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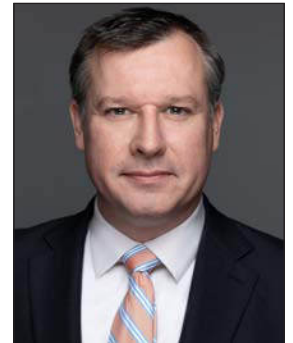
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Car Insurance Driver Tracking Devices: How Big Data Premium Discount Programs Can Be a Big Help in Litigation

By now, many of us have seen a certain television commercial starring the dulcet-toned Dennis Haysbert, perhaps best known for his long-running stint as the President of the United States in the Fox television series "24." In the commercial, Mr. Haysbert is unflappably reclined in an easy chair, speaking calmly into the camera as cars perilously whiz by. The commercial is an advertisement for Allstate's telematic usage-based insurance (UBI) program, which offers premium discounts to insured drivers who exhibit safe driving habits.



Grant H. Hackley

More accurately, telematics do not measure safe driving habits generally, but rather discrete data, such as instances of hard braking, high-speed driving, and the number of hours and time of day a vehicle is on the road. Based on this information, collected and analyzed in real time, carriers can calculate a premium discount based on the potential risk such activities incur. Fewer instances of risky driving behavior lead to a greater discount. These programs have long been known as pay-as-you-drive, or pay-how-you-drive programs, and they are not new. However, recent trends in technology, and the ubiquity of mobile devices—and miniaturization and economies of the relevant technology—have permitted an explosion in market penetration, particularly in the personal lines business. Several years ago, tracking was done primarily by the insertion of a physical device, or dongle, into a vehicle's on-board diagnostic (OBD) port. Advances in smartphone geolocation technology, however, now allow anyone with a connected smart device to download an app and reap the savings.

Consumers, carriers, and software vendors have taken notice, and Allstate is far from the only insurer to offer a UBI program. Progressive, Nationwide, State Farm, and many others now offer such programs, each under a different moniker. The consulting firm Berg Insight AB issued a report in April 2019 predicting that the number of telematics UBI policies in force in the United States would rise from an estimated 10.6 million at the end of 2018 to 49.8 million by 2023. Similarly, a McKinsey & Company report published in September 2016 predicted that automotive telematics data could be monetized to the tune of \$750 billion by 2030.

In addition to those seeking to take advantage of telematics from an economic standpoint, UBI programs offer new opportunities for litigators in the casualty arena. Information regarding vehicle speed, direction of travel, and braking is critically important in reconstructing an accident, and determining fault and exposure, after the fact.

While virtually all new vehicles on the road are equipped with black box-type event data recorders, older vehicles typically are not. Moreover, telematics UBI data can establish a much longer timeline than can an event data recorder for a driver or for a personal vehicle that is not tracked by satellite or other methodologies typically employed by large commercial motor carriers. The recorded data can provide a trove of information about both a client's and an adverse

party's driving habits generally, and about an incident giving rise to litigation specifically. Among other things, telematics data can demonstrate possible driver fatigue from a long trip, or aggressive and erratic driving behavior in the period leading up to the event in question.

Carriers should consider obtaining telematics data as a matter of course in the event of a claim, or requesting that counsel obtain it through discovery in litigation. Event data can help reconstruct an accident, and can illuminate the circumstances when witness accounts are unclear or incredible. In addition, such data may serve to either bolster or undermine police reports, which are rightfully treated as highly reliable—but not infallible—accounts of an accident.

The data itself may not necessarily serve as a separate witness. Third-party vendors who collect and provide the data to carriers may analyze and interpret it with proprietary software. The data itself may be provided in an indecipherable table of numbers and symbols. It thus behooves carriers with a high volume of claims to consider investing in the software and licenses necessary to interpret data provided from both its own insureds and from adverse claimants insured by other carriers, if not barred by contractual agreements or cost.

Reviewing telematics data for all claims may not be economically feasible, but reviewing the data on a case-by-case basis can provide a carrier and its counsel with information critical to determining settlement and litigation strategy. Knowledge that an adverse claimant may have been fatigued or was speeding, thus contributing to an accident, or was demonstrably dishonest in a statement to police based on subsequently retrieved telematics data, may invoke certain strategies and defenses that might otherwise not be considered. In short, if there is any suspicion that telematics data is available and may be helpful to the litigation, it should be requested in discovery. And, as already stated, not just the data. Telematics data should be requested in a format that is able to be interpreted without the need for additional

proprietary software.

Nevertheless, telematics data is not a panacea. Attorneys cannot utilize it in court to establish that the other driver is a terrible driver and should never have been on the road. Indeed, in civil cases, character evidence, such as a propensity for being a bad driver, is inadmissible to establish circumstantially that a party probably exhibited poor driving skills on the date in question, unless that character is put into issue. In other words, with certain exceptions, an adverse claimant's historical telematics data is not admissible to show that they were at fault in a particular accident. Only the data that immediately precedes an accident would generally be considered admissible.

That is not to say that the inadmissible data is not discoverable, for it is, especially as it can later become admissible based on the circumstances of a particular case. For instance, a witness contesting the circumstances of an accident caused by his excessive speed may testify, under oath: "I wasn't speeding that day." The witness's testimony is to be expected. Whether truthful or not, he is providing biased first-hand testimony about the circumstances of the accident. The telematics data relating to the accident is admissible because it is relevant to the case, and a jury can decide whether to believe our witness. But historical telematics data showing that the witness is a chronic speeder would not be admissible based on this statement alone. However, our hapless witness cannot help himself. He goes on to testify that "I've never sped a day in my life." This second statement, when contradicted by historical telematics data, instantly makes such historical data admissible for impeachment purposes, because a witness's character for truthfulness is always in issue.

In any event, telematics data can provide a critical objective account of the circumstances of an accident. This data cannot easily be colored by the subjective beliefs of witnesses or biases of the parties. Given the rate of adoption of telematics UBI policies, it should become—if it has not already—a critical tool in determining claim and litigation resolution strategy.

Grant H. Hackley is an associate in our **Pittsburgh** office. He concentrates his law practice in the areas of insurance coverage, construction, casualty & premises liability, product liability, and environmental, toxic and mass torts. Grant earned his J.D. from the University of Pittsburgh in 2007. He served as the *Law Review* Editor-in-Chief and was a Student Bar Association Representative. In addition, he won a Student Leadership Award. He was also awarded the Dean's Scholarship and the Arthur J. Murphy, Jr., Endowed Scholarship. He served as a Judicial Intern for the Honorable Ralph J. Cappy, Chief Justice of the Pennsylvania Supreme Court. In addition, he served a clerkship for the Honorable Bernard L. McGinley in the Commonwealth Court of Pennsylvania. Grant earned a B.S. degree in Physiology & Neurobiology from the University of Maryland, College Park, in 2000. He is admitted to practice in Pennsylvania and West Virginia, and also the U.S. District Court for the Western District of Pennsylvania, the U.S. District Courts for the Southern and Northern Districts of West Virginia, and the Third Circuit Court of Appeals. Grant was selected as a **Pennsylvania Rising Star** by *Super Lawyers* in 2016 and 2017. He has participated in the Allegheny County Bar Association Young Lawyers Division Bar Leadership Initiative. Grant is a Contributing Editor for the American Bar Association Litigation Section's *Litigation News* quarterly periodical. Prior to joining Rawle & Henderson LLP, Grant was an attorney in the Pittsburgh office of a litigation and business transactions law firm that is one of the largest law firms in the nation.

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NEW YORK

MEDICAL PROFESSIONAL LIABILITY

Dismissal of Misconduct Complaints

On January 23, 2020, **Dr. Marc R. Leffler** secured the dismissal of a disciplinary complaint made against Rawle & Henderson LLP's client with New York's Office of Professional Medical Conduct (OPMC). The claim against the doctor was that he had refused to provide copies of the original office records to the patient, which the patient claimed the doctor destroyed and then re-created, in an effort to hide improper care that he had delivered. After appearing on behalf of the doctor, Dr. Leffler was able to demonstrate to OPMC that copies of the records had, in fact, been given to the patient's representative, and that those records were a complete set. OPMC found no misconduct and closed its file.



Dr. Marc R. Leffler

In November 2019, New York's Office of Professional Discipline (OPD) lodged a complaint against an endodontist, asserting professional misconduct by the doctor for leaving a foreign body in a tooth—as a subsequent dentist had advised the patient—without notifying the patient of the situation. In consultation with his client, Dr. Leffler provided written records and x-rays to the investigator, demonstrating that the subsequent dentist had misread the films, misinterpreting a metal file for a hyperdense cement material. On January 24, 2020, OPD reported that it found no misconduct and dismissed the matter.

Dr. Marc R. Leffler is a partner in our **Midtown Manhattan** and **New Haven** offices. He practiced Oral Surgery in New York City from 1986–1997. In addition to being a board-certified oral and maxillofacial surgeon, Dr. Leffler is a seasoned trial attorney with a strong record of success at trial and as an appellate advocate. Since 1998, he has practiced law in the areas of dental and medical malpractice. He has tried many cases to verdict and has attained many significant verdicts on behalf of his clients. He also practices in the areas of premises liability, product liability and business and contract law. He is admitted to practice in New York and Connecticut, and also the U.S. District Courts for the Southern and Eastern Districts of New York. Marc has been recognized by Martindale-Hubbell with a rating of **AV Preeminent** and has been chosen as a **New York Super Lawyer** every year since 2015.

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PHILADELPHIA

Rory S. Crowe has joined the **Philadelphia** office of Rawle & Henderson LLP as an associate. He concentrates his law practice in the area of environmental, toxic and mass torts litigation.

Rory earned his J.D. from Drexel University Thomas R. Kline School of Law in 2019. While attending Drexel Law, he served as a certified legal intern in the Delaware County District Attorney's Office in Media, Pennsylvania. He was a Merit Scholarship Recipient and was on the Dean's List. Rory won the CALI Excellence for the Future Award for Best Student Performance in Criminal Law. Rory was a member of the Arbitration Competition Team and the Alternative Dispute Resolution Team. In addition, he was an Executive Board Member of OutLaw, an organization dedicated to serving the LGBTQ+ law student community.



Rory S. Crowe

Rory earned his Bachelor of Communication degree in Advertising from the University of Miami in 2014.

Prior to joining Rawle & Henderson LLP, Rory was a legal intern to the Honorable Charles J. Cunningham III, in the Philadelphia Court of Common Pleas. He is admitted to practice in Pennsylvania.

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PHILADELPHIA

Lauren C. Fantini has joined the **Philadelphia** office of Rawle & Henderson LLP as an associate. She has nearly 15 years of experience as a litigation and trial attorney. She focuses her law practice in the areas of catastrophic loss, casualty, premises liability, construction, product liability and medical professional liability.

Lauren earned her J.D. from the Pennsylvania State University Dickinson School of Law in May 2004. She served as a Miller Center Public Interest Advocate and was on the Trial Moot Court Board. While attending law school, she served as a certified legal intern for the Dauphin County District Attorney's Office in Harrisburg, Pennsylvania. She also served as a summer intern for Montgomery County Legal Aid in Norristown, Pennsylvania. She earned her B.A. in Criminal Justice with a minor in Legal Studies from the University of Delaware in May 2001. She was on the Dean's List and was a member of the National Honor Society in Sociology (Alpha Kappa Delta).

Lauren was selected by *Super Lawyers* as a **Pennsylvania Rising Star** in 2008, 2010, and 2012 through 2018. In addition, she was selected as one of the National Trial Lawyers' "Top 40 under 40" from 2012 through 2014 and one of the National Trial Lawyers' "Top 100 Trial Lawyers" in 2013. She is admitted to practice in Pennsylvania and New Jersey.

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Lauren C. Fantini

Alan Leff has joined the **Philadelphia** office of Rawle & Henderson LLP as an associate. He has over 10 years of experience handling all aspects of workers' compensation litigation throughout the state and federal court systems. He also practices in the areas of employment relations and appellate matters.

Alan earned his J.D. from Rutgers University School of Law in Camden, New Jersey in 2008. After graduating from law school, he served as a law clerk to the Honorable Judge Robert G. Millenky in the Superior Court of New Jersey in Camden. He earned his B.A. in History & Political Science from the University of Michigan - Ann Arbor in 2005.

Alan is admitted to practice in Pennsylvania and New Jersey, and also the U.S. District Court for the District of New Jersey, the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania and the U.S. Court of Appeals for the Third Circuit. Prior to joining Rawle & Henderson LLP, Alan was an attorney with a defense litigation law firm in Philadelphia.

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Alan Leff

Jason A. Zajdel has joined our **Philadelphia** office as an associate. He concentrates his law practice in the areas of casualty, premises liability, product liability, insurance coverage, construction, commercial motor vehicle defense, and employment relations.

Jason earned his J.D. from Syracuse University College of Law in May 2018. He was on the Dean's List (Spring 2018). He served as President of Syracuse Law's Dispute Resolution Society from 2017 to 2018 and as Vice President from 2016 to 2017. While attending law school, he served as a summer law clerk in 2016 for the Honorable George A. Pagano in the Delaware County Court of Common Pleas, Media, Pennsylvania. He also served as a student attorney for Syracuse Law's Securities Arbitration and Consumer Law Clinic and its Low Income Taxpayer Clinic. He was a global general counsel intern for DLL Financial Solutions Partner in Wayne, Pennsylvania, from May 2017 to October 2018. Jason earned his B.A. in Political Science from Syracuse University in May 2014. He was on the Dean's List (Fall 2011–Spring 2014). He was on Syracuse's Student-Athlete Honor Roll (Spring 2011–Spring 2014, Men's Crew) and was a Varsity Rower for the Men's Crew Team (Fall 2010–Spring 2014). Jason is admitted to practice in Pennsylvania. He is a member of the Delaware County Bar Association, the Pennsylvania Bar Association and the Philadelphia Bar Association.

Prior to joining Rawle & Henderson LLP, he was an administrative associate for a private equity investment firm focused on healthcare therapeutics and medical devices.

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