

Automotive “Black Boxes”: Why Insurance Carriers Cannot Afford to Ignore Them
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EVENT DATA RECORDER (“BLACK BOX”) BASICS:

An automotive event data recorder (“EDR”) commonly referred to as a “black box,” is a device installed on most passenger vehicles that is usually a function of the airbag control module. It records from 2 to 25 seconds of collision related data that may help determine speed, braking activity, stopping distance, impact severity, occupant kinematics, steering, avoidance measures, number and sequence of collisions, seat belt usage, airbag deployment and more. The devices are designed to store data following airbag deployment events, and non-deployment events where the change of velocity (Delta V) of the event is severe enough to “wake up” the system (usually 2- 4 mph).

PUBLIC AVAILABILITY:

While current commercial or “public” access to such data is limited to some GM, Ford and Chrysler models (about one third of vehicles on the road), the National Highway Traffic and Safety Administration (“NHTSA”) recently finalized regulations (49 CFR Part 563) requiring all manufacturers to make such data “publicly” accessible by September 2012 and setting minimum data element recording standards. Several models exceed and will continue to exceed these minimum standards. Manufacturers will also be required to publish a notice of the presence of an EDR device in all vehicle owner manuals.

Although the NHTSA regulations do not require the installation of EDRs, NHTSA stated that a mandate was not imposed because of the strong voluntary trends toward installation. NHTSA estimates that about 64% of 2004 models have EDRs, and that about 85% of the 2010 models will have EDRs. However, should those trends be reversed, NHTSA made it clear it would reconsider mandatory installation. In addition, several more manufacturers are expected to meet standards and provide public access ahead of the NHTSA deadline in order to “practice” compliance before the regulations go into effect, thereby averting the risk of not being allowed to sell a non-compliant model. Given these factors, it is reasonable to assume that within the next few years, the commercial availability of EDR data will increase dramatically and will become standard evidence in the investigation and reconstruction of passenger vehicle collisions.

CURRENT LEGAL ENVIRONMENT:

Currently, there are twelve states that have statutes governing the retrieval and use of EDR data.¹ While some of the statutes are more restrictive than others, they all deem the owner of the vehicle to be the owner of the data, and they all allow access by third parties via the owner’s written consent or court order. More legislation is expected to follow. While use of EDR data in

¹ Those states include Arkansas, California, Colorado, Connecticut, Maine, Nevada, New Hampshire, New York, North Dakota, Oregon, Texas and Virginia.

court cases has thus far been infrequent, its use is becoming more common, and it has been admitted into evidence by every court represented in the published cases. In addition, the history of its general acceptance and use by governmental bodies, engineers, and the automobile industry suggests that EDR data will continue to be easily accepted into evidence. Several courts have even suggested that expert testimony may no longer be necessary for its admission.

INSURANCE INDUSTRY CONSIDERATIONS:

There is concern in the insurance industry that while the data would be helpful in the determination of liability in a collision, retrieving the data could end up proving liability against an insured that would otherwise not have been proven, and in some cases could potentially result in exposure in excess of coverage. These risks tend to encourage a “wait and see” attitude among some insurance carriers. However, growing public availability and awareness of EDR data may create a greater risk in ignoring it.

A. Duty to Investigate

Insurance carriers have a duty to properly investigate claims filed under their policies. Given the relevance of EDR data in accident reconstruction, not obtaining available EDR data could be deemed a failure to properly investigate, which carries its own set of liabilities. As public awareness of the availability of EDR data becomes common knowledge, questions about why data was not retrieved will follow. Expectations of EDR data collection on contested cases will eventually become standard given the objectivity and reliability of EDR data over subjective driver/witness statements or police reports.

On claims where liability is not contested but the severity and/or injury potential of an accident is, EDR data may provide convincing evidence of the accident’s severity. Currently, most EDRs record events with a Delta V of at least 2 – 4 mph. NHTSA’s minimum standards require the recording of EDR data on events with a Delta-V exceeding 4.9 mph. Therefore, retrieval of EDR data could yield the actual Delta-V experienced in a given event, *or by the absence of any stored data*, evidence that the Delta-V was less than the minimum threshold, thereby confirming a “low severity” collision.

B. Duty to Preserve

All parties have a duty to preserve evidence in their possession or control when they have reason to believe it may be relevant to a potential claim. Therefore, when a carrier takes possession of a vehicle as part of a property claim settlement, if injury claims exists or could develop, the carrier has a duty to preserve any evidence, including EDR data that could be relevant to resolution of those injury claims. While some state laws prevent the “retrieval” of EDR data on vehicle’s “purchased” by a carrier as part of a property settlement without first obtaining the requisite original owner consent or court order, such laws may not relieve the carrier of the responsibility to take action to “preserve” the data. Therefore, carriers that wish to sell such vehicles following a property settlement should consider removing and storing the EDR unit (without “reading” it) until all existing or potential injury claims are concluded.

Most states recognize spoliation claims for failing to preserve evidence. Even unintentional loss or destruction could give rise to a spoliation claim when the party in possession is aware or should have been aware of the existence of a potential claim. Given the growing awareness of EDR data and the new NHTSA regulations requiring notice of the presence of EDRs in all vehicle owners' manuals, it will be difficult for an insurance carrier to argue that it was not or should not have been aware of available EDR data.

In situations where the carrier does not own or possess the vehicle, it may still be incumbent on the carrier to ensure that EDR data is preserved on its insured's vehicles. Since the carrier has a duty to defend its insured, they consequently have a duty to avoid actions that would initiate further claims against the insured, including spoliation claims. Therefore, even if a carrier does not take ownership of an insured's vehicle, it still may have a duty to take reasonable steps to preserve the EDR data to "defend" its insured against further liability.

Most EDRs are designed to permanently store data following *an airbag deployment*. While there should be no risk of the data being overwritten, there is risk of the EDR device itself being lost. Typically airbag control modules (which include the EDR) are discarded and replaced by auto repairmen when new airbags are installed. Care needs to be taken to ensure that the EDR is not discarded, and that proper chain-of-custody evidence is preserved when the device is removed. In addition, data stored on an EDR after *a non-deployment event* may be overwritten after 250 ignition cycles (250 on/off) or if a subsequent more severe event occurs. Therefore, in non-deployment events, quick action must be taken to preserve the EDR data by either promptly retrieving it or by removing the EDR device itself. Retrieval of the data may be preferred since removal of the device will require its replacement before the vehicle is returned to service.

Since EDRs do not date-time stamp the data, the longer a vehicle is driven following an event, the more difficult it may be to identify the subject event on the device. The reduced ability to identify an event on the device may be considered spoliation of the evidence necessary to identify the event. Again, prompt retrieval of the data is critical for evidence preservation.

Regardless of the method of preserving EDR data, it is imperative that the removal and/or retrieval be properly documented with admissible chain-of-custody proof. If proper chain-of-custody evidence is not secured, the data will likely be inadmissible in court, and the loss of the *chain-of-custody evidence* could likewise form the basis of yet another spoliation claim. Consideration must therefore be given to ensuring that whoever removes the EDR and/or retrieves its data follows proper procedures for documenting the process and chain-of-custody.

C. Bad Faith Claims

If available EDR data is not retrieved, bad faith claims may arise out of allegations that the carrier: 1) failed to properly investigate the underlying claim, 2) failed to preserve EDR data that was relevant to the claim, and/or 3) exposed the insured to additional liability via a spoliation claim.

Today, since retrieval of EDR data is still relatively new in the insurance industry, how an insured might react to its retrieval is unknown. There is some fear that retrieving the data itself

might give rise to a bad faith claim, if the data proves unflattering to the insured. Knowledge of the availability of EDR data is quickly growing, particularly among attorneys, and will result in more common and frequent requests and subpoenas for such data. Ignoring EDR data for fear that it might be negative is not an effective approach to defending a lawsuit. Ultimately, the opposing party will have the opportunity to discover the data, and once they have it, managing the effect of unflattering data may be much more difficult. Retrieving the data before it can be “discovered” through the litigation process gives the carrier a better idea of what the claim is worth and puts them in the position of making a more appropriate offer based on the facts, without risking the other party’s knowledge and exploitation of the data, or the creation of a spoliation claim.

Contrarily, if a carrier does not preserve clearly relevant data on behalf of the insured, such behavior could expose the insured to much more severe liability arising out of a spoliation claim, which may result in an additional lawsuit separate from the original claim, monetary, evidentiary or “death penalty” sanctions, and/or a written instruction to the jury at the trial of the underlying claim stating the presumption that the “spoiled” evidence would have been harmful to the insured. Perceived acts of hiding relevant evidence, whether by omission or otherwise, may carry a greater risk of inflaming a jury and creating excess liability than would the capture of the data early while it is still within the carrier’s work product, and while the carrier is still in good position to reasonably resolve the claim.

Not developing a program for the regular capture of EDR data out of fear that the data could be harmful also has the obvious negative effect of failing to secure evidence that could prove the fault of the opposing party. Consequently, the carrier risks the creation of complaints against it for failing to gather EDR evidence that would have exonerated the insured driver and hence prevented premium increases for their insured. An innocent insured’s complaint that their carrier did not properly secure relevant evidence may be much more compelling than as culpable insured’s complaint that their carrier discovered the truth.

EDR data will inevitably become a mainstay in the investigation of passenger vehicle claims. Carriers that set policy and standards now will be in a much better position to avoid the pitfalls of excess and bad faith liability that may follow the lack of management of EDR data. Since the access and availability of EDR data is fast becoming common knowledge in the insurance and legal industries, avoiding it is no longer a rational approach to dealing with it.

D. Risk Avoidance Measures:

In order to avoid or minimize the potential for bad faith claims that could result from the poor management of EDR data, carriers should develop a consistent management plan that: 1) identifies rational and consistent circumstances for when EDR data and/or devices should be retrieved to eliminate claims for failing to properly investigate, 2) sets up uniform procedures for the preservation and retrieval of EDR data and/or devices to ensure its admissibility if appropriate, and to eliminate the risk of spoliation claims and 3) provides consistent and actionable information to evaluate the claim and determine how to proceed once the EDR data has been collected. The plan should identify circumstances when EDR data retrieval could be unflattering to the insured, and set up procedures to notify the insured prior to any data retrieval

of the duties, risks and benefits of the data. The notice should be in writing and should absolve the carrier of the duty to retrieve (investigate) the data if the insured insists that the data *not be collected* despite the risks. The carrier should also put the insured on notice that they have a duty to preserve the data if they refuse the removal of the unit or the retrieval of the data.

For circumstances where an EDR unit is at risk of being lost or destroyed, the carrier should have a plan for its removal and storage until it can be determined what is to be done with the data. The device does not have to be “read”, but instead can be stored for data retrieval at some later date. While owner consent or court order is necessary to retrieve the data from the device, it is not necessary for the removal and storage of the device. Rational and consistent procedures should therefore be developed for removal and storage of EDRs in appropriate circumstances, and for proper chain-of-custody evidence preservation to ensure its admissibility when appropriate.