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ATTORNEY GENERAL OPINION NO. 90- 65

The Honorable William R. Carpenter
Administrative Judge
Third Judicial District
Shawnee County Courthouse
Topeka, Kansas

Re: State Boards, Commissions and Authorities--Crime
Victims Compensation Board--State's Subrogation
Rights; Criminal Restitution

Synopsis: Pursuant to K.S.A. 1989 Supp. 74-7312(a),
74-7301(d) and 74-7305(c)(1), the state should be
subrogated to the victim's receipt of restitution
to the extent of the victim's award from the crime
victims compensation board. Cited herein: K.S.A.
21-4610; K.S.A. 1989 Supp. 74-7301; 74-7305;
74-7312.

* * *

Dear Judge Carpenter:

You request our opinion regarding the state's right to
subrogation under K.S.A. 1989 Supp. 74-7312. Specifically,
you question whether court ordered restitution in criminal
cases should be applied to reimburse compensation paid to a
claimant under the crime victims compensation act, K.S.A.
74-7301 et seq.

K.S.A. 1989 Supp. 74-7312 provides in part:

"(a) If compensation is awarded, the
state shall be subrogated to all the

claimant's rights to receive or recover benefits or advantages for economic loss for which, and only to the extent that, [sic] compensation is awarded, from a source which is or, if readily available to the victim or claimant would be, a collateral source."

The term "collateral source" is defined at K.S.A. 1989 Supp. 74-7301(d):

"'Collateral source' means a source of benefits or advantages for economic loss otherwise reparable under this act which the victim or claimant has received, or which is readily available to the victim or claimant, from:

"(1) The offender;"

Finally, K.S.A. 1989 Supp. 74-7305(c)(1) requires that "[c]ompensation otherwise payable to a claimant shall be diminished . . . [t]o the extent, if any, that the economic loss upon which the claimant's claim is based is recouped from other persons, including collateral sources. . . ." We find nothing in these statutes to indicate that restitution was not intended to be a benefit or advantage received from a collateral source.

While subsections (b) and (c) of K.S.A. 1989 Supp. 74-7312 discuss procedures for subrogating the state in civil actions to recover damages, these sections do not, in our opinion, serve to limit the application of subsection (a) to only civil proceedings. The procedures of subsections (b) and (c) are not always necessary to recover from collateral sources. For instance, social security, workers' compensation and insurance proceeds are often automatically forthcoming upon filing a claim without resort to court proceedings. These too are collateral sources, the benefits of which the state has a right to subrogation. K.S.A. 1989 Supp. 74-7301(d)(3), (5), (7).

The Kansas crime victims compensation act was patterned after the uniform crime victims reparations act of 1973, 11 U.L.A. 33 (1974). While the commissioners' comments do not discuss whether restitution was considered a collateral source subject to subrogation, the prefatory note states that the overall policy of the act "is to preclude double recovery for any

criminal incident." Similarly one of the purposes of restitution is to make the victim whole. State v. Hinckley, 13 Kan.App.2d 417, 419 (1989). If restitution is paid to a victim in addition to compensation under the act, the victim may be doubly compensated contrary to the intent of both statutory remedies.

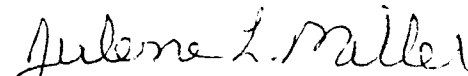
We note that there may also be occasions when neither restitution or compensation under the act will be enough to make the victim whole as far as economic losses due to criminally injurious conduct are concerned. The legislature may therefore wish to consider amending K.S.A. 74-7312(a) to allow courts to order restitution to supplement payments under the act to the point where the victim is made whole. For instance, if the victim's economic loss is \$50,000 but the compensation board can only award \$25,000, the court could order restitution up to \$50,000 with the first \$25,000 going to the victim rather than the board. Absent such an amendment, however, it is our opinion that the restitution must go first to subrogate the state, as compensation awarded under the crime victims compensation act is secondary to all other sources unless otherwise specifically provided. See K.S.A. 1989 Supp. 74-7301(d)(2); 11 U.L.A. 33, commissioners' prefatory note (1974); 24 C.J.S. Criminal Law § 1765 (1989); Peterson v. Pennsylvania Crime Victims Compensation Board, 404 A.2d 1364, 1366 (Pa. 1979).

We note that the Kansas Supreme Court has construed K.S.A. 21-4610 to allow substitution of the originally aggrieved party with a newly aggrieved party in certain circumstances. State v. Yost, 232 Kan. 370, 378 (1982). See also State v. Hinckley, 13 Kan.App.2d 417, 418 (1989). When the state has compensated a victim under the crime victims compensation act, the victim is no longer the aggrieved party; the state is. The Kansas Court of Appeals indicated in State v. Jones, 11 Kan.App.2d 428, 430 (1986) that the state can be an aggrieved party for purposes of receiving restitution.

Very truly yours,



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