Automobile Law Committee

REJECTING THE REJECTION

Pennsylvania state and federal courts strictly construe UIM rejection forms

By: Daniel E. Cummins, Esq. ¹

In a manner that is presumably similar to the requirements of the automobile law in other jurisdictions, Pennsylvania’s Motor Vehicle Responsibility Law [MVFRL] imposes a number of across-the-board requirements which automobile insurance carriers must follow during an insured’s application and purchase of an automobile insurance policy. Among the many requirements are mandated forms, containing specified language, which insurance companies must present and have executed by the applicant during the purchasing of the policy.

For example, Pennsylvania law mandates that a UIM carrier is required to provide UM and UIM coverage in an amount at least equal to the liability limits selected by its insured unless a valid rejection form, written in accordance with the specific form language set forth in 75 Pa.C.S. § 1731(c), was executed by the insured. Under the separate 75 Pa.C.S. § 1731(c.1), the Pennsylvania Legislature also provided that “[a]ny rejection form that does not specifically comply with this section is void.”

Litigation over the propriety of these forms typically arises later after the injured party insured has been in a motor vehicle accident and wishes to challenge whether he or she properly rejected or reduced the UM or UIM coverages under their own policy.

A number of recent state and federal court decisions in Pennsylvania have confirmed that the courts of this Commonwealth will engage in a strict constructionist approach when reviewing challenges to these UM/UIM rejection forms. From these decisions, it is readily

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Introduction

By the end of this year, the way we approach accident reconstruction may drastically change. The National Highway Traffic Safety Administration (NHTSA) estimated that by 2010, 85% of new vehicles would contain some type of Event Data Recorder (EDR)\(^1\). However, it has been unclear which vehicles contained an EDR, what data was being recorded and, more importantly, how an investigator could access and preserve this data.

When discussing automotive EDRs, parallels are often drawn to the flight data recorders, “black boxes,” found in modern aircraft. Flight data recorders are specifically designed to aid investigators in the event of an incident. However, in the case of EDRs found in automobiles, the capability of recording data is often a secondary or even tertiary function of an existing electronic control module (ECM) that is already installed in the vehicle. These devices were designed by automakers to monitor the performance of various component systems, not to assist in the investigation of an incident.

As of September 2012, this will no longer be the case. The NHTSA ruled in the Code of Federal Regulations (49 C.F.R. 563) that passenger vehicles manufactured after September 1, 2012 that are equipped with data recording capabilities would adopt uniform requirements for the accuracy, collection, storage and survivability of recorded data as well as provide a commercially available data retrieval tool to access this data. The goal of this ruling was to ensure that the data recorded by automotive EDRs was readily usable for Automatic Crash Notification systems (e.g. OnStar\(^\circ\)), effective crash investigations and the analysis of safety equipment performance\(^3\). While this ruling does not necessarily mandate the installation of EDRs in all vehicles, it requires that all vehicles in which the automaker has voluntarily installed an EDR to adhere to the standard.

History

In their most primitive form, automotive EDRs date back to the 1970’s\(^2\). General Motors installed complex devices in some Indy race cars in 1992 to research injury thresholds of the human body during a collision. However, modern EDRs became prevalent in 1994 when General Motors began to replace an electromechanical system used for crash detection with more sophisticated acceleration sensors and computers\(^3\).

These first generation EDRs retained only a few data elements: seatbelt status, airbag warning lamp status and acceleration versus time. Beginning in 1999, the General Motors airbag control modules expanded to record pre-crash data, consisting of vehicle speed \([\text{mph}]\), engine speed \([\text{rpm}]\) as well as throttle and brake usage\(^4\).

However, the ability to access and retrieve this data was not readily available to the public.

In 2000, the Vetrionix Corporation (now Bosch) released the first commercially available tool, the Crash Data Retrieval (CDR) System, supporting select General Motors vehicles made between 1994 and 2000\(^5\). This allowed members of law enforcement as well as other accident reconstructionists to retrieve and analyze data retained by the modules. Since 2000, many more automakers are supported by the CDR system including Ford, Dodge/Chrysler and Toyota. Other automakers such as Honda and Mazda have consequently entered into agreements for coverage using the Bosch CDR tool to meet the NHTSA’s requirement for data access by September 2012.

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How They Work

In the accident reconstruction community, three electronic control modules dominate the EDR landscape in passenger vehicles: the Airbag Control Module (ACM), the Powertrain Control Module (PCM) and Roll-Over Sensor (ROS). EDRs found in airbag control modules are the most frequently encountered due to their ability to detect, discern and record crash data.

Consider the following scenario involving a late model SUV with an ACM that has EDR functionality:

- A motorist drives an SUV on a rural highway at a constant speed of 53 mph. As the vehicle traverses the highway, various sensors within the vehicle continually transmit data along a common communication network. The ACM monitors this incoming data and performs its primary function of periodic self-diagnostic routines to ensure the system is ready to deploy airbags, if needed. Approximately once every second, data such as vehicle speed, engine speed, throttle and brake usage is retained in a temporary memory buffer. As new data is received, the oldest data element is discarded and the new data replaces it in what is referred to as a circular buffer. The data table on the lower left of the graphic below is representative of the output of a CDR system report.

- Suddenly, an oncoming motorist allows their vehicle to drift over the centerline, directly in the path of the SUV. The driver of the SUV reacts to the oncoming vehicle and attempts to avoid the collision by braking - all the while, the temporary memory buffer is continues to update, retaining pre-crash data that will aid investigators in determining what, if any, evasive maneuvers were performed by the driver of the SUV. In the graphics below, the newest data elements pertaining to the evasive maneuver are added to the bottom of the buffer.

- As the vehicles collide, the SUV experiences sudden accelerations and the collision detection system within the ACM is triggered. This is called Algorithm Enable (AE), the point at which the system begins its secondary function: to analyze the collision and determine whether or not to deploy supplemental restraints (seatbelt pretensioners and airbags). This determination is based on monitoring the acceleration and velocity change of the vehicle. Since collisions often last only fractions of a second, the ACM examines acceleration and speed change at a rate of hundreds of times per second.
• In this scenario, due to the severity of the impact and the circumstances surrounding the collision, the ACM determines the deployment of seatbelt pretensioners and frontal airbags are appropriate and these restraints are deployed.

• Once the ACM completes its primary (system readiness) and secondary (restraint deployment) functions, the module performs the additional process of recording the data held within the temporary memory buffer into a more robust, non-volatile memory (memory that can be retained even after the power to the module has been turned off). The data stored in non-volatile memory includes the pre-crash data: vehicle speed, engine speed, throttle and brake use as well as the crash related acceleration/velocity change versus time data. This data can be retrieved after the crash to aid in the post-crash investigation.

Application of EDR Data

As the accident reconstruction and automotive safety sectors began to examine EDRs in the 1990’s, entities such as the National Traffic Safety Board (NTSB), the National Aeronautics and Space Administration (NASA) and the National Highway Traffic Safety Administration (NHTSA) began to recognize the potential of this technology and recommended the expansion of EDR implementation. In 2001, NHTSA’s EDR Working Group reported in their Summary of Findings, that “EDRs have the potential to greatly improve highway safety, for example, by improving occupant protection systems and improving the accuracy of crash reconstructions.”

Since that report, the accident reconstruction community has researched and evaluated the performance of EDRs in controlled crash tests as the basis for numerous peer-reviewed publications. This research has shown EDRs to be highly accurate and repeatable. For example, Neihoff, et al. found the EDRs they tested in frontal crashes to be accurate within ± 6%, with some EDRs “almost exactly duplicating the crash test instrumentation.”

Such validation studies illustrate that EDR data is an invaluable tool for the accident reconstructionist, not only in catastrophic instances involving a deployment of supplemental restraints, as well as in low-speed, non-deployment collisions in situations where physical evidence is insufficiently documented and the lack of significant vehicle damage make more traditional reconstruction methods difficult.

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NTSB CELL PHONE ANNOUNCEMENT PITS CONSUMER CHOICE AGAINST PUBLIC SAFETY

By: Robert C. Rodriguez

The National Transportation Safety Board (NTSB) announced on December 13, 2011, its call for every state and Washington, D.C., to ban the nonemergency use of portable electronic devices for all drivers. The ban would include the use of cell phones, even if they are hands-free, but would allow the use of voice-activated systems installed by car manufacturers. Recent research has revealed the significant dangers of using a cell phone or, even worse, texting while driving. In today’s fast-paced, technology-driven society, however, drivers want to be able to communicate with friends, family, or the office while on the road. Carmakers struggle to balance this consumer demand for technology with the need for public safety. One thing is clear: The NTSB’s announcement has sparked a national debate about the dangers of driving while distracted.

The NTSB’s Recommendation

“We did not come to this recommendation lightly,” said NTSB Chair Deborah Hersman when making the agency’s announcement. In support of its position, the NTSB cited overwhelming evidence showing the dangerous effects of driving while distracted. “Distraction, whether it’s hands-free or handheld, whether it’s texting or talking, is deadly,” Hersman said. “In fact, the National Highway Transportation Safety Administration (NHTSA) said distraction-affected crashes killed 3,092 people last year, the equivalent of a regional jet crash every week.”

One such tragic example of cell phone distraction occurred on September 12, 2008, in California, when a Metrolink train ignored a red traffic signal giving the right of way to an oncoming train, and instead entered the path of a Union Pacific freight train, resulting in a terrible collision. Twenty-five people were killed in the deadliest train collision in Metrolink’s history. The NTSB’s investigation revealed that the Metrolink train engineer had been texting within seconds of the collision, and the board ruled this as the most likely cause of the collision.

Academic Research

Drivers who talk on their cell phones are as impaired as drunken drivers, according to experimental research conducted by Frank Drews, David Strayer, and Dennis L. Crouch of the University of Utah. Significantly, this research showed that both handheld and hands-free cell phones impaired driving, with no significant difference in the degree of impairment. The researchers believe “this suggests that legislative initiatives that restrict handheld devices but permit hands-free devices are not likely to eliminate the problems associated with using cell phones while driving.”

In explaining the effects of distracted driving related to cell phone use, the research team noted that auto accidents involving cell phones tend to be more severe than other accidents because brake time is longer due to the driver’s distracted condition. The team also concluded that drivers on cell phones are more likely to miss critical traffic signals, such as traffic lights and a vehicle braking in front of them, and are slower to respond to the traffic signals that they do detect.

Consumer Expectations

It is undeniable that a strong demand exists for the ability to communicate while on the road. For example, many working professionals spend a considerable amount of time in their car commuting and desire the ability to communicate with loved ones, as well as work colleagues, during this time. In response, auto manufacturers such as Ford (MyTouch and Sync technology) and General Motors (GM—MyLink) have introduced sophisticated systems that allow drivers to sync their cell phones into a voice-operated system. Fortunately, with an eye toward safety, auto manufacturers have recognized the need to allow drivers the option of using hands-free, voice-activated technology. “By using spoken commands, motorists can use [MyLink] without taking their hands off the wheel or their eyes off the road,” said Micky Bly, GM’s executive director of global electrical systems and hybrids. In trying to ensure that the company’s sync

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1 A slightly different version of this article was previously published in the Spring 2012 edition of TortSource
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system operates in a safe, secure manner, Bly added, “We don’t want to step across the line” and distract motorists.

Pending Legislation

In the context of driving while using cell phones, a national call to action is necessary. Consider that only eight states (California, Connecticut, Delaware, Maryland, New Jersey, New York, Oregon and Washington) prohibit all drivers, including novice drivers, bus drivers, and regular adults, from using handheld cell phones while driving.

Although the NTSB is not authorized to require individual states to enact its policies, the federal government does have the authority to withhold federal highway funds from states that refuse to take action. In addition, Congress has the power pass broad legislation, and Congresswoman Carolyn McCarthy (New York) has proposed the Safe Drivers Act of 2011, which would create a national standard for prohibition of the use of hand-held devices while driving. At least one auto manufacturer has voiced its support for the bill. In announcing Ford Motor Corporation’s position on McCarthy’s bill, Pete Lawson, the company’s vice president of government affairs said, “Ford supports the bill because it represents a practical, commonsense approach to a national problem. [The company] believes hands-free, voice-activated technology significantly reduces [driver distraction] risk by allowing drivers to keep their hands on the wheel and eyes on the road.”

The Road Forward

Many people acknowledge the dangers of driving while distracted, but there remains a strong desire on the part of the public to stay “connected” while driving. Most likely, consumers will need to fundamentally acknowledge that a vehicle is not the place to be communicating on a cell phone before any sweeping legislation on this issue will be able to gain strong momentum. The NTSB should be applauded, however, for sparking a national debate on this topic. When stating her agency’s position, NTSB Chair Hersman offered a compelling explanation for why legislation on this issue is needed. “Last year, there were at least 3,092 reasons to eliminate distractions behind the wheel,” she said. “How many more fatalities before we decide that enough is enough?”

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A PRACTITIONER’S GUIDE TO CLASS ACTIONS

Marcy Hogan Greer

Complete with a state-by-state analysis of the ways in which the class action rules differ from the Federal Rule of Civil Procedure 23, this comprehensive guide provides practitioners with an understanding of the intricacies of a class action lawsuit. The book is divided into three parts: Anatomy of a Class Action; Special Issues in Class Actions; and Jurisdictional Survey of Local Requirements Governing Class Actions.

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apparent that the even the slightest deviation from the statutorily mandated language will result in the forms and, therefore, the elections of reduced UM or UIM coverages, null and void as a matter of law.

Extra language renders form void

In its recent decision in the case of Jones v. Unitrin Auto and Home Insurance Company, 40 A.3d 125, 2012 WL 36196, No. 397 W.D.A. 2011 (Pa. Super. Feb. 6, 2012), the Pennsylvania Superior Court had an opportunity to address the propriety of an underinsured motorists (UIM) benefits rejection form in a declaratory judgment action filed by an injured party insured.

The novel question presented in this case of first impression was whether the inclusion of additional, or extra language, by the UIM carrier at the end of its underinsured motorist insurance rejection form which was over and above the statutorily mandated language failed to specifically comply with the MVFRL and was therefore void.

The Jones v. Unitrin Court noted that precedent required it to construe Pennsylvania auto insurance law “liberally” to give effect to the goals of that law, one of which was to “afford the injured claimant the greatest possible coverage.” The Court also recognized that in cases involving close questions, the courts were required to “interpret the intent of the legislature and the language of the insurance policies to favor coverage for the insured.”

Turning to the facts before it, the Court in Jones v. Unitrin noted that the UIM rejection form utilized by the carrier contained the exact same language required by the statute. However, as noted, the form also had an additional sentence appended to the end of the form which was not found in the mandated form. That sentence read, “By rejecting this coverage, I am also signing the waiver on P. 13 rejecting stacked limits of underinsured motorist coverage.”

Prior to the Superior Court’s decision last month in this case of Jones v. Unitrin, there were no appellate decisions in Pennsylvania addressing the effect of additional words on the validity of these types of automobile insurance rejection forms.

The Pennsylvania Superior Court in Jones v. Unitrin did draw guidance from another Pennsylvania appellate decision on a similar issue involving the effect of missing words from the required form. In its prior decision in the case of American Intern. Ins. Co. v. Vaxmonsky, 916 A.2d 1106 (Pa.Super. 2006), the Pennsylvania Superior Court had ruled that a UIM rejection form that was missing one word mandated by the statute was void for failing to specifically comply with the statutory mandates.

The Superior Court in Jones v. Unitrin likewise held that, in deviating from the statutorily mandated language in the form, in this case by adding extra language, the UIM carrier failed to specifically comply with the statutory requirements with regards to the underinsured motorist insurance rejection form and, as such, the form was void.

With this ruling, the Court rejected the trial court’s reliance upon the Pennsylvania Supreme Court decision of Winslow-Quattlebaum v. Maryland Ins. Group, 752 A.2d 878 (Pa. 2000), in which that Court wrote in dicta that “[t]here is nothing in the language of section 1731(c.1) to suggest that the required rejection statement for UM or UIM coverage must stand alone on a page without any other writing.”

The majority in Jones v. Unitrin distinguished the Winslow-Quattlebaum decision as focusing on the different issue of what different kinds of coverage rejections could be on the same page as opposed to the exact content of the wording of those rejection forms. The Jones v. Unitrin Court also noted that the form in the Winslow-Quattlebaum case, unlike the form in the case before it, did comply with the requirement that the form language be immediately followed by the mandated signature line.

In this regard, the Jones v. Unitrin Court faulted the form before it for also violating the “proximal relationship” between the mandated language and the required signature line following the form. In other words, the form in § 1731(c) did not have anything between the end of the language in the form and the signature line. Any deviation from that set-up also failed to specifically comply with the statute in the eyes of the Pennsylvania Superior Court.

Accordingly, the Pennsylvania Superior Court in this Jones v. Unitrin case strictly applied Pennsylvania automobile insurance law and found that, by adding an extra sentence to the form between the required language and the signature line, the Unitrin UIM rejection form did not, as required by §1731(c.1), “specifically comply” with the form found in §1731(c).
Similar results in Pennsylvania federal courts

Another recent case in which a UIM rejection form containing extra language—in this case only one extra word—was found to be invalid is the Federal Middle District Court decision of Grassetti v. Property & Casualty Insurance Company of Hartford et al., 2011 WL 1522326 (M.D. Pa. 2011).

In this decision, which was handed down before the Jones v. Unitrin decision, the court also relied upon the Vaxmonskey decision to hold that the carrier’s form deviated from the statutorily required language, albeit with respect to the addition of only one word. Whereas the statutorily mandated form language made reference to “Uninsured Coverage,” the carrier’s form at issue in this matter added a word and referred to “Uninsured Motorists Coverage.”

The Court in Grassetti emphasized that 75 Pa.C.S. Section 1731(c)(1) provided that “[a]ny rejection form that does not specifically comply with this section is void.” In so ruling, the Court also found Vaxmonskey persuasive on the issue of interpreting the specific compliance requirements of Section 1731(c)(1).

In a more recent Pennsylvania Eastern District Federal Court decision that was handed down after the Pennsylvania Superior Court’s decision in Jones v. Unitrin, Federal Senior Judge Edmund V. Ludwig relied upon Jones v. Unitrin in ruling against Travelers Indemnity Co. of America with regards to the propriety of a UIM rejection form in the case of Robinson v. Travelers Indemnity Co. of America, 2012 WL 677007 (E.D. Pa. Feb. 29, 2012).

Judge Ludwig ruled that, based upon the Jones v. Unitrin decision, the addition of a single word in an underinsured motorist coverage rejection form violated the specific mandates of the MVFRL and, as such, rendered the rejection void. In Robinson, Travelers had changed the waiver by adding the word “motorists” into the phrase “underinsured coverage” in the mandated language.

Take a closer look

The recent state and federal court decisions on the propriety of UM/UIM rejection forms should serve to compel both sides of the issue to break out the magnifying glasses to review the form language for strict compliance with the statutorily mandated language. The decisions issued to date confirm that, with respect to at least UM/UIM rejection forms, a deviation of the addition or omission of even only a single word could serve to render the form void and thereby result in greater coverage for the injured party insured.
# 2012 TIPS Calendar

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