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Follow That Car! Legal Issues Arising from Installation of Tracking Devices in Leased Consumer Goods and Equipment

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FOLLOW THAT CAR! LEGAL ISSUES ARISING FROM INSTALLATION OF TRACKING DEVICES IN LEASED CONSUMER GOODS AND EQUIPMENT

Leah Altaras¹

Abstract

Recent court cases in Connecticut and California have challenged the commercial use of Global Positioning Systems (GPS) for tracking and gathering data about consumers. Specifically, these cases focused on the terms and disclosures contained in automobile rental contracts relating to the use of GPS to monitor the driving patterns of rental car drivers. In response to concerns about consumer privacy, several states have also enacted legislation that addresses the use of tracking technology in the rental car market. This Article examines recent litigation concerning the use of GPS in rental cars and related legislative efforts. Although recent legislation and litigation focuses on the automobile rental industry's use of GPS, similar legal issues may arise in other circumstances where devices containing tracking technology may be leased to consumers or commercial parties. Such devices include cellular telephones, heavy machinery, and other types of tracking and remote technologies such as ignition kill devices.

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INTRODUCTION

<1>Two states recently challenged car rental companies' use of Global Positioning Systems (GPS) to monitor the driving speed and location of their customers. ² In addition to lawsuits, statutes in California, Connecticut, and New York specifically restrict the use of GPS by car rental companies.³ As a general matter, private and commercial parties commonly use Global Positioning Systems (GPS) in automobiles.⁴ GPS is a tracking system that uses satellite signals to calculate information related to navigation, such as location, speed, and direction of travel.⁵ Companies increasingly rely on GPS and similar tracking technology to collect data regarding product use.⁶ This Article focuses on recent legal challenges to the use of GPS in the rental market and uses these cases to illustrate some of the contractual and policy issues that may arise in other business contexts, when companies deploy tracking technology in conjunction with leasing products or equipment to consumers or commercial entities.

OVERVIEW OF GPS AND TRACKING TECHNOLOGIES

<2>The United States Department of Defense created GPS, a satellite based tracking program, in the early 1970s to increase military efficiency.⁷ A network of over 24 satellites transmits signals to the earth, where a receiver uses the signals to calculate its own position and other information such as speed and direction of travel.⁸ If the receiver has a transmitter, it can relay the calculated information to outside data gatherers or third parties.⁹ President Ronald Reagan approved commercial use of GPS in 1983, after Russia shot down a Korean Airlines flight when the plane erroneously entered Russian airspace.¹⁰

<3>Despite GPS' origin as a purely navigational tool, a variety of locational tracking devices now use GPS. Workforce monitoring programs observe employees using GPS devices in mobile phones and make this information available to employers via the Internet.¹¹ Equipment rental companies use "wireless management solutions" to track the length of time customers use equipment, which allows companies to enforce hourly rates and reduce uncompensated wear and tear on the equipment.¹² Car owners use ignition kill devices to deter thieves. Owners operate these devices from outside the vehicle using remote controls. The devices cut off power to the automobile's fuel pump, fuel injectors or spark plugs so that cars will not start.¹³ Auto racetracks currently use ignition kill devices to increase driver safety during races.¹⁴

<4>Although not widely in use, "biometric vehicle diagnostic/tracking/ignition kill" systems can disable vehicles from remote stations using information sent from a transceiver device.¹⁵ Law enforcement could use this technology to disable illegally driven vehicles, such as those that are not registered or insured.¹⁶ Commercial leasing companies could also use these systems to disable vehicles whose users have defaulted on their payments.¹⁷ Other non-GPS tracking technologies exist, such as Radio Frequency Identification (RFID). RFID tags are small wireless tracking devices that communicate with computers using radio waves.¹⁸ Retailers can embed these small, tags into consumer products such as clothing in order to track inventory.¹⁹

CONTRACTUAL ISSUES ARISING IN THE USE OF GPS IN THE RENTAL CAR MARKET

<5>The California and Connecticut legislatures enacted current GPS-restriction laws after courts in these states found car rental companies liable for not fully disclosing GPS use to consumers.²⁰ In *People v. Acceleron Corp.*, the California Attorney General filed a consumer protection lawsuit against the rental car company, Acceleron Corporation.²¹ The complaint alleged that Acceleron misled customers by failing to fully inform them about the use of GPS devices in rental cars and by advertising unlimited mileage but failing to adequately inform the renter of "geographic restrictions."²² Specifically, Acceleron did not inform consumers that it would use GPS to track vehicles, and that it would charge renters \$1 per mile for the entirety of the rental period if the renter drove outside certain geographical restrictions.²³ The complaint alleged that the \$1 per mile charge constituted a liquid damage penalty in violation of California's Civil Code § 1671, which forbids liquidated damage clauses that amount to penalties.²⁴

<6>The *Acceleron* complaint also stated that Acceleron had engaged in false and misleading advertising. Acceleron allegedly failed to inform renters how it would calculate the geographic restriction surcharge; and it failed to inform renters that an advertised offer of unlimited mileage was not available for 'local residents,' an undefined term in the contract.²⁵

<7>The parties agreed to settle the case.²⁶ The settlement agreement permanently prohibits Acceleron from using GPS to collect information about consumers' use of rental cars and from using GPS information to impose any fines, penalties, or surcharges.²⁷ It allows the use of GPS only for the narrow purpose of locating stolen, <https://digitalcommons.law.uw.edu/wjlt/vol3/iss3/1>

abandoned or missing rental vehicles.²⁸ Accelaron agreed to keep all records detailing its use of GPS or other electronic surveillance technology for three years following the rental contact related to such GPS use. Accelaron will make such records available to the offices of the California Attorney General and District Attorney within seven days of a request for inspection.²⁹

<8>In *American Car Rental, Inc. v. Comm'r of Consumer Protection*, the Connecticut Commissioner of Consumer Protection filed an administrative complaint against American Car Rental, Inc.³⁰ American Car Rental charged a \$150 speeding fee each time a rented vehicle exceeded 79 mile per hour continuously for two minutes or more. A GPS device located within the vehicle monitored customer speed.³¹ The rental agreement mentioned that "vehicles driven in excess of posted speed limit will be charged \$150 fee per occurrence" and that rental vehicles were equipped with GPS. However, the agreement did not define "occurrence" or "GPS," and did not provide a place for the customer to acknowledge that they understood the policy.³² The company explained the policy to some but not all customers,³³ and did not notify customers when it charged fines to customer credit cards.³⁴

<9>The Supreme Court of Connecticut held that the \$150 fine charged by American Car Rental constituted an illegal penalty rather than a valid liquidated damages charge, because it did not reflect the actual damage caused to the vehicle when the car was driven in a manner that violated the rental contract.³⁵ The court ordered the rental company to refund all speeding fees.³⁶ It reasoned that the fine violated the Connecticut Unfair Trade Practices Act (CUTPA).³⁷

<10>These cases demonstrate that, in states without legislation regulating GPS use, companies must consider public policy considerations and privacy issues. Companies should clearly disclose to customers the use of tracking devices and the relationship between information collected from such technology and subsequent damages. Further, companies should communicate any damage amount imposed on consumers before assessing charges. Finally, any imposed surcharges should more directly correspond to reflect the amount of damages.

I. Disclosure of Tracking Technology Use and Notice of Charges

<11>The *Accelaron* case emphasizes the need for companies that deploy tracking technology in consumer leasing situations to disclose the use of such technology to the customer in a written contract signed by the customer. As highlighted in *Accelaron Corp.* a car rental company disclosed that it would charge customers \$1 per mile for driving outside a designated area, but did not disclose that it would use GPS to detect a car's location.³⁸ The company also did not reveal that it would impose a \$1 per mile fee based on every mile driven, whether within or outside the restricted area. It did mention the use of GPS, but buried the reference in the text of the contract.

<12>The *Accelaron* settlement agreement focused on the company's failure to adequately disclose GPS use to its customers.³⁹ Accelaron agreed to "clearly and conspicuously" inform future consumers throughout the rental process that it may use GPS or similar devices, and the manner in which Accelaron uses such devices.⁴⁰ Accelaron was required to make these explanations in all communication with future or present customers, including at the rental counter and in a written contract signed by the consumer.⁴¹

<13>In *American Car Rental, Inc.*, a car rental company charged consumers \$150 each time they drove more than 79 miles per hour continuously for two minutes or more.

⁴² The rental agreement mentioned both the \$150 fee and the fact that all vehicles contained GPS equipment.⁴³ The rental contract did not, however, contain an

explanation of the policy or definition of the term "GPS".⁴⁴ The Supreme Court of Connecticut ruled against the rental company on the basis that mentioning GPS equipment and including a statement of the fee did not sufficiently put the consumer on notice that the company used GPS to monitor customer speed.

<14>The court concluded that American Car Rental may charge speeding fees only if it (1) obviously states the amount of the speeding fee in writing in the rental agreement, (2) mentions that the GPS device is used to track the rental car's speed clearly in the written rental agreement, and (3) obtains each customer's consent to the terms of the written agreement in writing next to the statements of the amounts of the speeding fee and the fact that GPS is used to track the vehicle's movement.⁴⁵

<15>Companies should ensure that charges are clearly communicated to customers. Adequate notice may require complete disclosure of both the reason for and exact amount of the charge. In *American Car Rental*, elements three through five of the administrative complaint filed by the Commissioner of Consumer Protection included findings that American, "(3)failed to notify consumers that they had been charged the speeding fee; (4) failed to provide consumers who had been charged the speeding fee an opportunity to refute the alleged violation of the plaintiff's policy; and (5) failed to notify consumers that the speeding fee would be charged against their credit or debit cards."⁴⁶ Both the trial and appellate courts declined to address the issue of whether American's customers received sufficient notice of the speeding fee. This is because it found that the speeding fee itself constituted an illegal penalty that was contrary to public policy.⁴⁷ The court stated that the issue of notice was moot because, "adequate notice of an illegal penalty would not justify its enforcement."⁴⁸ Nonetheless, the company's failure to notify customers of charges prompted litigation.

<16>*Accelaron* and *American Car Rental* demonstrate that companies may use tracking technology in consumer contracts so long as companies clearly and conspicuously notify customers of such use in the absence of law to the contrary.⁴⁹ Additionally, such contracts should mention the relationship between tracking and fee imposition in an easily comprehensible manner. In these cases, full disclosure should likely have included: a definition of the tracking technology, an explanation of the types of data the rental company would collect via GPS, and the purpose for which the company uses the data. Rental contracts should also disclose the precise type of fees or surcharges will be imposed and under what circumstances a company will do so.

II. Liquidated Damages v. Unenforceable Penalties

<17>Under the common law, contracting parties may impose liquidated damages but may not impose penalties.⁵⁰ Therefore, rental companies may not charge customers penalties for violating rental agreements.⁵¹ In both *Accelaron* and *American Car Rental*, courts found that the particular fines or surcharges imposed on consumers for speeding or driving out of state constituted disguised penalties rather than valid liquidated damages.

<18>In *Accelaron*, the rental company charged \$1 per mile traveled for the entire rental period if a renter drove beyond a geographical restriction.⁵² The complaint alleged that the charge constituted an illegal penalty, in violation of California Civil Code section 1671, which "forbids the assessment of liquidated damages penalties."⁵³ The settlement agreement enjoined the company from using electronic surveillance technology to track a vehicle in order to impose "surcharges, fines or penalties relating to the renter's use of the vehicle"⁵⁴ and ordered *Accelaron* to restore the full amount of any surcharges to all renters who submitted a complaint.⁵⁵

<19>In *American Car Rental*, even though the rental contract stated the specific amount charged to customers who drove in excess of 79 miles per hour, the court invalidated the charges because the fines did not reflect actual damage to the

<https://digitalcommons.law.uw.edu/wjlt/vol3/iss3/1>

vehicle.⁵⁶ Both parties presented expert testimony concerning costs incurred by the additional wear and tear on a rental vehicle when a renter drives over 79 miles per hour to the hearing officer who initially heard the case.⁵⁷ The hearing officer found that operating a rental vehicle at 80 miles per hour could increase wear to the car, create an increase in maintenance and repair requirements, and decrease the vehicle's "useful service life."⁵⁸ Further, the officer found that the damage that a renter could cause by driving at high speeds during a typical rental period was insignificant.⁵⁹ He noted that the car involved in the case, a Plymouth Neon, cost about \$14,000 new and has an expected service life of 150,000 miles.⁶⁰ Occasional operation of the vehicle at 80 miles per hour could decrease the expected service life and value of the car by up to 10 percent and operation at 80 miles per hour continuously could decrease the expected service life and value by up to 50 percent.⁶¹ Based on these findings, the additional wear and tear on the Plymouth Neon would be equal to approximately 37 cents of damage when operated at eighty miles per hour for two minutes.⁶²

<20>The hearing officer concluded that the speeding fee of \$150 imposed by the company was "unreasonably disproportionate to any actual damages that might be suffered ... and, as such, represented an illegal penalty rather than a valid liquidated damages charge."⁶³ The trial court agreed with the hearing officer's findings. On appeal, the rental company argued that the imposed speeding fee of \$150 was a valid liquidated damages charge because the actual damage caused to the vehicle was uncertain.⁶⁴ The Supreme Court of Connecticut disagreed and upheld the findings of the initial hearing officer, stating that the speeding fee was an illegal penalty that violated CUTPA.⁶⁵

<21>The court held that American Car Rental's fine violated CUTPA⁶⁶ and was contrary to public policy. The court reasoned that the speeding fee imposed on the consumer was punitive because it was a significantly more than the actual value of the damage that a customer could cause in case of a breach of contract.⁶⁷ If companies choose to impose liquidated damages or surcharges for excessive wear and tear to equipment, as indicated by electronic monitoring devices, they should only impose such fees that are proportionate to actual or projected damages to equipment caused by a consumer's breach of a contract. This is consistent with traditional contract doctrine relating to the enforceability of liquidated damages clauses in contracts.

LEGISLATIVE LIMITATIONS ON THE USE OF GPS IN CONSUMER LEASING

<22>California, Connecticut and New York have enacted legislation that restricts the commercial use of GPS.⁶⁸ Statutes in these states only allow businesses to use GPS to deter theft and locate equipment in cases of contract default.

<23>The Connecticut statute, enacted in 2003, restricts businesses' use of Electronic self-help, including GPS. The statute allows companies to use GPS or other tracking technology installed in cars only when customers breach rental agreements. Businesses may use "electronic self help" such as GPS or ignition kill devices only if the consumer separately agrees to a term in the contract authorizing electronic self-help.⁶⁹ In non-consumer transactions, the statute deems the contractee to have authorized "electronic self-help" if the rental or lease contract includes such a provision; the contractee does not need to separately agree. In both consumer and non-consumer transactions, the business utilizing "electronic self-help" must give notice to the debtor that electronic self help will be used 15 days before it is used.⁷⁰ Further, regardless of the circumstances, a business may not use electronic self-help if it knows or should know that use of such would cause significant danger or harm to third parties or public not involved in the transaction.⁷¹

<24>The California's statute, enacted in 2004, responded to the use of electronic

surveillance technology by rental car companies to monitor renters' driving habits.⁷² The statute prohibits a rental company from using tracking or information-gathering technology such as GPS to access or obtain any information relating to renter's use of a rental vehicle.⁷³ An exception to the rule allows car rental companies to use GPS tracking to locate a stolen, abandoned or missing vehicle in each of the following cases: (1) when a renter or law enforcement official informs the company that the vehicle has been stolen, abandoned, or missing; (2) when a renter does not return a vehicle following one week after the return date; and (3) when the rental company discovers that the vehicle has been stolen, abandoned, or missing.⁷⁴ The statute also mandates that a rental company shall maintain a record of information relevant to any activation of surveillance technology and that this record shall be maintained at least twelve months from the date activated and shall be available to the renter upon request.⁷⁵ The California law allows the use of GPS for data collection, but only after the vehicle is returned. Specifically, GPS can be used to determine the date and time vehicles are returned, total mileage driven, and fuel level of returned vehicles.⁷⁶

<25> Like the California statute, the New York statute focuses on rental vehicle protections.⁷⁷ The statute mandates that information collected via GPS may not be used to determine or impose any costs, fees, charges, or penalties on an authorized driver for such driver's use of a rental vehicle, but can be used to impose costs, fees, charges, or penalties to recover a vehicle that is lost, misplaced, or stolen.⁷⁸ The statute's specific mention of "authorized driver" seems to permit the use of GPS if a person who drives a car was not authorized to do so under the rental contract (i.e. for court proceedings if there is proof that someone else was driving vehicle).

<26> Companies must comply with the statutory limitations and requirements in states with legislation that regulates the use of tracking technology. Mere operation within a state necessitates compliance with the state's statute. New York legislation defines "Rental Vehicle Company" as any person or company in the business of renting vehicles out to members of the public from a location in the state.⁷⁹ The California statute defines "Rental Company" as "any person or entity."⁸⁰ Thus, companies that operate within a regulated state cannot escape compliance with that state's laws by drafting contracts under the law of a legislation-free state.

<27> In 2006, several states enacted GPS-related legislation in reaction to consumer privacy concerns, Maine, Colorado, New Hampshire, and Virginia recently enacted legislation requiring motor vehicle manufacturers to disclose the presence of data recording devices, such as GPS, to consumers.⁸¹ The laws protect both vehicle owners and persons entitled to possession of the vehicle, including lease-holders.⁸²

<28> Maine, Colorado, New Hampshire, and Virginia, now restrict access of data from data recording devices to vehicle owners and possessors except: (1) when the owner/possessor consents to retrieval of the information, (2) when a court orders production of such information, (3) for the purpose of repairing or servicing the car by a licensed auto dealer or technician, and (4) to provide emergency aid in case of an auto crash.⁸³ Further, statutes in the four states require that a subscription service agreement must disclose the fact that information may be recorded or transmitted where transmission of data from an event data recorder is a part of a subscription service.⁸⁴

<29> Recent legislation aims at increasing consumer protection and limiting access to vehicle data, although the state laws differ in some respects. Maine, Colorado, and Virginia allow access to such data by a law enforcement officer acting as authorized under statutory or constitutional law.⁸⁵ In addition, Maine and Colorado allow the use of data from data recording devices for research purposes so long as the research is aimed at improving motor vehicle safety and the identity of the owner/possessor/ or driver of the vehicle is not disclosed, and as a part of discovery in a legal

<30> Newly enacted legislation in New Hampshire prohibits the State of New Hampshire and any of its political subdivisions from using surveillance devices including GPS to identify vehicles on highway.⁸⁷ Virginia law disallows auto insurers from reducing coverage, increasing insurance rates, or not applying discounts only because the owner of a vehicle does not allow release of data from their vehicle's data recording device to the insurer.⁸⁸ The only exception to Virginia's law is that insurance companies can offer a discount based on information from a data-recording device, if the insured authorizes the release of such information to the insurer.⁸⁹ Companies that do business in multiple states should keep abreast of new state legislation focused on GPS and tracking technology.

CONCLUSION: CAR RENTAL GPS LITIGATION AND LEGISLATION IS RELEVANT FOR OTHER INDUSTRIES

<31> The car rental litigation relating to consumer contracts and GPS, as well as related legislation, provide guidance for businesses that wish to use tracking technology. Contracts should reflect public policy and privacy considerations.

<32> The burden to disclose and explain the use of tracking technology may be lower in situations where a contract is between two commercial parties. Courts typically will consider a non-drafting party's level of sophistication and ability to negotiate a contract to determine if contract terms are fair or unfair. The Connecticut GPS statute specifically states that in non-consumer transactions, a commercial party does not have to sign a separate statement authorizing the use of electronic self-help, such as GPS, but automatically agrees to any clause allowing for such if the clause is in the main contract.⁹⁰

<33> In conclusion, companies that lease or rent equipment to consumers should: (1) clearly disclose to customers the use of tracking devices and the relationship between information collected from tracking devices and any subsequent charges or fines or actions that may be based on the use of GPS; (2) communicate any surcharge that may be imposed on consumers before assessing such charges; and (3) ensure that any imposed surcharges correspond closely to actual or projected damage to the leased goods.

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Footnotes

1. Leah Altaras, University of Washington School of Law, Class of 2007. Thank you to Professor Anita Ramasastry of the University of Washington School of Law.
2. See, e.g., *Am. Car Rental, Inc. v. Comm'r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005); *People v. Accelaron Corp.*, proposed J. (Cal. Super. Ct. 2004) [hereinafter *Accelaron*], available at http://ag.ca.gov/newsalerts/cms04/04-129_settle.pdf (site last visited February 3, 2007).
3. Conn.Gen.Stat. § 42a-9-609 (2003); Cal. Civ. Code § 1936(6)(o) (2002); N.Y. General Business Law § 20 Art. 26 § 396-z (2006).
4. See, e.g., www.vehicle-tracking.com; <http://www.gpsonsale.com/vehicletrackingdevices/index.htm?ovchn=GGL&ovcpn=Tracking&ovcrn=gps+tracking&ovtac=PPC>; www.advantrack.com.
5. See, e.g., Anita Ramasastry, *Tracking Every Move You Make: Can Car Rental Companies Use Technology to Monitor Our Driving?: A Connecticut Court's Ruling Highlights an Important Question*, FindLaw's Legal

6. y 28, 2007 Rental Equip. Reg. 79, V. 47, Issue 5, (2004), 2004
7. LNR 825187, Waseem Karim, *The Privacy Implications of Personal Locators: Why You Should Think Twice Before Voluntarily Availing Yourself to GPS Monitoring*, 14 Wash. U.J.L. & Pol'y 485 (2004); Jill Yung, *Big Brother Is Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It*, 36 Seton Hall L. Rev. 163 (2005); Kristen Edmundson, *Global Positioning System Implants: Must Consumer Privacy Be Lost In Order For People To Be Found?*, 38 Ind. L. Rev 207 (2005.), Karim, *supra* note 7 at 485; Yung, *supra* note 7 at 170.
9. See, e.g., Ramasastry, *supra*, note 7.
10. See, e.g., Yung, *supra* note 7, at 171.
11. *Id.* at 172-3.
12. *Unplugged*, *supra* note 6.
13. See, e.g., Tom Magliozzi & Ray Magliozzi, *Hold the Dog and Beep-Beep Alarm; Get Ignition-Kill Device*, Pitt. Post-Gazette, March 24, 2002, at H1.
14. Paul Bradley, *Drag Crash Part of Study State Looks at Need for Regulation*, Richmond Times-Dispatch, November 17, 1996 at C1.
15. See, e.g., George O'Brien, *Putting His Finger on a Solution*, BusinessWest 32, September 1, 2001.
16. *Id.* at 32.
17. Elizabeth Yen, *Rent a Car, Rent a Spy: Governments React to New Uses for GPS*, 14-Aug Bus. L. Today 59, 63 (2005).
18. D. Zachary Hostetter, *When Small Technology Is a Big Deal: Legal Issues Arising From Business Use of RFID*, 2 Shidler J.L. Com. & Tech. 10 (2005).
19. *Id.*
20. Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 869 A.2d 1198 (Conn. 2005) at 1202; *Acceleron*, *supra* note 2, at 5.
21. People v. Acceleron Corp., compl., [hereinafter *Acceleron compl.*] available at: http://ag.ca.gov/newsalerts/cms04/04-129_complaint.pdf (last visited February 3, 2007).
22. *Id.* at 5-6.
23. *Id.* at 3.
24. *Id.* at 5.
25. *Id.* at 6.
26. Press Release, California Office of the Attorney General, *Attorney General Lockyer Announces Consumer Protection Settlement with Bay Area Rental Car Firm: San Mateo DA Fox Also Reaches Settlement with Acceleron That Provides Restitution*, (November 9, 2004) (available at <http://ag.ca.gov/newsalerts/release.php?id=845&year=2004&month=11>) (last visited February 3, 2007).
27. *Id.*
28. *Acceleron*, *supra* note 2, at 3.
29. *Id.* at 3-4.

30. *Am. Car Rental, Inc. v. Comm’r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005) at 1202; Follow That Car! Legal Issues Arising from Installation of Tracki
31. *Id.* at 1201.
32. *Id.* at 1202.
33. *Id.*
34. *Id.*
35. *Id.* at 1203, 1204.
36. *Id.* at 1204.
37. *Id.* at 1205. The test is met if the practice fulfills either one or, if at a lesser extent, all three of the following: “(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]...”
38. *Acceleron compl.*, *supra* note 21 at 3.
39. *Acceleron*, *supra* note 2 at 4.
40. *Id.* at 4.
41. *Id.*
42. *Am. Car Rental, Inc. v. Comm’r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005) at 1201.
43. *Id.* at 1201-1202.
44. *Id.*
45. *Id.* at 1204.
46. *Id.* at 1202.
47. *Id.* at 1204.
48. *Id.*
49. Some state constitutions specifically protect the right to privacy. The issue remains as to whether the use of GPS devices, alone, violates that provision. Certainly such provisions counsel for great care to be taken in disclosing the devices’ use. *See, e.g.*, Cal. Const. art. I, § I.
50. Companies should be aware that in some states, public policy regarding punitive damages is different depending on the type of contract at issue. For instance, if the contract at issue is an arm’s-length agreement between two businesses, different rules may apply than apply to a boilerplate consumer contract. *See, e.g.*, Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 *Wake Forest L. Rev.* 295 (2005).
51. A penalty is a fine that is intended as such and is greater than the forecasted economic value of the potential breach of contract for which the fine is imposed. *See* Restatement (Second) of Contracts § 356 (1981); and U.C.C. § 2-718 (2003). “Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated

52. *Acceleron compl.*, *supra* note 21, at 3.
53. *Id.* at 5.
54. *Acceleron*, *supra* note 2 at 3.
55. *Id.* at 11.
56. *Am. Car Rental, Inc. v. Comm’r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005) at 1209-1210.
57. *Id.* at 1204.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1203-1204, n.4 (explaining the exact calculations made by the hearing officer).
63. *Id.* at 1204.
64. *Id.* at 1204.
65. *Id.* at 1205.
66. *Id.* at 1205, and n. 6. The Federal Trade Commission in Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed initially articulated the criteria. Reg. 8355 (July 2, 1964) (not codified per 54 Fed. Reg. 26187-01). The Supreme Court of Connecticut used these criteria to interpret “unfairness” under CUTPA but noted that General Statutes § 42-110b (c) and federal trade commission and federal court interpretations of the Federal Trade Act should also guide their decision and those authorities cast doubt on whether the cigarette rule remained the guiding rule authorized by the federal trade commission. They chose not to address that issue and used the Cigarette rule anyhow. Cigarette rule factors do not all need to be satisfied to support a finding that a practice is unfair. The factors are: (1) whether the practice without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise... (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, (competitors or other businesspersons)...
67. *Id.* at 1206.
68. Conn.Gen.Stat. § 42a-9-609 (2003); Cal. Civ. Code § 1936(6)(o) (2002); N.Y. General Business Law § 20 Art. 26 § 396-z (2006).
69. Conn.Gen.Stat. § 42a-9-609 (2003).
70. *Id.* at (b)(3)(A).
71. *Id.* at (b)(5).
72. *Rental Car Companies: Electronic Surveillance Technology: Hearing on A.B. 2840 before the Assembly Comm. on the Judiciary*, 2004 Leg., Regular Session (Cal. 2004).
73. *Id.* at (o).

74. Cal. Civ. Code § 1936(6)(o) (2002).
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75. *Id.*
76. *Id.*
77. N.Y. General Business Law § 396-z (2004). The Connecticut GPS litigation directly instigated the bill. N.Y. Spons. Memo. 2004 Ch. 476 , 227th Leg., Regular Session (N. Y. 2004).
78. N.Y. General Business Law § 20 Art. 26 § 396-z (2006).
79. *Id.* § (1)(c).
80. Cal. Civ. Code § 1936 (a)(1) (2002).
81. Colo. S.B. 06-224. enacted by Governor June 6, 2006, *available at*: http://www.leg.state.co.us/clics2006a/csl.nsf/fsbillcont3/6FF3F3A24034AC1B8725713300558A?Open&file=224_01.pdf (site last visited February 3, 2007); Me. L.D. 1885, signed by Governor April 4, 2006, Chapter 544, *available at* <http://www.mainelegislature.org/legis/bills/LD.asp?LD=1885> (site last visited February 3, 2007); N.H. H.B. 599, signed by Governor May 10, 2006, Chapter 95, *available at* <http://www.gencourt.state.nh.us/legislation/2006/HB0599.html> (site last visited February 3, 2007); Va. H.B. 816, Enacted April 19, 2006, Chapter 851, *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+CHAP0851> (site last visited February 3, 2007).
82. *Id.* Lease holders are protected so long as the lease agreement is for a period of at least three months at it's inception.
83. Me. L.D. 1885, *supra* note 81, at §1972(1); Colo. S.B. 06-224, *supra* note 81at 12-6-402(2)(a); N.H..H.B. 599, *supra* note 81, at IV; Virginia H.B. 816, *supra* note 81at § 46.2-1088.6(B).
84. Me. L.D. 1885, *supra* note 81, at §1972(13); Colo. S.B. 06-224, *supra* note 81at 12-6-402(4); N.H. H.B. 599, *supra* note 81at V; Va. H.B. 816, *supra* note 81at § 46.2-1088.6(B)(1).
85. Me. L.D. 1885, *supra* note 81 at §1972(1); Colo. S.B. 06-224, *supra* note 81at 12-6-402(2)(a); Va. H.B. 816, *supra* note 81at § 46.2-1088.6(B).
86. Me. L.D. 1885, *supra* note 81at §1972(1); Colo. S.B. 06-224, *supra* note 81 at 12-6-402(2)(a);
87. N.J.H.B. 1738-FN, *available at* <http://www.gencourt.state.nh.us/legislation/2006/HB1738.html> (site last visited February 3, 2007).
88. Va. H.B. 816, *supra* note 81, at §38.2-2213.1
89. *Id.*
90. Conn.Gen.Stat. § 42a-9-609 (2003).

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