

Issue Brief

Regulating Event Data Recorders: How Should Insurers React to New State Laws?

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Introduction

Motor vehicle event data recorders (“EDRs” or auto “black boxes”) date as far back as 1974 when the federal National Highway Traffic Safety Administration (NHTSA) first began using these devices to analyze crash data.¹ Over the years, the NHTSA and auto manufacturers have continued to conduct experiments, so that it is now widely held that EDRs “offer great potential of improving vehicle and highway safety.”²

This year, four states – Arkansas, Nevada, North Dakota and Texas – followed the example taken by California lawmakers in 2003 and enacted laws that specify how motor vehicle event data recorders (“EDRs” or auto “black boxes”) are to be regulated in their respective jurisdictions. As of July 1, the states of New York, Massachusetts, New Jersey and Pennsylvania were still considering similar legislation. In another seven states – Alaska, Connecticut, Montana, New Hampshire, Tennessee, Virginia and West Virginia -- EDR bills were introduced this year, but they failed to pass before those legislatures adjourned.³

What’s behind the sudden interest in EDR legislation? Two factors may be at play. First, the National Highway Traffic Safety Administration (NHTSA) announced its intention in June 2004 to develop a proposed rule for EDRs that, among other things, would require a minimum set of specified data elements for crash investigations and also specify the requirements for the data elements.⁴ This decision followed a three-year study of EDRs by a NHTSA working group. The second factor simply may be a reaction to the proliferation of EDR devices now being voluntarily installed as standard equipment in automobiles. While precise figures are not available from the auto manufacturers, the NHTSA estimates that between 65 and 90 percent of light vehicles built in 2004 are now equipped with EDR devices.⁵ No doubt, this has prompted some state lawmakers to consider laws to regulate EDR devices as a way to protect the privacy rights of their constituents.

California Assembly Bill 2133

California became the first state to consider regulating EDRs when Republican Assemblyman Tim Leslie introduced Assembly Bill 213 in January 2003.⁶ The bill was initially intended only to make it unlawful for an auto dealer to sell or lease a new vehicle without disclosing in writing to the buyer or lessee that the vehicle was equipped with one or more recording devices. However, AB 313 was amended twice in the Assembly and three times in the Senate before it was signed into law in September 2003.

AB 213 requires manufacturers of new motor vehicles that contain “recording devices” such as an EDR or “sensing and diagnostic modules (SDM)” to disclose that fact in the owner’s manual of all vehicles manufactured on or after July 1, 2004.

The law defines “recording device” as a device that does one or more of the following after an accident:

1. Records how fast and in which direction the motor vehicle is traveling;
2. Records a history of where the motor vehicle travels;
3. Records steering performance;
4. Records brake performance, including, but not limited to, whether brakes were applied before an accident;
5. Records the driver’s seatbelt status, and
6. Has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communication system when an accident occurs.

The California law makes it clear that the data belongs to the registered owner of the motor vehicle and it only can be downloaded or retrieved by someone else when the owner consents to the retrieval, a court with jurisdiction orders the data’s release, the data is used to improve motor vehicle safety, or it is downloaded by the dealer or an automobile technician to diagnose, service or repair the vehicle. The law adds that any use of the data for vehicle safety or medical research purposes may not identify the registered owner or driver, but this does not apply to the vehicle identification number.

Finally, AB 213 requires subscription services, such as *OnStar*, to disclose in their subscription service agreements if they record data on where a vehicle travels and if information is transmitted to a central communication system when an accident occurs. Another provision specifies that the disclosure exceptions noted above do not apply to subscription services.

Enacted 2005 Legislation

While this year’s laws in Arkansas, Nevada, North Dakota and Texas closely track with California’s “black box” law, some important differences exist.

For example, Arkansas Senate Bill 51,⁷ in addition to requiring auto manufacturers to disclose the presence of EDR devices in their vehicles, also specifies that the seller or manufacturer also must disclose the type of EDR being used and what that information records, stores or transmits.

The Arkansas law, while acknowledging that the data belongs to the vehicle’s owner and it only can be disclosed under certain circumstances, goes further. It prohibits the retrieval of data where the vehicle becomes the property of the lienholder or insurer following an accident, where the data retrieval is considered a condition of a policy or lease or as where it is a condition for a claims payment.

SB 51 allows the EDR data to be produced without the owner’s consent at the time of an accident if:

1. A court of competent jurisdiction orders production of the data;
2. A law enforcement officer obtains the data based on probable cause of an offense;
3. A law enforcement officer, firefighter or emergency medical services provider obtains it in the course of responding to or investigating an emergency involving physical injury or the risk of physical injury to any person; or
4. The Arkansas State Highway and Transportation Department may retrieve data from a motor vehicle event data recorder if the data is used to pre-clear weigh stations, automate driver records of duty status, replace handwritten fuel tax or mileage reports and to comply with a state or federal law.

The Arkansas law allows data from EDR devices to be used to facilitate medical research of the human body’s reaction to motor vehicle crashes, but prohibits disclosure of the driver’s identity and the last four digits of the vehicle identification number.

Finally, SB 51 says data from a motor vehicle data recorder shall not be permitted into evidence in a civil or criminal matter pending before a court in the State of Arkansas unless it is shown to be relevant and reliable pursuant to the Arkansas Rules of Evidence.

Most provisions in Nevada Assembly Bill 315⁸

follow the California law, but AB 315 is the only bill among the four laws enacted so far this year which specifies that anyone who retrieves EDR data without the owner's consent is guilty of a misdemeanor.

North Dakota Senate Bill 2200⁹ came about, in part, because the bill's sponsor, Sen. Raymon Holmberg, became upset that his car dealer did not divulge to him that his newly purchased automobile contained an EDR device. SB 2200 follows the California law closely, but it contains a subsection prohibiting insurers from being able to use EDR data as a condition in setting an individual's premium rate.

Texas House Bill 160¹⁰ is also similar to the California law, but subsection (d) allows a court order to be obtained to retrieve location data after a showing that:

1. retrieval of the information is necessary to protect the public safety; or
2. the information is evidence of an offense or constitutes evidence that a particular person committed an offense.

Implications for Insurers

As more states consider legislation to regulate EDR devices, it will be important for insurers to closely monitor these developments to ensure that any new bill proposals do not contain some of the provisions found in the 2005 laws. These include: 1) the Arkansas provision prohibiting data retrieval as a condition of a policy or lease being issued or as a condition for a claims payment; 2) the Nevada provision that makes it a misdemeanor to retrieve EDR data without the owner's consent; or 3) the North Dakota provision prohibiting an insurer from using EDR data as a condition for setting rates.

While only a handful of companies have tested the concept of "miles-driven" auto policies,¹¹ placing the North Dakota provision on future EDR bills would severely limit an insurer's ability to offer "miles-driven" policies if, and when, they were to become more commonplace.

"Black box" legislation has the potential to help settle claims more quickly and effectively and to fight fraud, but as legislative scimmages ensue with future EDR bill introductions, the battle is most likely to be fought over the question of how a balance can be struck between the privacy rights of individual vehicle owners

and the rights of society as a whole. So far, this does not appear to be a problem with respect to using EDR devices for vehicle or medical research purposes. Each of the five states that have enacted EDR laws allow the data to be used for this purpose.

The most contentious part of the privacy debate will be whether data gleaned from EDR devices can be used as evidence in civil and criminal cases. Privacy rights advocates will no doubt argue, among other things, that vehicle owners need to be protected against self-incrimination, and therefore, new EDR laws should prohibit individuals from having to hand over data from EDR devices.

While some lawmakers will view this claim as a persuasive argument, the evidence so far suggests that state lawmakers are more inclined to let the courts decide if data from EDR devices should be revealed in a legal proceeding. Each of the five states to enact EDR laws allow for such a scenario, and the Arkansas law, in particular, spells out these situations in great detail.

Further, a survey¹² of legal cases from around the country shows that since 2000, judges in at least 14 states have upheld the right of data from EDR devices to be used as evidence, mostly in criminal cases. Many of these decisions have relied on the federal Frye doctrine,¹³ which has served as the standard for determining whether an expert's testimony would assist the trier of fact.

State policymakers will need to be made aware of these facts, as well as the insurer's contractual duty to defend its policyholder and the policyholder's contractual duty to cooperate with its insurer in the defense of claims, whenever EDR legislation is considered in the future.

Endnotes:

¹The National Highway Traffic Safety Administration (NHTSA) has created a Web site devoted to information about Event Data Recorders (EDRs). It can be found at www-nrd.nhtsa.dot.gov/edr-site/.

²Ibid. This conclusion was reached in the final report of the NHTSA Event Data Recorder Working Group published in August 2001.

³The list of EDR bills was gathered from charts prepared by StateNet and the National Conference of State Legislatures.

⁴NHTSA published a Notice of Proposed Rulemaking for Event Data Recorders (EDRs) in the Federal Register on June 14, 2004, to be followed by a comment period ending August 18, 2004.

⁵See Department of Transportation, National Highway Traffic Safety Administration, 49 CFR Part 563, Docket No. NHTSA-2004-18029. RIN 2127-A172, Event Data Recorders.

⁶California Assembly Bill 213, Chapter 427, Laws of 2004. The requirements of this law apply to all motor vehicles manufactured on or after July 1, 2004.

⁷Arkansas Senate Bill 51, Act 1419, Laws of 2004. The bill is effective September 1, 2005.

⁸Nevada Assembly Bill 315, Chapter 361, Laws of 2004. The bill is effective January 1, 2006.

⁹North Dakota Senate Bill 2200. The bill is effective on August 1, 2005.

¹⁰Texas House Bill 160. The bill is effective on September 1, 2006.

¹¹See “Minnesotans Leaving Money on the Table When It Comes to Auto Insurance; Exclusive Discount

Program Gives Minnesotans Opportunity to Save Big on Auto Insurance,” Business Wire, May 8, 2005. In August 2004, The Progressive Direct Group of Insurance Companies introduced “TripSense,” a first of its kind usage-based auto insurance discount program. It uses a free, matchbox-size device on the vehicle’s On Board Diagnostic (OBDII) port found near the car’s steering column. The device collects mileage, speed and the time when the vehicle is driven and this information is used to calculate the renewal discount the customer can receive. So far, the program has attracted more than 3,000 participants, who are saving an average of 12 to 15 percent on the cost of their auto insurance.

¹²Harris Technical Services, one of the country’s leading accident reconstruction experts, has compiled a list on its Web site (<http://harristechnical.com>) of state legal proceedings dealing with the use of EDRs.

¹³The Frye doctrine, as articulated in *Frye vs. U.S.*, 293 F. 1013, D.C. Ct. App. 1923, requires that expert testimony be supported by scientific principles or evidence generally accepted by the relevant scientific or professional community. Frye rulings traditionally rely on peer review, particularly the availability of peer-reviewed articles, to assess general acceptance.