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Opinion Committee

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Office of the Attorney General
Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

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Dear Ladies and Gentlemen:

Opinion Committee

The Automobile Theft Prevention Authority (ATPA) was established in June 1991, under Vernon's Annotated Civil Statutes, Article 4413(37), to create a statewide effort for the reduction of vehicle theft. Six of the seven members of the ATPA are appointed by the Governor and include two representatives from each of the following three categories: Law enforcement, auto insurance providers, and consumers. The seventh member is the Executive Director of the Texas Department of Public Safety and serves ex-officio. The ATPA is statutorily established in the criminal justice division of the Office of the Governor, but all administrative services are provided by the Texas Department of Transportation through an interagency cooperation agreement.

Article 4413(37) grants the ATPA broad rule-making authority to implement its powers and duties. These powers and duties are clearly specified in the statute and do not expressly include the power to hear and decide disputed matters. Section 6 sets forth ATPA's general powers and duties. Section 9 requires the ATPA to develop a state automobile registration program. Section 11 requires the ATPA to determine the automobile theft rate.

Section 10 of the statute requires each insurer to pay an annual fee to the ATPA. Under that section, the only statutory authority that the APA has is to notify the State Board of Insurance of any insurer that fails to pay the required fee.

Section 8 of the statute outlines the administration of the automobile theft prevention fund. Under this section, the ATPA is authorized to use the fund to: (a) pay administration costs; and (b) to achieve its statutory purposes which primarily focus on providing financial assistance to law enforcement agencies for programs designed to reduce the incidence of automobile theft and economic automobile theft.

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The statute is fairly detailed as to what the ATPA is authorized to do. The legislature deemed it important to explicitly state how the ATPA could use the automobile theft prevention fund, yet the statute does not grant refund powers to the ATPA, nor does it direct the resolution of fee disputes. In fact, it appears that refunds were not even contemplated under the statute. Even if it is implied that an insurer may seek a refund of these fees, it does not appear that the legislature anticipated that the ATPA would address such issues. Nor does it appear that the board anticipated that it would be called upon to determine whether an insurer properly calculated its assessment.

Since its inception, the ATPA has made decisions on the allocation of the money that is collected into the fund, primarily through the award of competitive grants to various law enforcement agencies and other automobile theft prevention programs throughout the State. The focus of the ATPA staff has been to administer the board's grant-making functions and address general government matters.

In addition to enumerating certain powers and duties, the statute provides for a special fund, designated the automobile theft prevention fund, which is administered by the state treasurer. The fund is financed through an annual fee which is assessed against all insurance companies writing any form of motor vehicle insurance in this state, similar to other fees and taxes that are assessed against insurers. Section 10(c) of the statute expressly states that this fee is "in addition to any other fee or tax imposed by law on an insurer". The fees were originally collected by the Department of Insurance and deposited into the fund. When the Tax Administration division of the Department of Insurance was transferred from that agency, an interagency agreement was entered into with the Comptroller of Public Accounts to collect the fees.

On more than one occasion, insurance companies paying the assessments have requested refunds of at least a portion of their assessment. Originally, the Department of Insurance made a few small refunds to companies when the refunds requested were, in the opinion of the Tax Administration staff, clearly mathematical or clerical errors. In one case, the refund was very large, and the Department of Insurance referred the request to the ATPA board for disposition. Under advise of legal counsel, the Board did not act on the refund request because it was not clear that it had the authority to do so.

One insurance company has continued to request the refund, both from the Tax Administration Division of the Comptroller's Office (formerly part of the Department of Insurance), as well as from the ATPA. During a regular meeting of the ATPA, the board voted to direct the Executive Director to request an opinion from the Attorney General on the issue of authority to determine the refund question. Please render your opinion on the following issues:

- (1) Does the ATPA have the statutory authority (either expressed or implied) to make decisions regarding refunds?
- (2) If the ATPA has the authority to determine whether or not an insurer is entitled to a refund of payments made under Article 4413(37), does the ATPA have the authority to further direct the actual payment of such refunds, i.e., can the ATPA direct the Comptroller's Office or other state agency to actually pay the refund amount to the requesting insurer?
- (3) If the ATPA does not have the authority to determine the refund question, does this authority rest with some other state entity? In addressing this question, please note that in October 1992, the Texas Department of Insurance adopted Board Order No. 59893 authorizing insurers to directly recoup the assessment from individual policyholders.

Arguably, if the Department of Insurance controls whether an insurer can recoup the payment from the consumer, then that same entity controls whether the insurer can recover the payment through some other means.

Please let me know what additional information and action is required. I am available to provide documents and records, and to meet with you if you request. You may contact me by phone at (512) 467-3999.

Sincerely,

A handwritten signature in cursive script that reads "Linda Young".

Linda Young, Executive Director
Automobile Theft Prevention Authority