# TEXAS COUNTY MUTUALS:<br>STILL ALIVE AND KICKING

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In September 2000, we wrote an article in the FORC Quarterly Journal of Insurance Law and Regulation entitled *Texas County Mutuals: Their Tradition and Their Future*.[1] The article discussed how twenty-three county mutual insurance companies had come to write 26.2% of the private passenger auto premium in Texas in 1999, and pointed out that the primary reasons for this growth were three advantages which county mutual insurers then had over non-county mutual insurers in writing private passenger auto insurance in Texas:

1. Insurance written by county mutuals could be placed by an agent holding a "Group II" agent's license (a license that required no prior examination and no continuing education, unlike other licenses at the time);

2. County mutuals' rates and classifications were not regulated by the Texas Department of Insurance ("TDI"); and

3. County mutuals were not required to accept assignments or assessments from Texas' automobile assigned risk plan, the Texas Automobile Insurance Plan Association ("TAIPA").

Since the time that article was published, the Texas Legislature has eliminated or significantly reduced these three advantages.

In 2001, the Texas Legislature eliminated "Group II" agent licenses leaving both county mutual and non-county mutual insurers with the same types of agents, subject to the same licensing laws.[2]

In 2003, the Texas Legislature, pursuant to Senate Bill 14 ("SB 14"), totally revamped the system for regulating private passenger auto insurance in Texas by moving all insurers, including county mutual insurers, to a "file and use" rating system effective December 1, 2004.[3] Although county mutuals retained their freedom from regulation of rates and classifications under the file and use system, non-county mutual insurers also have that benefit effective December 1, 2004.

Finally, SB 14 eliminated the exemption from assignments or assessments from TAIPA effective December 1, 2004, except that a limited number of county mutual insurers remain exempt.[4]

Although it is true that most Texas county mutuals no longer have these advantages over non-county mutual insurers, a few significant advantages remain and that is the subject of this article.

**Same Laws Applicable to County Mutual and Non-County Mutual Insurers**

Some of the key laws which apply equally to county mutual and non-county mutual insurers after SB 14 is fully effective December 1, 2004, include the following:

1. "File and use" rating applies to all personal auto insurers effective December 1, 2004.[5]

2. Use of rating territories smaller than a county is limited effective June 11, 2003 for all insurers, except that these limitations became effective January 1, 2004 for all county mutuals, Lloyd's plan insurers, reciprocals and interinsurance exchanges.[6]

3. Use of credit information is restricted.[7]

4. New private passenger auto policy forms and endorsements may be filed, but they must be approved by the TDI prior to usage.[8]

5. Underwriting guidelines must be filed with the TDI and are confidential only if confidential under the Texas open records law.[9]

6. County mutuals must report premium, expense and loss experience data in the manner prescribed by the Texas Commissioner of Insurance ("Commissioner"), which presumably will equate with data required of non-county mutuals.[10]

7. Both insurers are subject to assessments by the Texas Windstorm Insurance Association, the catastrophe pool which provides property coverage for Gulf Coast exposures.[11]

8. Both insurers must issue refunds if the premium they charge is excessive or unfairly discriminatory.[12]

**Advantages of County Mutual Insurers over Non-County Mutual Insurers**

County mutual insurers are exempt from the operation of all insurance laws of Texas except for those laws that are made applicable by their specific terms, or except as specifically provided in Section 912.002 of the Texas Insurance Code.[13] We have not attempted to identify all of the insurance laws which do not apply to county mutuals, however some of the areas in which county mutuals are treated more favorably than non-county mutual insurers, after giving effect to SB 14, include the following:

1. County mutuals remain exempt from TAIPA assessments and assignments until December 1, 2004, except that an "exempt county mutual," hereinafter described, continues to be exempt on and after December 1, 2004.[14]

2. County mutuals are not subject to fees and assessments for the Medical Liability Insurance Underwriting Association ("JUA"), which provides professional liability insurance to physicians and other health care providers (including, without limitation, nurses, hospitals, nursing homes, and assisted living facilities).[15]

3. Mandatory surcharges for intoxication-related driving offenses are not applicable to county mutuals.[16]

4. County mutuals are not prohibited from assigning rate consequences to a charge or conviction for violation of certain traffic laws.[17]

Non-county mutual insurers are (i) subject to TAIPA assessments and assignments and JUA fees and assessments, (ii) subject to mandatory surcharges for intoxication-related driving offenses, and (iii) prohibited from assigning rate consequences to a charge or conviction for violation of certain traffic laws.

TAIPA assessments have not been large, historically. In 2004, assessments from TAIPA totaled approximately $2 million. TAIPA assignments, while not accounting for a sizable portion of the private passenger auto market, can nevertheless be costly not only because of the exposure to losses on assigned policies, but also because some companies are required to make system changes to accommodate the handling of assigned risk policies. Companies can avoid these costs by choosing to "buy out" of their assignments as permitted under the TAIPA Plan of Operation.[18] JUA fees and assessments can be quite sizable given the difficulty which physicians and other health care providers have had in obtaining professional liability insurance and the exposure which goes along with providing that type of insurance. Mandatory surcharges remove flexibility from rating plans, and the prohibition of assigning rate

consequences to a charge or conviction for violation of traffic laws makes it more difficult to properly rate some of the riskier drivers in Texas.

**Additional Laws Not Applicable to Exempt County Mutuals**

SB 14 creates a new category of Texas county mutuals, generally referred in the industry and in this article as "exempt county mutuals" because of their exemption from two laws applicable to all other county mutuals.

An exempt county mutual is one which satisfies the requirements of Section 13 of Article 5.13-2 of the Texas Insurance Code; that is, a county mutual insurer that issues "personal automobile insurance policies only at nonstandard rates," but only if the insurer and the insurer's affiliated companies or group "have a market share of less than 3.5%."[19] An exempt county mutual is subject to the same laws as a non-exempt county mutual with two exceptions:

(i) an exempt county mutual is not subject to assessments or assignments from TAIPA under Article 21.81 of the Texas Insurance Code; and

(ii) an exempt county mutual is eligible for reduced filing requirements which may be established by rule by the Commissioner.[20]

There have been no formal rules issued by the TDI interpreting what is meant by either of the phrases "personal automobile insurance policies only at nonstandard rates" or "market share of less than 3.5%," and we understand that the TDI is not planning to issue any such rules. It is also our understanding that the TDI believes that a county mutual which writes both commercial auto and personal auto insurance is eligible to be an exempt insurer under Article 5.13-2, § 13 if **all** of the personal auto insurance policies it writes are written **only** at "nonstandard rates," as defined under the statute, and otherwise meets the market share requirement. Commercial auto writings are irrelevant in making this determination.

Although the statute is not clear as to what "market" a county mutual's share ought to be measured against, the TDI has taken the position on its website in a section entitled "Standard Rate Index FAQ's" ("FAQ") that the 3.5% market limitation should be based on the total Texas market for private passenger PIP, auto liability and physical damage insurance premium, as derived from the compilation of page 14/15 of the annual statements of all companies as published by the TDI each calendar year.[21] The 2003 compilation will be used in determining the market share of companies for purposes of determining exempt county mutuals when this aspect of the law goes into effect on December 1, 2004. If a county mutual is exempt because of its personal auto writings, it is our understanding that the TDI and TAIPA agree that it will be exempt from TAIPA assignments and assessments for both private passenger and commercial auto insurance.

Each county mutual will be required to notify the TDI that it is an exempt county mutual and it is expected that this notification will be required annually, although that is not clear. Under proposed rules ("Proposed Rules") published by the TDI on its website, the TDI has proposed that insurers claiming to be exempt must include a certification of compliance with each rate filing certifying that the insurer writes only at nonstandard rates and that the market share of the insurer and the insurer's affiliated companies or group have a market share of less than 3.5%.[22]

It is unlikely there will be any retrospective assessments or assignments made by TAIPA during any year that an exempt county mutual insurer becomes non-exempt because of that insurer's failure to meet the requirements of Section 13(f) of Article 5.13-2, although prospective adjustments are likely once TAIPA is made aware of the situation. TAIPA assesses members effective January 1 of each year for the coming year and it is expected that TAIPA will make its assessments based on the companies which the TDI advises are exempt. Although it is unusual for TAIPA to make an assessment mid-year, a mid-year assessment is possible given the uncertainty of the impact of SB 14 on the population and operations of TAIPA. While the costs may be expected to increase, there should also be more members paying those costs.

Assignments by TAIPA of assigned risk policies are based on a "rolling" four quarters of information with a two quarter lag.[23] Assignment quotas are reviewed and adjusted on a quarterly basis and therefore assignments to a new member could be made within the first quarter following a loss of exemption.

One additional issue relates to what constitutes "nonstandard rates." "Nonstandard rates" are defined by statute to mean rates that are 30% or more above the "standard rate index" as determined by the Commissioner.[24] The Commissioner issued Bulletin No. B-0028-04 on June 21, 2004 and announced that the then current benchmark rate was adopted as the initial standard rate index ("SRI") under Article 5.13-2, effective December 1, 2004.[25] According to the FAQ, policy fees or other fees charged by a county mutual will not be considered in determining whether rates are at least 30% above the SRI. Moreover, the TDI intends to apply full discounts available to every applicable insured to determine if the 30% threshold has been met.

Generally, this new law requires the county mutuals seeking to be exempt to compare all of the private passenger auto rates which they are charging to the SRI and all of such rates must be at least 30% more than the SRI rates. The initial SRI is identical to the expiring benchmark rate. Because most county mutuals have not been using the same classifications, territories, symbols, discounts and surcharges as non-county mutual insurers under the benchmark rate system, a comparison will be difficult and may require a sophisticated analysis which converts the rates of the county mutual to comparable rates under the SRI. According to the FAQ, each tier utilized and each coverage written by a county mutual must be compared against the 30% threshold.[26] The TDI intends to apply the 30% threshold on a company-wide basis and not on a program by program basis.[27] As such, a comparison must essentially be made for every rate charged by the county mutual. A single exception would destroy a company's right to rely on its exempt status, although that disallowance would likely have a prospective rather than a retrospective effect as previously discussed because of the way in which TAIPA's assessments and assignments are expected to be made. For county mutuals using separate rating plans for its managing general agents, a single rate of less than the 30% threshold could destroy the exempt status of the county mutual for all of its agents.

While the Commissioner had not adopted, as of October 22, 2004, any formal rules regarding reduced filing requirements if a county mutual qualifies as exempt, the Commissioner has published the Proposed Rules.[28] Until these rules are formally adopted, they have no legal effect, although they do provide a clear indication of how the TDI presently plans to proceed. Comments to the Proposed Rules may be submitted until November 29, 2004. A public hearing will be held on November 30, 2004, to consider the adoption of the Proposed Rules.

Under the Proposed Rules, the most significant benefit to an exempt county mutual is the exemption from having to file most of the "supporting information" required of other carriers. "Supporting information" includes actuarial support, projected and historical expense information, loss cost reference information, historical experience information, profit provision information, rate reference information, and rate change information, all as defined under the Proposed Rules. An exempt county mutual is only required to file rate change information, and no other "supporting information," but it is still required to file prospective loss cost multipliers, rates and rating manuals, supplementary rating information, and information concerning policy fees, service fees and other fees charged or collected by an insurer. Rate change information generally includes rate change history, statewide average proposed rate change for each applicable coverage, form, or classification, and total average rate change for all coverages, forms, and classifications combined.[29]

Although some "supporting information" may not have to be filed by an exempt county mutual, the TDI may still request this information.[30] If requested, it must be furnished within the time period specified in the request. Therefore, the reduced filing exemption may be somewhat illusory because the company will need to have the information available in the event it is requested. On the other hand, because rate filings and supporting information under Article 5.13-2 are open to public inspection, any information which is not filed is obviously not open to public scrutiny, and this creates an advantage for the exempt insurers.

Should a county mutual lose its exempt status, it will merely lose its exemption from TAIPA assignments and assessments and from any simplified filing requirements. It presumably would not be subject to any sanctions under the law unless it knowingly made a misrepresentation to the TDI in connection with the notification of exemption process. If a county mutual loses its exempt status, it would not likely be prohibited from regaining its status in a subsequent year, although the TDI has not yet taken a formal position on this issue.

**Summary**

Much of the recent legislation in Texas affecting Texas county mutual insurers does not take effect until a few days before the publication of this article. The TDI may have published additional rules or bulletins to implement SB 14 or to clarify the TDI's position since this article was submitted. The author would be happy to respond to any inquiry requesting an update on the status of TDI's position on these issues.

While county mutuals clearly do not have the same advantages they once had over the remainder of the private passenger auto insurance market in Texas, they do retain a number of significant advantages which will continue to make county mutuals a desirable alternative to insurance companies wanting to write private passenger auto insurance in Texas.

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[1] Jack M. Cleaveland, Jr., *Texas County Mutuals: Their Tradition and Their Future,* FORC Quarterly Journal of Insurance Law and Regulation, September 8, 2000, Vol. XII, Edition III, at 2 - 5.

[2] Act of June 11, 2001, 77th Leg., R.S., ch. 703, § 1.09, eff. September 1, 2001.

[3] Act of June 13, 2003, 78th Leg., R.S., ch. 206, § 6.06, eff. Dec. 1, 2004.

[4] Act of June 13, 2003, 78th Leg., R.S., ch. 206, § 6.08, eff. Dec. 1, 2004.

[5] Tex. Ins. Code Ann. art. 5.13-2, § 5 (Vernon Supp. 2004-2005).

[6] Tex. Ins. Code. Ann. arts. 5.171, 5.172 (Vernon Supp. 2004-2005).

[7] Tex. Ins. Code Ann. art. 21.49-2U (Vernon Supp. 2004-2005).

[8] Tex. Ins. Code Ann. art. 5.13-2, § 8 (Vernon Supp. 2004-2005).

[9] Tex. Ins. Code Ann. § 38.002 (Vernon Supp. 2004-2005).

[10] Tex. Ins. Code Ann. § 912.201 (Vernon Supp. 2004-2005).

[11] Tex. Ins. Code Ann. art. 21.49, § 3(k) (Vernon Supp. 2004-2005).

[12] Tex. Ins. Code Ann. art. 5.144 (Vernon Supp. 2004-2005).

[13] Tex. Ins. Code Ann. art. 912.002 (Vernon Supp. 2004-2005).

[14] Tex. Ins. Code Ann. arts. 5.13-2, § 13, § 21.81 (Vernon Supp. 2004-2005).

[15] Tex. Ins. Code Ann. art. 21.49-3 (Vernon Supp. 2004-2005).

[16] Tex. Ins. Code Ann. art. 5.03-1 (Vernon Supp. 2004-2005).

[17] Tex. Ins. Code Ann. art. 5.01-1 (Vernon Supp. 2004-2005).

[18] www.taipa.org.

[19] Tex. Ins. Code Ann. art. 5.13-2, § 13 (Vernon Supp. 2004-2005).

[20] Tex. Ins. Code Ann. arts. 5.13-2, § 13, § 21.81 (Vernon Supp. 2004-2005).

[21] www.tdi.state.tx.us/commish/bulletins/b-0028a-4.html.

[22] www.tdi.state.tx.us/commish/rules/1018-059.html.

[23] www.taipa.org.

[24] Tex. Ins. Code Ann. art. 5.13-2, § 13 (Vernon Supp. 2004-2005).

[25] www.tdi.state.tx.us/commish/bulletins/b-0028a-4.html.

[26] *Id.*

[27] *Id*.

[28] www.tdi.state.tx.us/commish/rules/1018-059.html.

[29] *Id.*

[30] *Id.*