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Where's Waldo? Using Technology Tracking in Claims Investigations

There are numerous ways to find out when and where people were, and when and where evidence was created. People carrying smartphones, whether or not they make or receive calls, leave information as to where they were and when they were there. People who take pictures, especially with their smartphones, create information as to when and where the picture was taken. Insurers are exploring this new technology as a vital tool to investigate claims and fight fraud. Like any new technology, it is not without risk. In developing a proper policy for using tracking technology, it is important to understand the available ways to trace and monitor a person's whereabouts. It also is important to understand the tools that are available to obtain the tracking information.

1. From Cellphones to Smartphones And Beyond

Tracking of a claimant's whereabouts beyond traditional surveillance first arose in the 1980s with the advent of cellular technology. As towers sprang up, insurers realized cellular call records were relevant to claims investigations.

While technology has advanced far beyond "bag phones" and bulky car trunk transmitters, the basic technology remains. Cellular telephones use radio frequency bands to exchange signals with strategically located antennas. Each time the cellular device sends or receives information, whether it is a call, text, or other communication, an antenna is located, and the exchange of data occurs between the device and normally the strongest signal tower available. Even when no calls are being made, no texts are being received, and the internet is not being accessed, as long as the phone is turned on, information is developed as to what cell towers it is near.

Modern technology allows for the usually seamless passing of a signal from one set of antennas to another as the device moves or signal strength becomes stronger or weaker. While specific devices may be unique, there are normally at least four points of data exchanged every seven to eight seconds between the device and towers. This may include voice, data, global positioning systems (GPS), or text.

On a recent major fire loss claim, records subpoenaed from the cellular provider demonstrated (to nearly 100 percent accuracy) that the insured was not where they claimed and instead was at or near the fire location within minutes of the fire being reported.

Expert evaluation normally will be required to decipher the data and verify accuracy of the information. By working in cooperation with experts, animated models can be built at a very low cost to graphically show a jury the travel path and locations of a party during the time period surrounding an insurance loss.

2. Geotagging and GPS

Virtually every smartphone camera and many other electronic devices are equipped with geotagging. This feature is traditionally set in the “on” mode and is difficult to turn off. In its simplest form, geotagging records the exact latitude and longitude of every photograph taken on the device and stores the information as metadata.

By right clicking on a digital photograph, it may be possible to determine, to an accuracy of within 15 feet, the exact location where the photograph was taken. The geotagging feature is in addition to the time and date stamps, which on most devices are now set automatically and cannot easily be altered.

Collectively, knowing the date, time, and exact location of a photograph may be crucial to an insurance investigation. Additionally, this data is stored in an easily retrievable format. Most smart devices contain a searchable photo archive.

Reviewing the photo geotag archive may well determine a person’s physical whereabouts around the time of the loss. Combining a series of photographs may even allow the opportunity to track a person’s whereabouts over a period of hours, days or weeks based upon the geotagging data.

GPS uses satellite technology to locate with extreme accuracy the device’s physical location or route of travel. Once it is confirmed that the device is in the possession of the person making the claim, GPS information, including stored routes of travel, may provide extremely accurate information detailing not only a person’s whereabouts, but specific roadways traveled and exact times and locations of key events.

3. Video Surveillance

Americans literally are on camera anywhere we go. Street cameras led to almost immediate identification of the Boston bombers. Office buildings, schools, parking garages, hospitals, retail stores, shopping malls, and hotels often are equipped with extensive video surveillance. Many private homes even incorporate video security. Look up in almost any major establishment and you will often see video devices in operation.

Vehicles are now tracked on highways by “plate readers.” The databases associated with this technology can be searched to identify the exact date, time, and location where a vehicle was traveling. Many traffic apps now provide direct links to highway and intersection cameras. If captured quickly enough, actual video of an auto accident occurrence may be retrievable.

While much of this data may not be kept for extended periods of time, if a major loss occurs, steps may be taken promptly to secure the information, either by cooperation or emergency court order. Astute claims investigators should look at all loss sites as potential resources for relevant video information. A nearby video camera or data reader may provide documentation of the claimant’s whereabouts, observe a vehicle driving by, or provide other relevant information.

4. Tracking Cards

We Americans can never resist a bargain or discount. Merchants now offer loyalty cards keyed to specific discounts or consumer rewards. Whether scanned by a barcode or recalled by a telephone number, tracking card information may be relevant to not only determine a person’s whereabouts, but also their buying practices and purchase histories.

On a recent theft claim, the individual claimed a large number of items purchased from a national high-end department store. The store offered a consumer loyalty discount program, to which the claimant did not belong. The claimant did, however, belong to and use an extensive number of similar customer programs, all with more moderately priced retailers.

While businesses from grocery stores to gas stations have embraced loyalty cards, one of the first uses of these tracking systems was in casinos. These preferred customer cards track not only the person’s gaming activities at the casino, but also when they enter and leave the property. On a fire loss in Indiana, the insured’s alibi was gambling at a local casino. The casino’s tracking records proved the insured was at the casino on the night of the fire but left, returning 45 minutes later. It was during this time window the fire was set.

5. ATM and Bank Records

The days of simply looking at banking records for financial balances are over. Each time a person utilizes an ATM, not only is the transaction recorded, but a video or still photograph records the person making the withdrawal and the exact time and location. By reviewing banking records surrounding the time of loss, it may be possible to establish by ATM records and the accompanying photo or video a claimant’s exact location to either verify or dispel their version of the events under review.

6. Fitness Bands, Health Apps, and Smartwatches

The ability to track a person's whereabouts is not limited solely to property claims. Most iPhones and similar devices now come equipped with health apps. These apps are preloaded and normally do not require activation. What many individuals are unaware of is that these devices automatically track the number of steps taken and miles walked by the device owner on a daily basis.

In a recent deposition, a bodily injury claimant testified that her injuries prohibited walking any measurable distance rendering her homebound. The plaintiff was surprised when, after verifying she kept her smartphone with her at all times, she was shown the app on her phone (which she did not even know existed) disclosing that, in the past two days alone, she had walked more than five miles.

In addition to these apps being loaded on smart devices, one of the trends sweeping across America has been fitness bands or similar devices. While we may be an overweight population, we are equally fixated on health and fitness. Recovery of data from fitness bands or similar physical fitness monitoring devices may provide a treasure trove of information regarding a person's physical activities, depending upon the extent of injury they may be claiming.

The rollout of the Apple Watch brings the ability to monitor and track a person's activities and whereabouts literally to within arm's reach.

7. How to Get Tracking Information

Courts across the United States understand the rapid rise of technology and the need for insurers and other businesses to secure relevant data. Most states allow for the ability to file a petition for discovery to secure relevant records via subpoena, even before any underlying claim litigation may be filed. However, the standards may not easily fit into the standards for a pre-suit, "preservation of evidence", subpoena when that is required.

While insurers historically have been reluctant to file suit against their own insureds to secure information, most no longer have to. While notification should be given to the insured or their counsel, most courts now will recognize the right of an insurer to file a petition for discovery directly against a cellular service provider or business entity to secure relevant video or data information before it is lost or destroyed.

Some states have procedures that require the insured's cooperation, and sometimes consent, before records can be obtained. Pre-litigation subpoenas, under traditional civil procedure rules, require a need to preserve evidence that otherwise would be lost or destroyed by the time litigation is filed. Some cellphone companies have a policy of permanently retaining records. In short, the rules are designed to facilitate litigation, not insurance claims investigation. Thus, subpoena requests must be tailored to show the evidence will not exist if

litigation is filed in the states that require such a showing. It also may be required to state that litigation is expected, which is not an assertion insurance companies wish to make before a decision on the claim is made. Doing so may expose the company to arguments in a bad faith suit it decided to deny the claim before obtaining all facts, which is why it expected to be a party to a lawsuit.

Pursuant to Federal Rules of Civil Procedure, Rule 27(a), a person who expects to be a party to an action in a United States court may seek a court order preserving documents and other evidence before the action is filed and discovery commences. The party seeking the evidence must establish requirements such as the present inability to bring a lawsuit, the reasons why it is necessary to perpetuate or preserve the evidence before a lawsuit is filed and the substance of what information is sought. If a court does not believe pre-litigation discovery is necessary to obtain non-cumulative material that is distinctly useful to a finder of fact, the motion for discovery may not be granted.