MEMORANDUM

TO: Members, Automobile Burglary and Theft Prevention Authority

FROM: C. David Richards, General Counsel

DATE: January 8, 2019

SUBJECT: Art. 4413(37), § 10, Texas Revised Civil Statutes: Legal Overview of the Roles and Responsibilities of the Automobile Burglary and Theft Prevention Authority (the “ABTPA” and/or the “Authority”)

I. BACKGROUND

Under the above-referenced statute, an insurance company writing any form of motor vehicle insurance in this state shall pay to the authority a fee equal to $2 multiplied by the total number of motor vehicle years of insurance for insurance policies delivered, issued for delivery, or renewed by the insurer. TEX. REV. CIV. STAT. ART. 4413(37), § 10(b)

To ensure compliance with the statute, i.e. the payment of the fee, the ABTPA coordinates with the Texas Comptroller of Public Accounts (the “CPA”) via an Interagency Agreement, the Texas Department of Insurance (the “TDI”), insurance companies, and insurance trade associations.

The Authority is responsible for notifying the Texas Department of Insurance (fka State Board of Insurance) of any insurer that fails to pay the fee required by this section and the TDI board may for that reason revoke an insurer’s certificate of authority. TEX. REV. CIV. STAT. Art. 4413(37), § 10(d).

In conducting its due diligence under the statute and as an initial starting point, the Authority references the CPA’s listing of those Property and Casualty insurers that have filed CPA Form 25-106 and 25-107, Insurance Automobile Burglary and Theft Prevention Authority Semi-Annual Assessment Report, to determine which insurers have not filed the required report. The data derived from the reports reveal either: (1) an insurer filed the report and paid the assessment; (2) an insurer filed the report and claimed zero motor vehicle years; or (3) filed no report at all.

As a cross reference, the data derived from CPA Form, #25-102, Texas Annual Maintenance, Assessment, and Retaliatory Report, has surprisingly revealed to ABTPA staff that in some instances, insurance companies are reporting “motor vehicle premium tax” on the above-reference form, while claiming on CPA Form 25-106 and/or 25-107 that the ABTPA assessment was zero?
II. DISCUSSION

The ABTPA enabling Act contemplates that the Authority collect the ABTPA Assessment Fee. As a small agency administratively attached to the Texas Department of Motor Vehicles, the ABTPA facilitates its due diligence with and through the CPA through an interagency agreement (IA). In the IA, the CPA makes clear that they have only ministerial duties outlined in the IA regarding the collection of these fees. The ABTPA is responsible to notify the TDI if insurers fail to pay the statutorily required assessment fee. The ABTPA has no express authority to enforce the statute through its own collection efforts, nor does it have the ability or right to request that the TDI revoke an insurer’s certificate of authority. (See. Art. 4413(37), §10(d) REV. CIV. STAT. ANN.).

A portion of the due diligence that is contemplated under the statute is the ability of the ABTPA to make contact with those insurance companies who are shown by CPA records to: (1) have failed to file Form 25-106 or Form 25-107; (2) to claim “motor vehicle premium tax” on CPA Form 25-102, Line 3, but, claimed zero on the CPA Form 25-106 pertaining to the ABTPA assessment fee; or (3) have failed to file a report at all.

A. History of Administrative Rules

An unresolved issue currently confronting the ABTPA (fka the “ATPA”) involves the claim of exemptions to the payment of the ABTPA assessment fee by some insurance companies. The exemptions owe their genesis to the former State Board of Insurance (nka the “TDI”) which in July 1992 proposed to amend its (SBOI) administrative rules (28 TAC §5.205(d)) to create certain exemptions for insurers from paying the ATPA assessment fee required under Art. 4413(37), Texas Revised Civil Statutes. Subsection (d) as adopted in September 1992, was further amended at the request of a commenter to include the qualifier “…and any motor vehicle insurance policy not providing primary liability coverage.” (17 TexReg 6449)

Subsequently, the Automobile Theft Prevention Authority (the “ATPA”) proposed amendments to 43 TAC §57.48 in August 1998 with the intent of providing the insurance industry and other interested persons better information on the type of policies and vehicles that are included in the calculation of the total amount of the fees owed by an insurer. Notably, the ATPA proposed amendments did not restrict the fee to only primary liability coverage as did the 1992 SBOI rule. Under the ATPA proposal, all motor vehicle policies, not exempted by the proposed rule, covering a motor vehicle as defined by the Texas Insurance Code* Article 5.01(e) were subjected to the fee. If the covered property is not a defined motor vehicle, even though covered under a motor vehicle policy, such as a mobile home, the policy on that property would not be assessed the fee. Finally, the ATPA proposed an amendment to add “mechanical breakdown policies” to the list of exemptions to the payment of the assessment fee.

The proposed amendments to §57.48 were adopted by the ATPA board and became effective on November 12, 1998. No comments were received by the ATPA. A year later, the Texas Department of Insurance proposed to delete 28 TAC §§ 5.205(c) to

*The Insurance Code defines “motor vehicle or automobile insurance” to mean “every form of insurance on any automobile or other vehicle hereinafter enumerated and its operating equipment or necessitated by reason of the liability imposed by law for damages arising out of ownership, operation, maintenance, or use in this State of any automobile, motorcycle, motorbicycle, truck, truck-tractor, tractor, traction engine, or any self-propelled vehicle, and including also every vehicle, trailer, semi-trailer pulled or towed by a motor vehicle, but, excluding every motor vehicle running only upon fixed rails or tracks.”
The Insurance Code defines “motor vehicle or automobile insurance” to mean “every form of insurance on any automobile or other vehicle hereinafter enumerated and its operating equipment or necessitated by reason of the liability imposed by law for damages arising out of ownership, operation, maintenance, or use in this State of any automobile, motorcycle, motorbicycle, truck, tractor, or any self-propelled vehicle, and including also every vehicle, trailer, semi-trailer pulled or towed by a motor vehicle, but, excluding every motor vehicle running only upon fixed rails or tracks.”

B. Attorney General Opinion (JC-0166)

One aspect of the ATPA’s rulemaking procedure in 1998 was to create and/or set forth certain exemptions from the payment of the assessment fee. In its proposed Preamble the ATPA stated that “the ATPA interprets §6(a) as authorizing it to adopt rules implementing its statutory powers and duties, which includes administering the statutory fee assessment and collection mandates provided in §10, in coordination with the state comptroller’s office and the department of insurance.” (23 TAC 8415). In other words, the ATPA staff and board at that time believed that its enabling statute provided it with the authority to create exemptions to the fee assessment by rule.

Interestingly, in late 1999, ATPA Board Chair, Patty J. Williams, sought an Attorney General Opinion on behalf of the board asking “may the Authority by rule exempt single interest insurance policies from the fee imposed by art. 4413(37), §10, of the Revised Civil Statutes. (RQ-0087-JC) The previous year, the ATPA took the position that it had the authority under §6(a) of the statute to create exemptions by rule.

On January 12, 2000, Attorney General (the “AG”) John Cornyn issued an opinion that the “Authority did not have the power to exempt [this] form of automobile insurance from the statutory fee by rule.” Administrative agencies may adopt a rule only if the rule is authorized by and is consistent with the agency’s authority. (See. TEX. ATT’Y GEN. OP. NO. JC-72(1999) at 4-5). The opinion recognized that the Authority has general rulemaking power pursuant to article 4413(37), section 6(a), and the power under section 6A(a) to “make determinations regarding the sufficiency” of payments by insurers of the statutory fee, it does not have power to set aside the plain language of the statute. (See. Railroad Commission v. ARCO Oil & Gas, Co., 876 S.W. 2d 473, 481-82 (Tex. App.---Austin 1994, writ denied).

While some may argue that the AG opinion is narrowly tailored to address “single interest insurance policies” (JC-0166 found it significant that “no suggestion had been made that “single interest policy was not a motor vehicle insurance policy”, hence, it fell under the Insurance Code §5.01(e)... “every form of insurance on any automobile or other vehicle hereinafter enumerated and its operating equipment), administrative law strict constructionists might argue that the opinion should be read more broadly to provide that the Authority does not have the express or implied power to create exemptions not contemplated by its enabling statute.

C. Effect of OAG Opinion on Administrative Rules

While it is true that the Attorney General serves as the top lawyer for the State of Texas, an Attorney General Opinion constitutes “secondary” legal authority which is advisory in nature. In other words, an OAG opinion does not have the same legal effect on agency rules as a decision from a court of law, particularly, the Texas Supreme Court or a
Texas Appellate court. As a result, the Authority’s rules regarding exemptions continue in effect until: (1) successfully challenged in a Texas court of law; (2) the Authority chooses to repeal some or all of the existing exemptions; or (3) the Texas Legislature amends the statute to expressly provide the Authority with the power to create exemptions or expressly negate such power.

Thus, regardless of whether JC-0166 is to be narrowly construed to apply only to “single interest insurance policies”, or broadly read to address the ABTPA’s lack of authority to create exemptions not expressly contemplated by the statute, Section 57.48(a)(4) continues in effect. Similarly, the current assessment fee forms created and utilized by the Office of the Texas Comptroller citing qualifying exemptions to the payment of the assessment fee continue as written until an appellate court renders a decision to the contrary, or the ABTPA board repeals the exemptions.

D. Letter from TDI (November 2, 2018)

The legal validity of the exemptions to the payment of the ABTPA assessment fee became further unclear upon the ABTPA’s receipt of a November 2, 2018, response letter from the Texas Department of Insurance. As you recall, the board instructed Mr. Bryan Wilson, Director, of the ABTPA, to contact the TDI and to ask, in part, if the TDI considers any of the Section 57.48(a) (4) exemptions to constitute “motor vehicle insurance” which is defined under the TDI’s enabling statute. (See. TEX. INS. CODE ANN. ART. 5.01(e)(Vernon 2018).

Despite the fact that “motor vehicle insurance” is defined under the TDI statute, the TDI nevertheless responded in its November 2d correspondence that “motor vehicle insurance” is *not a term we commonly use and we did not find a statute that authorizes TDI to determine when a “motor vehicle insurance” policy is subject to the ABTPA fee.” (See. Letter from Marianne Baker, Director, Property & Casualty Lines Office, TDI (November 2, 2018). The writer then goes on to suggest that perhaps it was “practical considerations that led to the creation of the exceptions.” Interestingly, the SBOI, predecessor to TDI, did find statutory authority that enabled it to promulgate SBOI rules in 1992 setting forth those policies which it believed were exempted from paying the ATAP assessment fee based on its legal counsel’s reading of existing law. So, where does all of the foregoing leave the Authority as of January 10, 2019?

III. CONCLUSION

The questions now before the ABTPA board and/or staff are: (1) what legal authority do each have regarding the collection of the statutory assessment fee, (2) does the ABTPA have the legal authority under its governing statute to create exemptions by rule; and if so, (3) which motor vehicle insurance policies qualify for exemptions, if any, in light of the TDI’s current statutory definition of “motor vehicle or automobile insurance” (i.e. “motor vehicle or automobile insurance” means “every form of insurance on any automobile or other vehicle hereinafter enumerated and its operating equipment or use in this State…”). (See. TEX. INS. CODE ANN. ART. 5.01(e) (Vernon 2018). One should then ask an additional related question, are any of the *The Insurance Code defines “motor vehicle or automobile insurance” to mean “every form of insurance on any automobile or other vehicle hereinafter enumerated and its operating equipment or necessitated by reason of the liability imposed by law for damages arising out of ownership, operation, maintenance, or use in this State of any automobile, motorcycle, motorbicycle, truck, truck-tractor, tractor, traction engine, or any self-propelled vehicle, and including also every vehicle, trailer, semi-trailer pulled or towed by a motor vehicle, but, excluding every motor vehicle running only upon fixed rails or tracks.”
stated exemptions provided for in ABTPA rule Section 57.48(a)(4) legally valid when consideration is given to the fact that the ABTPA board chose not to include in its rules the limitation of “primary liability” insurance policy criteria as the sole source for the collection of the assessment fee? [Note: a legal justification for the stated exemptions according to the TDI staff during the 1998 ABTPA rulemaking process was these [i.e. the stated exemptions] “are secondary policies for vehicles with primary liability policies which would have [already] been assessed the fee.” (See. 23 TEXREG 8414)

With the deletion and/or removal of the restriction of only “primary” liability insurance policies in both the ABTPA and TDI rules, should these so-called “secondary” policies now also be subject to the ABTPA statutory assessment fee in light of the TDI statutory definition of “motor vehicle or automobile insurance? If not, why not?

Finally, as JC-0166 provides, the “formula, in short, is based upon policy years, not upon the number of automobiles insured.”

**IV. LEGAL RECOMMENDATION**

The General Counsel recommends that the Board Chair create an advisory committee consisting of ABTPA members, members of relevant stakeholder groups, including staff from the TDI and the CPA, as well as, industry representatives, to review the relevant laws, rules, and forms, as well as, review industry practices, before determining which course of action the ABTPA board should take regarding the collection of the statutory assessment fee.

DR

cc:  Bryan Wilson, Director

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