uninsured by paying the fee pursuant to Section 56-10-510.

S.C. Code § 38-77-150 (1976 Code, as amended).<sup>2</sup> By way of background, subrogation broadly defined means "the substitution of one person in the place of another with reference to a lawful claim or right." Shumpert v. Time Ins. Co., 329 S.C. 605, 496 S.E.2d 653 (Ct.App.1998) (citing 73 Am.Jur.2d Subrogation § 1 (1974)). Subrogation "enables the insurer to recover the amount paid to its insured out of any judgment or settlement proceeds received by the insured from the third party." Shumpert, 329 S.C. 605, 496 S.E.2d 653. Therefore, let us examine more law concerning subrogation. This State recognizes

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<sup>1</sup> While a traffic accident may not always involve a crime being committed, this Office has issued a previous opinion allowing for Victims involved in traffic accidents with drunk drivers to be eligible for an award by the Victim Compensation fund if they meet the other requirements. See Op. S.C. Atty. Gen., 1984 WL 159857 (May 2, 1984). This Office will assume this particular traffic incident meets all requirements for compensation by SOVA.

<sup>2</sup> Please note this statute was amended in 2013 pursuant to South Carolina Laws Act 47 (S.B. 464). The previous version of the statute and the version provided in your letter list in Section (A) ten thousand dollars' (\$10,000.00) coverage instead of the amended version which lists twenty-five thousand dollars' (\$25,000.00) coverage.

the right to subrogation through three different methods: statutorily, by contract, and through equity. Shumpert v. Time Ins. Co., 329 S.C. 605, 496 S.E.2d 653 (Ct.App.1998) (citing Dailey v. Secura Ins. Co., 164 Wis.2d 624, 476 N.W.2d 299 (App.1991)).

While you offer S.C. Code § 38-77-150 in your letter, we suggest S.C. Code § 38-77-160 would be applicable to your question. It states:

Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage. **Benefits paid pursuant to this section [for uninsured and underinsured motorist coverage] are not subject to subrogation and assignment.**

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

S.C. Code § 38-77-160 (1976 Code, as amended) (emphasis added). This statute states that benefits paid for uninsured and underinsured motorist coverage may not be subrogated.<sup>3</sup> However, the South Carolina Code of Laws concerning the State's right to subrogation for payments says:

Payment of an award pursuant to this article **subrogates the State to the extent of the payment to any right of action accruing to the claimant or to the victim or**

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<sup>3</sup> Concerning this statute [S.C. Code § 38-77-160], South Carolina Jurisprudence states that the language denying subrogation and assignment even appears broad enough to defeat a workers' compensation lien. 6 S.C. Jur. Workers' compensation liens § 26 (2013).

**intervenor to recover losses resulting from the crime with respect to which the award is made, except that subrogation shall not reduce the financial recovery by the victim, claimant, or intervenor to less than one hundred percent of actual losses or expenses.** The subrogation amount must be reduced if there is a jury award or judicial award in a bench trial, which results in a loss to the victim, claimant, or intervenor. Subrogation shall not be reduced if the action is terminated other than by a jury award or judicial award in a bench trial.

S.C. Code § 16-3-1250 (1976 Code, as amended) (emphasis added). This section is conferring the right of subrogation to the State statutorily. However, please note the State's right to subrogation is restricted until after the Victim receives one hundred percent of actual losses or expenses. *Id.* Consequently, the State cannot at the same time have the right to subrogation and have no right to subrogation for uninsured and underinsured motorist claims. Thus, it appears the two statutes are in conflict with each other concerning subrogation. As this Office has previously stated, when two statutes appear to be in conflict with each other:

The language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). And where two statutes are in apparent conflict, they should be construed, if reasonably possible, to give force and effect to each. Stone & Clamp, General Contractors v. Holmes, 217 S.C. 203, 60 S.E.2d 231 (1950). This rule applies with peculiar force to statutes passed during the same legislative session, and as to such statutes, they must not be construed as inconsistent if they can reasonably be construed otherwise. State ex rel. S.C. Tax Commission v. Brown, 154 S.C. 55, 151 S.E. 218 (1930).

Op. S.C. Atty. Gen., 1988 WL 485345 (December 1, 1988). While this Office does not have the ability to ascertain how a court might rule, we are confident that even if a court may find SOVA does not have the right of subrogation (either through its contract with the Victim or statutorily through S.C. Code § 16-3-1250), the court is likely to find a way for SOVA to recover the funds it paid to a Victim who later recovered through an insurance policy.

**While there are various methods a court could employ, this Office believes the most likely method the court would use for SOVA to recover its funds is through unjust enrichment.**<sup>4</sup> Unjust enrichment is an action in equity. It means "one shall not be allowed to profit or enrich himself at the expense of another contrary to equity." Op. S.C. Atty. Gen., 1976 WL 4309 (March 24, 1976) (citing Restatement, Rest., § 1, et seq.). As quoted by the South Carolina Court of Appeals:

"A party may be unjustly enriched when it has and retains benefits or money which in

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<sup>4</sup> While this Office is referring to actions in equity, equitable subrogation would not likely apply here. Equitable subrogation requires: the party claiming subrogation to have paid the debt; the party had a direct interest in the discharge of the debt; the party was secondarily liable for the debt; no injustice will be done to the other party by the allowance of the equity. 12 S.C. Jur. Equitable subrogation § 23.4 (2013) (citing Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134, 43 A.L.R.5<sup>th</sup> 847 (1992); United Carolina Bank v. Carprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994)).

justice and equity belong to another.” Dema v. Tenet Physician Servs.–Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). The remedy for unjust enrichment is restitution. See Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) (“Restitution is a remedy designed to prevent unjust enrichment.”). To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. Campbell v. Robinson, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct.App.2012); Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct.App.1988).

Inglese v. Beal, 403 S.C. 290, 742 S.E.2d 687 (Ct.App.2013). To put in plain terms, this Office does not believe the legislature intended for Victims of crime to be reimbursed for expenses by SOVA and by an insurance company or other third party. SOVA, as an agency of the state government, has limited funds with which it is able to assist Victims of crimes. If a Victim receives funds sufficient to cover all costs, SOVA should be able to recover in equity for funds “had and received” based on unjust enrichment. Additionally, SOVA’s contract with Victims makes it clear SOVA intends to be reimbursed if the Victim otherwise receives compensation for the crime.<sup>5</sup>

**Conclusion:** Therefore, this Office believes a court will likely conclude SOVA [the State Office of Victim Assistance] has the right to recover (whether through unjust enrichment under the common law or through statutory or contractual subrogation) the assistance it provided to the Victim of a crime to the full amount over and above the Victim’s recovery of 100% of actual losses and expenses as a direct result of the crime. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office

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<sup>5</sup> Without knowing or determining the facts concerning your question, if the Victim owned a policy and recovered under health insurance coverage, it is possible that, pursuant to S.C. Code § 16-3-1250, SOVA may be able to subrogate in order to recover any funds paid by the health insurance company over and above one hundred percent reimbursement to the Victim. As an aside, the South Carolina Court of Appeals previously upheld the denial of equitable subrogation for a health insurance provider where the policy did not contractually give the right to subrogation. See Shumpert v. Time Ins. Co., 329 S.C. 605, 496 S.E.2d 653 (Ct.App.1998). The South Carolina Code concerning subrogation for insurers says:

Any policy or contract of accident and health insurance issued in this State may include provision for subrogation by the insurer to the insured's right of recovery against a liable third party for not more than the amount of insurance benefits that the insurer has paid previously in relation to the insured's injury by the liable third party. If the director or his designee, upon being petitioned by the insured, determines that the exercise of subrogation by an insurer is inequitable and commits an injustice to the insured, subrogation is not allowed. Attorneys' fees and costs must be paid by the insurer from the amounts recovered. This determination by the director or his designee may be appealed to the Administrative Law Judge Division as provided by law in accordance with Section 38-3-210.

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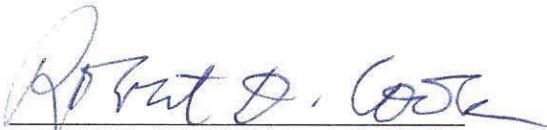
believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General