

The official publication of the Auto Body Association of Texas (ABAT)

# TEXAS AUTOMOTIVE™



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## PROPER PARTS, PROTECTED CONSUMERS: ABAT BILLS MAKE WAVES IN AUSTIN

### **PLUS:**

- *An OEM Repair Victory*
- *Weathering the Storms*
- *Back to Busy*



## WHAT IS THE PREVAILING PRACTICE AND HOW IS IT DETERMINED?

Dear Mr. McDorman:

I operate a collision facility in East Texas. We are OEM-certified for each make and model that we repair. We always completely disassemble our clients' vehicles and write a complete repair plan as outlined by the manufacturer guidelines to present to the carrier. Many times each month, while working with our clients' insurance carrier and discussing the needed operations and procedures to return their vehicles to pre-loss condition, we are told some of the OEM-required operations and procedures we have listed in our repair plan are not considered prevailing practice in our market. I don't understand how it is possible that a carrier will recognize certain operations and procedures in one market and not in another. Regardless of the carriers' prevailing practice methodology, we have a duty to our clients to perform the repairs as stated under the OEM guidelines. When a client's carrier takes this position and refuses to accept liability for these required operations and procedures that it deems are not the prevailing practice in our market, it always leaves our client owing a balance on top of their deductible to return their vehicle to its pre-loss condition.

My question is, what is the prevailing practice, and how is the prevailing practice determined?

This is a great question. The prevailing practice is an industry standard for operations and procedures recognized as a liability by the carrier in a specific market area by a specific group of collision repair facilities. I understand the prevailing practice is based on the average prevailing practices from a selected group of collision facilities in a specific market area. The prevailing practice from carrier to carrier is determined by their own internal methodology; to my knowledge, their assumptions and methods are never disclosed. Also, the policy language about the prevailing practice varies from carrier to carrier. We routinely see carriers use the prevailing practice methodology to escape liability.

In 2018, I attended several meetings with the Texas Department of Insurance (TDI) over under-indemnification issues. When the prevailing practice issue was brought up during the meeting, the Deputy Commissioner stated, "We do not recognize or monitor the prevailing practice or prevailing rate. We call this 'the black box.'" So, apparently even TDI has no idea what goes into determining these "prevailing practices."

In support of your question about the prevailing practice methodology, I recently had an in-depth conversation about this topic with a USAA senior insurance manager who presides over 14 states. His exact words were, "The market sets the prevailing practice." My response was, "So, if 99 collision facilities are performing a specific operation and not asking to be paid for it, and one shop is performing the operation and asking to be paid for it, because the 99 shops are not asking to be paid for what they have

done, this penalizes the one shop that performs the operations and does ask to be paid for it, and you will not pay them?" His response was, "Yes, it is our policy right." In my professional opinion, the prevailing practice methodology used by carriers can be best described as a "black box used to escape liability."

The insured has the absolute right to request the prevailing practice methodology, supporting documents and the data to support the carrier's claimed prevailing practice used to fund its undisputed liability. Any such assertions on behalf of the carrier or their representatives as to what they are or are not liable for must be supported and documented as a policy right of the insured. As the writer of the contract, the burden of proof falls on the carrier, and the carrier must support its prevailing practice methodology assertions and be held accountable for any short gaps and/or misrepresentations of such. Unfortunately, this rarely (if ever) happens.

What is happening here is that the insurance carrier is using an asserted but unsubstantiated prevailing practice dictate to administer claims that are not accurate, credible or supported by facts. It is crystal clear to me as a public insurance adjuster that there is a potential indemnity issue any time a certified shop is performing OEM-authorized repair operations and procedures and the carrier pays only for operations that are consistent with market prevailing practices according to its unregulated prevailing practice black box. In each case where the insured is having to pay a difference between the OEM-approved repair plan and the insurance carrier's perceived prevailing practice, the insurance carrier has under-indemnified the claim and not made the insured whole.

Any algorithm for determining something as broad and vague as "prevailing practice" must contain many assumptions and much subjectivity. Without knowing what is in the black box, we can reasonably guess that all of the assumptions and subjectivity are used to bias the output in the carrier's favor. Any time there is this kind of subjectivity, we must be able to obtain the proper



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documents and employ appropriate resources to identify and understand the differences. If this can't be done to the insured's satisfaction, the insured has the option to invoke their right of appraisal in most policies in contest of the loss statement presented by the insurer. **The Appraisal Clause** in most policies allows loss disputes over a covered loss to be resolved amicably by appraisers or two appraisers and an umpire.

The under-indemnification in total loss and repair procedure claims in Texas is rampant. Besides the higher settlements for total loss clients averaging 28 percent above the carrier's undisputed loss statement, we have also reduced clients' out-of-pocket expenses by an average of 35 percent on repair procedure disputes. These under-indemnification percentages are staggering and harmful to Texas citizens.

Please call me should you have any questions relating to the policy or covered loss. We have most insurance policies in our library. Always keep in mind a safe repair is a quality repair, and quality equates to value. I thank you for your question and look forward to any follow-up questions that may arise.

Sincerely,

Robert L. McDorman  
TXA

## Executive Director's Message

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appropriate that we would choose a location that had ties to the auto industry, but that's not at all why we chose this magnificent location.

On its website, Toyota Music Factory touts itself as an "experience" and a "world-class entertainment destination" – and for good reason, too. Home to over 15 bars, unique restaurants and entertainment facilities, it is a fun place to go. It has axe throwing, Cajun food, a wine cellar, a honky tonk, a cinema, a Brazilian steakhouse, pizza, desserts and so much more. It also has its own calendar of events, with live music happening in several places onsite, including the lawn area located right in the center of it all.

It's not all hustle and bustle, though; there are plenty of places to relax and unwind – especially in our host hotel, Texican Court. I can't wait to share more information with you about this super-cool, Texas-themed boutique hotel that is located just steps away from the Show. Be on the lookout for more information on the hotel, the Show and its educational offerings in the coming months.

See you in September!

*Jill Juggle*

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TXA

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