

**SUBCHAPTER W. CONSUMER PROTECTION REQUIREMENTS**  
**Consumer Bills of Rights**  
**28 TAC §5.9970**

**1. INTRODUCTION.** The commissioner of insurance adopts amendments to Subchapter W, §5.9970, concerning the Consumer Bills of Rights. The commissioner adopts the amendments to §5.9970 with changes to the proposed text published in the May 4, 2012, issue of the *Texas Register* (37 TexReg 3345).

**2. REASONED JUSTIFICATION.** The Texas Department of Insurance received petitions from the Office of Public Insurance Counsel, requesting the adoption of revised Consumer Bills of Rights for Personal Automobile Insurance (BRPA) and Homeowners, Dwelling, and Renters Insurance (BRHO). Insurance Code §501.156 requires OPIC to submit to TDI for adoption a consumer bill of rights appropriate to each personal line of insurance TDI regulates. An insurer must distribute the appropriate bill of rights to each policyholder upon issuance of a policy under TDI rules.

The revised BRPA and BRHO are necessary to ensure that insurers distribute up-to-date consumer rights information to current and future policyholders. The Spanish language translations of the revised BRPA and BRHO ensure that the information is available to policyholders whose primary language is Spanish. The revised bills of rights are set forth in Figure 1: 28 TAC §5.9970(b), Figure 2: 28 TAC §5.9970(b), Figure 1: 28 TAC §5.9970(d), and Figure 2: 28 TAC §5.9970(d) of this adoption. TDI adopted the current versions of the BRPA and BRHO on April 19, 2005. The revisions contain changes due to legislative acts and regulatory actions that affect

the rights of insurance consumers, as well as nonsubstantive editorial changes.

Insurers may begin providing the revised BRPA and BRHO immediately after adoption.

Insurers must provide the revised BRPA and BRHO on and after January 31, 2013.

On June 26, 2012, TDI held a hearing on the proposal to amend §5.9970. In response to written comments and comments made at the hearing, TDI has made the following changes to the proposed section. TDI has changed the definition of “insurer” in 28 TAC §5.9970(a) to clarify that it does not include the Texas Windstorm Insurance Association or the Texas Fair Plan Association. TDI has also changed 28 TAC §5.9970(c) and (e) to allow consumers to request electronic copies of those documents instead of receiving hard copies. Finally, TDI has changed the language in BRHO #29 and BRPA #24 to clarify the insured’s options if the insured disagrees with a settlement offer.

**3. HOW THE SECTION WILL FUNCTION.** Section 5.9970 adopts the revised BRPA and BRHO in English and Spanish. The section defines “insurer” and requires insurers to provide copies of the BRPA and BRHO to insureds. The revised BRPA and BRHO summarize consumers’ existing rights in clear, accurate terms. They are not all-inclusive statements of rights, and they do not grant additional rights or impose obligations not based in statute or rule. Since TDI adopted the current versions of the BRPA and BRHO on April 19, 2005, legislative acts and regulatory actions have affected the rights of insurance consumers, as stated in the BRPA and BRHO. The adopted section and revisions to the BRPA and BRHO ensure that consumers receive relevant, up-to-date information.

#### 4. SUMMARY OF COMMENTS AND AGENCY RESPONSE TO COMMENTS.

**Comment:** Two commenters requested that TDI amend §5.9970(a) to clarify that the definition of “insurer” does not include TWIA and TFPA, because neither of those organizations qualify under the definition of “insurer” in Insurance Code §2301.051(1), which applies to this rule.

**Agency Response:** TDI has changed the definition of “insurer” in §5.9970(a) to exclude TWIA and TFPA. Insurance Code §2301.052, which forms part of the statutory basis for §5.9970, includes the definition of “insurer” in §2301.051(1). That definition specifically excludes TWIA and TFPA. TWIA and TFPA do not currently provide copies of the BRHO and BRPA with their policies because many of the rights in the BRHO and BRPA do not apply to TWIA and TFPA policies. In contrast, the Texas Automobile Insurance Plan Association, while also not included in the definition of “insurer” in §2301.051(1), does not issue policies. Instead, it assigns risks to participating automobile insurers, who then issue policies and provide copies of the BRPA to their policyholders. Unlike TWIA and TFPA, the rights summarized in the BRPA apply to policyholders assigned through TAIPA, so it is logical for those policyholders to receive copies of the BRPA in accordance with §5.9970.

**Comment:** A commenter requested that TDI clarify BRPA #27, Choice of Repair Shop and Replacement Parts. Several commenters requested that TDI add to BRPA #9, Notice of Reduced Coverage, the language “such as the use of aftermarket new or used parts,” or “repair shop from a list of approved shops.” The commenters also requested that TDI add to BRPA #27 the language “of your choice” after “shop.” Another

commenter requested that TDI not add the “of your choice” language, observing that 28 TAC §5.501 already requires disclosure as to the insured’s right to select a repair shop. The commenter stated that repeating the disclosure, which the insured has already received, in the BRPA would be duplicative.

**Agency Response:** TDI disagrees that the language in BRPA #27 needs clarification. In accordance with the stated definition of the BRPA as a summary of rights, BRPA #27 clearly, concisely, and accurately summarizes the consumer rights afforded by Insurance Code Chapter 1952, Subchapter G, Repair of Motor Vehicles.

TDI declines to add the phrase “such as the use of aftermarket new or used parts” to BRPA #9. If the policy states that the insured vehicle may be repaired with parts of like kind and quality (LKQ), using LKQ parts would not reduce coverage under the policy.

TDI declines to add the phrase “repair shop from a list of approved shops” to BRPA #9 because Insurance Code §1952.301 already prohibits an insurer from limiting the policyholder’s selection of a repair person or facility to repair damage to the vehicle. Adding the requested limitation to the BRPA would be confusing and unnecessary.

TDI declines to add the phrase “of your choice” after “shop” to BRPA #27. BRPA #27 already states that the insured has the right to choose the repair shop and replacement parts for the vehicle.

**Comment:** Several commenters requested that TDI define the terms “fair and reasonable,” “fairly and honestly,” “unfair,” and “promptly.” Another commenter responded that the definition of terms like “reasonable” depends on the facts, so defining them in the BRPA would be unwise.

Several commenters stated that insurers are not paying for proper repairs. They asserted that unreasonable insurer claim payment amounts are an unfair settlement practice; that insurers are not paying for repairs that the manufacturers say are necessary; that the insurers' willingness to pay for replacing parts is partly based on cost to replace; and that using used structure and suspension parts is a safety issue.

Several commenters requested that TDI amend BRPA #27 to define "reasonable amount." The comment refers to the notice to claimants regarding motor vehicle repairs mandated by 28 TAC §5.501, which states that an insurance company is not required to pay more than a reasonable amount for repairs and parts. The commenters requested that BRPA #27 define "reasonable amount" as the manufacturer's suggested retail price of the original equipment manufacturer (OEM) part. The commenters asserted that consumers expect OEM parts, that only OEM parts are LKQ, and that the use of non-OEM parts could void manufacturer warranties. The commenters questioned the worth of the LKQ part certification and requested that TDI require a notice concerning the use of non-OEM parts.

Another commenter responded that consumers can choose the part used to repair the vehicle. If the selected part costs more than the insurer's estimated cost for that part, the consumer can pay the difference. The commenter asserted that insurers do not require LKQ parts for "safety parts," that using LKQ parts is "green," and that using OEM parts does not guarantee that the repair shop will not have to return and reorder parts due to damage or bad fit.

**Agency Response:** As stated in TDI's response to the previous comment, the BRPA is a summary of existing rights. It does not grant additional rights or impose obligations

not based in existing law. TDI cannot incorporate the requested language into the BRPA because there is no basis in statute or rule for the requested language.

Additionally, in using the terms “reasonable,” “fair and reasonable,” “fairly and honestly,” “unfair,” and “promptly,” the legislature created a flexible system to address multiple situations. Attempting to fit all possible factual scenarios into a universal definition of fairness, honesty, or reasonableness is not practical. Determining what these terms mean in a particular situation is one of the duties of the courts.

Whether an insurer’s claim payment is proper or reasonable, or whether a repair is necessary in any given situation depends on the specific facts of that situation. The manufacturer’s guidelines may be evidence of necessity, but that determination, if disputed, must be made by a finder of fact. An insurer’s motivation for paying to replace a part is not relevant; what is relevant are the insurer’s actions. What constitutes a safety issue is also a question of fact. Section 5.9970 cannot address these factual issues.

With regard to the definition of “promptly,” Insurance Code §§542.051-061 address prompt payment of claims. Copying these statutes into BRPA #26, Time Frames for Claim Processing and Payment, would unnecessarily lengthen and complicate the BRPA. The general guidelines for the deadlines applicable to most auto claims that BRPA #26 provides suit the purpose of the BRPA as a summary of rights.

Asserting that the only reasonable amount is the OEM price is also inconsistent with Insurance Code §1952.301, which does not require insurance companies to pay for new OEM parts in every situation. TDI has consistently stated that Insurance Code §1952.301 does not abrogate the language in automobile insurance policies that allows

insurers to pay for repairs using LKQ parts. In *Berry v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884 (Tex.Ct.App.2000), the court of appeals supported TDI's construction of Article 5.07-1 (which was later recodified as Insurance Code §1952.301), holding that the statute does not require insurance companies to pay for new OEM parts in the satisfaction of all legitimate claims.

In the *Berry* decision, the court noted that the legislature was aware of concerns that the use of non-OEM parts could void existing warranties, and ultimately held that LKQ parts may be used to satisfy claims. Thus, there is no statutory basis for TDI to require a notice with regard to the use of non-OEM parts. Whether the use of non-OEM parts could void manufacturer warranties is an issue for the claimant to consider, but not necessarily one that affects coverage. TDI agrees that insureds can request that the repair shop use only OEM parts on their vehicles and pay the difference between the LKQ and OEM prices.

**Comment:** A commenter requested that TDI allow a six-month period between the adoption date of the rule and its effective date. Another commenter requested that TDI adopt §5.9970 as proposed and published, with a three-month period between the adoption date of the rule and its effective date.

**Agency Response:** TDI agrees that a transition period is warranted. Insurers may begin providing the revised BRPA and BRHO immediately after adoption. Insurers must provide the revised BRPA and BRHO on and after January 31, 2013.

**Comment:** A commenter requested that TDI amend §5.9970(e) to allow policyholders the option of receiving the bills of rights electronically, or to opt out of receiving the

documents at each renewal. Another commenter suggested that electronic distribution should be on an opt-in basis.

**Agency Response:** Electronic distribution of the BRPA and BRHO on an opt-in basis is consistent with Insurance Code §§35.001-004. Insurance Code §35.003 allows a regulated entity to conduct business electronically to the same extent that the entity is authorized to conduct business otherwise if before the conduct of business each party to the business agrees to conduct the business electronically. TDI has changed §5.9970(c) and §5.9970(e) to specifically allow policyholders to receive the BRPA and BRHO electronically, provided that they must affirmatively inform the insurer of that choice.

TDI declines to amend §5.9970(c) or §5.9970(e) to allow policyholders to opt out of receiving the BRPA or BRHO at each renewal, because such an amendment would be unnecessary. Section 5.9970(c) and §5.9970(e) already state that the insurer must provide the bill of rights with each renewal notice for any such insurance unless the insurer has previously provided the insured with a copy. Thus, the insured would only receive a copy of the BRPA or BRHO at renewal if he or she had not already received one, making it unnecessary for the insured to affirmatively opt out at each renewal.

**Comment:** A commenter requested that TDI amend BRPA #24 and BRHO #29 to state that an insurer has no duty to change its offer if the insurer determines that the offer is reasonable and appropriate.

**Agency Response:** TDI concurs that no statute requires an insurer to change its offer under those circumstances. Because an affirmative statement of options is more helpful to consumers than a statement that an insurer has no duty to act, TDI has



changed BRPA #24 and BRHO #29 to clarify the insured's options if the insured disagrees with a settlement offer, rather than merely stating what the insurer is not obligated to do.

**Comment:** Several commenters asserted that automobile policy changes should be in writing.

**Agency Response:** Insurance Code Article 5.06(2) already requires insurers to confirm automobile policy changes in writing. Article 5.06(2) states in part, "A contract or agreement not written into the application and policy is void and of no effect and in violation of the provisions of this subchapter."

**Comment:** Several commenters stated that insurers total cars to their benefit, and requested that TDI add a section to the BRPA regarding total loss vehicles. The commenters stated that the Department of Public Safety's owner-retained report refers to penalties for a "person," which leaves out insurance companies.

**Agency Response:** There is no explicit statutory or rule authority for adding a section to the BRPA regarding total loss vehicles. The BRPA is a summary of existing rights. It does not grant additional rights or impose obligations not based in existing law. For the BRPA to contain a section regarding total loss vehicles, there must first be a law or a rule creating those rights. TDI cannot comment on the Department of Public Safety's actions or reports.

**Comment:** Several commenters requested that TDI change "may" to "shall" in BRPA #36, Right to Sue.

**Agency Response:** TDI declines to change BRPA #36 to assert that aggrieved policyholders can always sue, because it would be inaccurate. In order to sue, the

complainant must meet certain legal criteria, such as standing and a valid cause of action.

**Comment:** Several commenters requested that TDI change BRPA #37, asserting that in court, the plaintiff has the burden of proof.

**Agency Response:** TDI declines to make the requested change to BRPA #37 (Burden of Proof). BRPA #37 accurately restates Insurance Code §554.002, which states, “In a suit to recover under an insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer or health maintenance organization constitutes an avoidance or an affirmative defense.”

**Comment:** Several commenters requested that TDI change BRPA #38, Requesting New Rules, to refer to the statutory or rule authority requirement and include persuadability.

**Agency Response:** TDI declines to make this change. The basis for the commenters’ request relates to correspondence from TDI about a previous rule request pertaining to the BRPA. TDI received the request and responded that staff did not find statutory authority that would support it, but that the requester could request a hearing on this rule and attempt to make a persuasive case for the requested amendment. The commenters appear to have misinterpreted TDI’s use of “persuasive” in the letter. TDI’s use of “persuasive” in the context of requesting rule language refers to persuasion by

arguing that an existing statute or rule mandates or allows the requested language. The language in BRPA #38 is accurate and clear.

**Comment:** Several commenters stated that they like the proposed changes.

**Agency Response:** TDI appreciates the comment.

**Comment:** Several commenters requested that TDI create an auto repair industry advisory board, and that TDI should educate its staff on repair shop operations.

A commenter asserted that insurers manipulate repair shop tickets with their estimates to avoid taxes.

A commenter requested that TDI require that the consumer sign a separate notice regarding the use of non-OEM parts and its possible effects on the consumer's vehicle warranty.

A commenter requested a new requirement that insurers notify consumers of the differences between company procedures in dealing with direct repair program (DRP) and independent shops.

Several commenters asserted that insurers must be improperly steering insureds to DRPs; that DRP agreements are one-sided, unfair, and bad for consumers; and that insurers blame delays on non-DRP body shops. The commenters asserted that insurers pay steering fees, so they must be acting improperly.

Several commenters stated that the TDI complaint process is ineffective, that TDI should act on behalf of consumers that cannot hire an attorney to force insurers to reconsider appraisals, and that TDI should rule in favor of every complainant, leaving insurers to sue if they think the complainant is wrong.

Several commenters stated that labor rates should be higher. The commenters asserted that insurers should give repair shops a 15% deviation on labor rates. They stated that materials prices have increased, but labor rates have not increased at the same rate, because DRP agreements keep labor rates down. They requested that TDI conduct a labor rate study.

A commenter asserted that insurers are not training or paying adjusters adequately.

Several commenters stated that insurers delay repairs, requesting that TDI mandate timelines for the appraisal process and for supplemental claims. A commenter responded that insurers have no incentive to delay repairs, because costly car rental coverage motivates insurers to expedite repairs.

Several commenters stated that insurers delay repairs by basing estimates on out-of-town suppliers' prices, and requested that TDI require insurers to use local sources to supply parts for auto repairs. Another commenter responded that restricting insurers to local suppliers would limit part availability, decrease competition, and increase costs. The commenter stated that pre-paying for remotely purchased parts is part of the cost of doing business, and that consumer remedies exist when the shop does not get the product it purchased.

**Agency Response:** TDI notes the comments, but the comments are beyond the scope of §5.9970. The purpose of §5.9970 is to adopt the revised BRPA and BRHO, and to require insurers to provide them to policyholders. The BRPA and BRHO summarize existing rights. They do not grant additional rights or impose obligations not based in existing law.

With respect to complaints, §5.9970 does not affect the TDI complaint process.

TDI can and does take action on justified complaints. However, complaints as to coverage and the amount of loss often involve questions of law and fact that the courts must resolve.

With respect to labor costs, TDI does not regulate labor rates or materials costs.

With respect to adjuster management, Insurance Code §4101.053 sets out the requirements for an adjuster license, and §4101.059 discusses continuing education for adjusters. What constitutes “adequate” payment for an adjuster is a question of fact.

With respect to appraisal timelines, there is no statutory authority for TDI to mandate detailed timelines for insurers to appraise damaged vehicles.

With respect to out-of-town suppliers, there is no statutory basis for requiring insurers to use local sources to supply parts for auto repairs.

## **5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTION.**

**For with changes:** Office of Public Insurance Counsel; Texas Windstorm Insurance Association; Texas Fair Plan Association; Nationwide Insurance and Financial Services; Houston Auto Body Association; Deer Park Paint and Body; United Services Automobile Association; Autocraft; Roadrunner Body and Paint; and four individuals.

**6. STATUTORY AUTHORITY.** TDI adopts the amendments to §5.9970 pursuant to Insurance Code §§501.156, 2301.052, 2301.055, and 36.001. Section 501.156 requires OPIC to submit to TDI for adoption a consumer bill of rights appropriate to each personal line of insurance TDI regulates. These bills of rights are to be distributed on

issuance of a policy by an insurer to each policyholder under TDI rules. Section 2301.052(a) states that, notwithstanding any other provision of the Insurance Code and except under specific circumstances, Chapter 2301, Subchapter A applies to an insurer with respect to insurance policy forms and endorsements for personal automobile insurance and residential property insurance. Section 2301.055 grants the commissioner the authority to adopt reasonable and necessary rules to implement Subchapter A. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

## 7. TEXT.

### **§5.9970. Responsibility and Obligation of Insurers To Provide Copies of the Consumer Bills of Rights to Each Insured for Personal Automobile Insurance and for Homeowners, Dwelling and Renters Insurance.**

(a) For purposes of this section, insurer(s) means an insurance company, reciprocal or interinsurance exchange, mutual insurance company, capital stock company, county mutual insurance company, Lloyd's plan, or other legal entity authorized to write personal automobile insurance or residential property insurance in this state. The term includes an affiliate, as described by §823.003(a) of the Insurance Code, if that affiliate is authorized to write and is writing personal automobile insurance or residential property insurance in this state. The term does not include the Texas Windstorm Insurance Association or the Texas Fair Plan Association.

(b) The Texas Department of Insurance adopts the “Consumer Bill of Rights Personal Automobile Insurance” (BRPA – Revised 2012), and the Spanish language translation:

FIGURE 1: 28 TAC §5.9970(b)

FIGURE 2: 28 TAC §5.9970(b)

(c) All insurers writing personal automobile insurance policies must provide with each new policy of personal automobile insurance a copy of the BRPA – Revised 2012. At the consumer’s request, the insurer may provide an electronic copy of the BRPA – Revised 2012 instead of a hard copy. The insurer must provide the BRPA – Revised 2012 with each renewal notice for personal automobile insurance unless the insurer has previously provided the insured with the BRPA – Revised 2012. The BRPA – Revised 2012 must appear in no less than 10 point type and be on separate pages with no other text on those pages. The insurer must provide the Spanish language version of the BRPA – Revised 2012 to any consumer who requests it from the insurer. You may request a copy of the BRPA – Revised 2012 from the Texas Department of Insurance, Mail Code 104-1A, P.O. Box 149104, Austin, Texas 78714-9104 or from the Texas Department of Insurance website at [www.tdi.texas.gov](http://www.tdi.texas.gov).

(d) The Texas Department of Insurance adopts the “Consumer Bill of Rights Homeowners, Dwelling and Renters Insurance” (BRHO – Revised 2012), and the Spanish language translation:

FIGURE 1: 28 TAC §5.9970(d)

FIGURE 2: 28 TAC §5.9970(d)

(e) All insurers writing homeowners, renters, or dwelling insurance must provide with each new policy of any such insurance a copy of the BRHO – Revised 2012. At the consumer's request, the insurer may provide an electronic copy of the BRHO – Revised 2012 instead of a hard copy. The insurer must provide the BRHO – Revised 2012 with each renewal notice for any such insurance unless the insurer has previously provided the insured with the BRHO – Revised 2012. The BRHO – Revised 2012 must appear in no less than 10 point type and be on separate pages with no other text on those pages. The insurer must provide the Spanish language version of the BRHO – Revised 2012 to any consumer who requests it from the insurer. You may request a copy of the BRHO – Revised 2012 from the Texas Department of Insurance, Mail Code 104-1A, P.O. Box 149104, Austin, Texas 78714-9104 or from the Texas Department of Insurance website at [www.tdi.texas.gov](http://www.tdi.texas.gov).

**CERTIFICATION.** This agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on November 2, 2012.



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Sara Waitt, General Counsel  
Texas Department of Insurance

The commissioner orders that the amendments to §5.9970 are adopted. Insurers may begin providing the BRPA – Revised 2012 and the BRHO – Revised 2012 immediately



# 12-0862

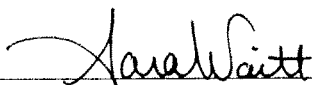
TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Section  
Page 17 of 17

after adoption, and must provide them with policies issued or renewed on or after January 31, 2013.

  
ELEANOR KITZMAN  
COMMISSIONER OF INSURANCE

ATTEST:

  
Sara Waitt, General Counsel  
Texas Department of Insurance

COMMISSIONER'S ORDER NO. **12-0862**  
NOV 05 2012