

Arkansas Insurance Department

Asa Hutchinson
Governor



Allen Kerr
Commissioner

September 14, 2018

Aaron Schulenburg
SCRS Executive Director
P.O. Box 909
Prosser, WA 99350

VIA Electronic Mail: aaron@scrs.com

RE: SCRS request for information on Arkansas OEM part replacement policies and procedures

Dear Director Schulenburg,

Thank you for your questions concerning claims settlement practices in Arkansas. In general, Arkansas' unfair claims settlement practices law under the Trade Practices act at Ark. Code Ann. §§ 23-66-101 et seq., and Department Rule 43, Unfair Claims Settlement Practices are almost identical to the NAIC Model as to unfair claims. Outside of the Arkansas Insurance Department's (AID) jurisdiction, the Arkansas Attorney General is the state's chief law enforcement agency.

I understand your concerns stem from the decision reached in *Seebachan v. John Eagle Collision Ctr.*, No. DC-15-09782 (Tex. Dist. Ct. Dallas Cnty. Oct. 2, 2017) in which a collision repair center was found to be grossly negligent for failing to follow the manufacturer's repair guidelines stating that a roof be welded, as opposed to being glued. In that case, there was testimony that the plaintiff's insurer specifically dictated the procedures the repair shop should use and those were the procedures that were found to be negligent. The plaintiffs alleged that the collision center and insurer violated the Texas Deceptive Trade Practice Act (DTPA).

Arkansas has its own Deceptive Trade Practices Act (ADTPA), codified at Ark. Code Ann. §§ 4-88-101 et seq., that the Arkansas Attorney General has the authority to enforce.

As to your specific questions:

Q: 43. Is your department charged with consumer protection and the entity who serves as the regulatory agency to govern and supervise the business of insurance in your state?

A: Yes. AID is the primary regulator as to the business of insurance in Arkansas.

Q: 44. Are claims settlement practices a part of that regulatory oversight?

A: Yes. AID is the primary regulator as to allegations of unfair claims settlement practices in Arkansas as articulated in Ark. Code Ann. § 23-66-206 and AID Rule 43.

Q: 45. In many cases, vehicle manufacturers provide specific instructions and documented procedures on how repair and replacement operations are to be performed to produce a safe and proper repair. As evidenced in the *SEEBACHAN v. JOHN EAGLE COLLISION CTR* case in TX, failure of the facility performing the repair to follow these procedures can result in catastrophic loss, and incur avoidable liability that negatively impacts garage insurers. Many state laws relevant to insurer claims settlement rely on subjective terms such as "reasonable" as a means of satisfying their obligations.

- a. Is there anything that holds insurers and insurance policies sold in your state accountable to recognize manufacturer documented procedures as a basis for settling claims and loss indemnification?**

A: AID Rule 43, Unfair Claims Settlement practice, requires: in Part 10 § 3(e)

When the insurer elects to repair, and, with the insured's written consent, a specific repair shop is selected, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss at the estimate cost with no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.

The term "restored to its condition prior to the loss" has no further definition or interpretation. Likewise the rule, as is the statute, is silent as to whether an insurer should follow the manufacturer's specifications as to how to restore an automobile where it is as safe as it was prior to the loss.

While the Arkansas law and AID Rule 43 do not explicitly refer to manufacturers repair procedures, the Arkansas Insurance Code has disclosure requirements if and when an insurer requires the use of aftermarket parts and the disclosure must be included in the consumer's automobile insurance policy or affixed via sticker as per Ark. Code Ann. § 4-90-307. The disclosure requires the policy must state that aftermarket parts will be "equal in terms of fit, quality, performance, and warranty" to the original manufacturers parts.

Where proper notice has been given, there are no requirements for an insurer to pay for OEM parts. However, where an automobile is still under its original warranty, a repair facility may not use aftermarket parts without express written consent from the consumer. See Ark. Code Ann. § 4-90-306. Aside from the required policy disclosure, AID is not the regulator or enforcer as to this statute.

Q: 46. Would your department consider it a "reasonable" expectation that if an OEM repair procedure or instruction existed, that the claim should cover the associated costs?

A: AID does not have any rules or documented interpretation of a statute that addresses this question. Only considering compliance with AID Rule 43, if an insurer directs a repair facility not to follow OEM repair safety procedures used to install a OEM part, but the vehicle is shown to have been "restored to its condition prior to the loss" then such a decision may be considered to be reasonable. Conversely if failure to use OEM guidelines resulted in a vehicle that was not "restored to its condition prior to the loss," failure to follow such guidelines would not be reasonable.

Q: 47. Would your department expect consumers to be clearly notified through exclusions in the policy where costs associated with documented OEM procedures would not be covered; otherwise, allowing a consumer to reasonably assume they would be?

A: The statute, as previously discussed, only requires notice where aftermarket, as opposed to OEM parts will be used. The Arkansas Insurance Code and Rule 43 are silent as to the use or non-use of OEM procedures, and therefore no such policy provision would be expected or required.

Q: 48. If there is a dispute between a consumer and their insurance carrier over the cost to restore their vehicle to pre-loss condition in accordance with manufacturer documented procedures, is your department the correct one to address those issues and provide consumer protection?

o. If yes, please explain?

A: Yes, AID is the primary regulator as to issues of compliance with Rule 43, which requires an insured vehicle being repaired to be "restored to its condition prior to the loss." Insureds would file a Complaint with AID on issues involving an insurer refusing to fully restore a damaged vehicle that was not a total loss.

p. If no, who is the appropriate consumer protection body to do so?

A: As discussed previously, AID does not specifically, through rule or statute, address the procedures, as opposed to parts, to be used to achieve the requirement to be "restored to its condition prior to the loss." AID is the one to enforce any violations under the laws and rules pertaining to insurance. Any alleged violation of the ADTPA would not be investigated or enforced by AID, but instead by the Arkansas Attorney General's office or addressed in private civil litigation.

Thank you for your inquiry. If you have any further questions, please contact me directly suzanne.tipton@arkansas.gov.

Sincerely,



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