PELOTON, NORDIC TRACK, ECHELON, OH MY!

Discovery Strategies to obtain Virtual Fitness Data that could send Plaintiff's case riding off into the sunset.

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INTRODUCTION

In recent years, virtual fitness tracking applications and wearable devices have taken the fitness world by storm. Between virtual fitness trackers linked to at-home fitness equipment and wearable devices, people are now tracking and documenting their fitness activities by the mile and minute. While these virtual fitness tracking applications and wearable devices can provide motivation and helpful information for fitness enthusiasts and health-conscious individuals alike, this information can become problematic for a plaintiff in personal injury litigation that is not being honest about his or her limitations following an accident. As at-home fitness equipment and applications take off, these platforms continue to collect even more useful data than wearable devices in many circumstances. This article will explore the data collected from virtual fitness trackers and wearable devices and its discoverability, as well as obstacles to admissibility and authentication of this critical data.

DATA COLLECTED

With shutdowns of gyms and health clubs, at-home fitness equipment has increased in popularity, in part, from a belief that gyms and health clubs may present increased health risks during the pandemic. At-home fitness equipment like that manufactured by Peloton, Nordic Track, Echelon, Tonal, and Mirror, among others, provide at-home fitness classes virtually and track progress of users through virtual fitness tracking applications. These applications provide separate profiles for each user and track the number of total workouts completed, distance traveled, and when those workouts were completed, as well as cadence, resistance, and overall output (watts), making the data collected more reliable and consistent than that of wearable devices. In addition to data collected on these fitness applications, many applications have social media communities where users openly post and discuss their respective fitness journeys.

A comprehensive picture of an individual's general daily activity can be ascertained from data collected from wearable devices such as those manufactured by Apple, Fitbit, and Google, among others. Unlike virtual fitness trackers linked to specific fitness equipment or fitness applications, wearable devices collect data from the time the device is put on to the time it is taken off. Wearable devices collect information such as the wearer's location, route taken for outdoor exercise, activity levels, steps taken daily, heart rate, sleep patterns, active minutes, and time standing daily.

Data acquired from both virtual fitness tracking applications and wearable devices can offer evidence that could be used by the plaintiff to prove damages or by the defense to establish lack of damages. For example, if the data shows the plaintiff's activity levels diminished following the accident, the plaintiff could use it to support he or she is less active than prior to the accident. Conversely, the data could be used by the defense to establish a plaintiff is being untruthful regarding the extent of his or her damages if the plaintiff's activity levels do not match that attested to by the plaintiff. Moreover, discovery relating to activity levels prior to the subject accident can be used to disprove the plaintiff's claims of being very active prior to the accident and inactive after the accident.

DISCOVERABILITY

It can be challenging for the defense to obtain data from virtual fitness tracking applications and/or wearable devices because it will either need to come from the plaintiff directly or company itself. Manufacturers of virtual fitness tracking applications and wearable devices provide their users direct access to the data, as such, discovery requests should be served directly to the plaintiff. However, as the user can generally delete the data at any time, a litigation hold should be served on the plaintiff as soon as possible. Information regarding ownership of at-home fitness equipment and/or a wearable device, as well as participation in at-home fitness classes and social media groups may be obtained during the plaintiff's deposition through questions tailored to claimed activity levels before and after the accident, after which targeted discovery requests can be served to obtain production of the data. Targeted discovery requests should be tailored to the relevant time frame to limit objections by the plaintiff. These requests should include inquiries as to whether the plaintiff owns at-home fitness equipment and/or takes at-home fitness classes that virtually track the progress of the user through virtual fitness tracking applications, and/or whether the plaintiff owns a wearable device, along with a request for production of a download of the data. Additionally, many social media groups exist where users of home fitness equipment like Peloton, Nordic Track, Tonal, Echelon, and Mirror chronical their fitness journeys, which may be obtained through discovery to the plaintiff.

When a subpoena is sent directly to the company of the virtual fitness tracking application and/or wearable device, the subpoena will need to be domesticated in the jurisdiction where the company is based. The process for domesticating subpoenas varies state by state and jurisdiction by jurisdiction. Even after the subpoena is domesticated, there is no guarantee the company will provide data for its users as many of these companies purport to support user privacy. As such, if possible, this information should be obtained directly from the plaintiff. In many cases, the user's smartphone maintains and displays data from the virtual fitness tracker linked to at-home exercise equipment, and in certain jurisdictions it is possible to obtain a Court Order allowing a forensic expert to download the data directly from the plaintiff's phone. Therefore, the plaintiff's smart phone should be included in any litigation hold letter served at the outset of litigation.

ADMISSIBILITY

It is important to remember when seeking to introduce data collected by virtual fitness trackers and/or wearable devices that it should be treated like any other evidence, and should be admitted if it is relevant, authentic, and reliable.

Relevancy

The data collected from virtual fitness tracking applications and/or wearable devices would likely be deemed relevant to prove or disprove damages in personal injury cases where a plaintiff is alleging decreased ability to exercise to the extent he or she could prior to the accident. For example, the data could be used to establish a decrease or increase in the plaintiff's use of the at-home equipment linked to virtual fitness tracking application when a comparison is made of the data from before and after the accident. Therefore, data of this type is relevant in personal injury cases because it relates to plaintiff's activity levels and tends to prove or disprove the plaintiff's claimed damages.

Authenticity

The data can be authenticated through witness testimony that it is what the proponent claims it to be by identification of data unique to the user or through a computer forensic expert. Most virtual fitness tracking applications have profiles for each user that can be authenticated through testimony of the plaintiff. For example, the plaintiff could be questioned regarding the type, amount, and time of classes taken as reflected on the virtual fitness tracking application to establish the data is authentic and/or regarding specific fitness goals contained in data from a wearable device, as well as GPS coordinates associated with the home of the plaintiff to establish authenticity. If the testimony cannot be obtained through the plaintiff, defense counsel could hire a computer forensic expert to authenticate the data from either virtual fitness trackers or wearable devices.

Reliability

Even if data from virtual fitness trackers and/or wearable devices is properly authenticated, it is still necessary to establish it is reliable. Evidence is only considered reliable if it can accurately prove an issue in dispute without prejudicing or misleading the jury. Data from virtual fitness trackers linked to at-home exercise equipment is generally reliable regarding the number of classes taken and total time of exercise, as well as cadence, resistance, and overall output (watts) as this data is less subject to manipulation and each user is assigned a unique profile.

However, data from wearable devices is more susceptible to manipulation and is only reliable if the device is used properly. Additionally, the data could be misinterpreted by the reader, and there is no standardization among the wearable device manufacturers so there is the possibility for inaccurate information to be recorded. For example, heartrate monitors from several wearable device brands have been deemed unreliable when submerged in water, when used with skin perforations or tattoos, and/or irregular movements, among others. Moreover, some wearable devices incorrectly calculate step counts from erratic arm movements or fidgeting while the wearer is stilling down. Even still, these trackers could be deemed reliable for basic functionality such as time, frequency, and number of workouts performed.

CONCLUSION

As technology rapidly advances in the fitness industry, the digital footprint for active individuals is increasing. While data from virtual fitness trackers and wearable devices have fitness enthusiasts and health-conscious individuals tracking their activities by the mile and minute, the discoverability, admissibility, and authentication of this data is not without its challenges. However, an aggressive discovery strategy with this data in mind can provide insight into whether the plaintiff is being truthful regarding his or her alleged damages.

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