



## Increasing Cost of Automobile Claims

### Automobile Black Boxes and Economic Damages

California auto insurance rates are going up due to the escalating cost of claims. On average, insurers are paying out \$1.14 for every \$1.00 of premium they collect. Increased traffic on roadways, distracted drivers, escalating medical costs, rising repair costs, and finally, economic damages from severe auto injuries, are the reasons for these increased claim costs.

#### **Event Data Recorders also known as Black Boxes:**

Many operators of fleets have no idea that black boxes are already in their company vehicles. Event Data Recorders aka Black Boxes are found in most vehicles purchased after 2013. Harris Technical Services website - [harristechnical.com](http://harristechnical.com) - publishes a list of vehicles with EDRs. Black Boxes have been around for over 10 years. It is very likely that your newer company vehicles already have an EDR on board.

EDRs are somewhat similar to black boxes for airlines without the voice recordings. Data is retained by the black box. The EDR is an electronic memory chip. It records a continuous loop of information flowing from the vehicle's sensors and control modules. When an accident occurs, the EDR captures about 5 seconds of data before the event and after it. This information would include acceleration, whether the brakes were applied, the timing of airbag deployment, engine and powertrain controls, traction control, and collision avoidance systems to name a few. It will even record the number of people in the vehicle through seat sensors. This data can be accessed by harvesting it. Meaning only connecting a special reader to the vehicle will yield the information. Once it is recorded it cannot be modified or destroyed. It is now evidence that can be used in a civil trial.

The information captured by an EDR is significant and can cause a business to have more exposure to auto insurance risks than they bargained for because the EDR will record things such as speed just before and after impact with another object.

#### **Getting Black Box Data:**

California Vehicle Code Section 9951 (c), last modified on September 9, 2016, allows this data to be obtained:

- With the vehicle owner's consent.
- By court order having jurisdiction.
- For the purpose of improving motor vehicle safety (research).
- By a licensed authorized mechanic for diagnosing, servicing or repair of your vehicle.

The California Highway Patrol, local police officers and insurance adjusters investigating auto accidents will use this captured data to help them determine how and why an accident occurred. The key data points tracked by the EDR would include speed, steering, braking, acceleration, seatbelt use, occupant presence, and whether airbags were deployed. Anytime there is a fatality or a severe injury you can expect this data will be collected and reviewed.

### **How do economic damages fit into this EDR picture?**

Economic damages and general damages are common in automobile accident litigation. Economic damages are: medical costs, past and present wage loss, and burial expenses—best described as hard costs. On the other hand, general damages are not hard dollars that have been spent or will be incurred by plaintiff. Usually general damages reflect a plaintiff’s pain and suffering, or loss of consortium of a spouse; it is viewed as an intangible and subjective loss, but general damages can add up to a significant monetary exposure depending on the type of injury and circumstances of the claim. In a civil case, a plaintiff is entitled to both damages if you are held liable for an accident. However, in California, you are only responsible for your proportional share of fault since California is a comparative negligence jurisdiction, but there is an exception to this rule for economic damages when there are multiple codefendants (tortfeasors).

The California Supreme Court has noted that Civil Code Section 1431.2 "carefully" defines the "important distinction" between economic and noneconomic damages. *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600. The court stated that codefendants retain the joint liability of all tortfeasors (codefendants), regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses (economic damages). On the flipside, the more intangible and subjective categories of damages (general damages) were limited to the rule of strict proportionate liability based on individual comparative negligence.

### **Example Based on California Comparative Negligence:**

If the black box on your company vehicle reveals a speeding violation at the time of an accident, it could lead to negligence per se, meaning any percentage of negligence for your driver compared with the other codefendants could then be used to establish your obligation for all economic damages.

Freeway Accident: Three cars colliding with a single plaintiff, resulting in a severe bodily injury to the plaintiff and the plaintiff is absolutely fault free:

Plaintiff’s Economic Damages: \$800,000  
Plaintiff’s General Damages: \$2,000,000  
Total Damages: \$2,800,000

Plaintiff: 0% negligence  
Codefendant – Vehicle 1: 45% of negligence with **\$100,000** in auto policy limits  
Codefendant – Vehicle 2: 45% of negligence with **\$100,000** in auto policy limits  
Your Driver – Vehicle 3: 10% of negligence with **\$1,000,000** in auto policy limits, plus \$5,000,000 umbrella limits

Codefendants 1 and 2 have auto policy limits of \$100,000 each (and no other assets), and those limits are completely exhausted by mutual agreement with the plaintiff; all of those insurance proceeds (\$200,000 in total) then go toward the plaintiff's general damages of \$2,000,000.

Your company's share of the general damages is 10% of the \$2,000,000 or \$20,000. So far, this is a good outcome, but the plaintiff is still entitled to all economic damages since the plaintiff was not at fault for the accident.

Now the tables are turned. Your 10% negligence and adequate insurance proceeds (or assets) means you will pay all of the plaintiff's economic damages. You owe \$800,000 plus the \$20,000 for general damages for a total of \$820,000. Since the other codefendants have nothing more to contribute toward the settlement or verdict, your company is held jointly and severally liable for all of the plaintiff's economic damages. These economic damages are your sole burden to satisfy even though Codefendants 1 and 2 had 90% of the comparative negligence (fault).

Low insurance limits with high comparative negligence of the codefendants is not a favorable situation for your company, even with 1% comparative negligence. Reason: Economic damages will still be dumped onto your company even though your driver did very little to cause an accident. Moreover, really high economic damages can create even greater potential risk and umbrella coverage could be needed to fully protect your interests. The data on the black box has worked against you; that data has also worked against your business auto insurance company.

### **Moral:**

Remind employees that driving your vehicles is a privilege and not a right. Train them annually, to encourage proper driving behavior. Remind them that if they are found to be criminally negligent when driving a company vehicle, they might find themselves answering to a local district attorney, and maybe serve jail time. The data from a black box could be used for this purpose too!

### **How we can help:**

- Review and update your auto safety program
- Check employee driving records and help you enroll in the DMV Pull Notice Program
- Provide annual driver training

### **Alternative:**

Consider installing GPS on your company vehicles to keep track of your employees' driving habits. It may add a chilling effect to their driving behavior because you are watching them.

**Contact Jim Untiedt, President, at 408.418.2734, [juntiedt@pentarisk.com](mailto:juntiedt@pentarisk.com), or your PentaRisk account executive for added assistance, and visit our website at <http://pentarisk.com/>**

#### **California**

PentaRisk Insurance Services  
2033 Gateway Pl Ste 150  
San Jose CA 95110  
p 408.418.2720 · f 408.418.2721  
CA License Number 0G47886

#### **Georgia**

PentaRisk Insurance Specialists  
3715 Northside Pkwy  
Bldg 400 Ste 550  
Atlanta GA 30327  
p 404.809.2530 · f 404.809.2531  
GA License Number 186880

#### **Alabama**

PentaRisk Associates of Alabama  
500 Office Park Dr Ste 420  
Birmingham AL 35223  
p 205.874.9700 · f 404.809.2531  
AL License Number 0415532

#### **Illinois**

PentaRisk Associates of Illinois  
600 Spring Hill Ring Ste 201  
West Dundee IL 60118  
p 847.649.5000 · f 847.836.1431  
IL License Number 100288418