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**Car insurance patents threaten consumer choice**

By Peter Lewis, Insure.com  
Last updated July 10, 2009

It would be futile, silly and legally dubious for a car insurance company to try to "steal" such well-branded slogans as Allstate's "You're in Good Hands" or State Farm's "Like a Good Neighbor" — or, heaven forbid, GEICO's gecko.

But a more ambiguous "ownership" is emerging when the question turns to car insurance patents, where the rules of the game are still unfolding and patents that once seemed solid may no longer be.

Under [a major decision handed down last fall](#), the United States Court of Appeals for the Federal Circuit interpreted federal law to make it much more difficult to patent "business methods."

The so-called "Bilski" decision essentially ended a decade of looser standards the same court introduced in 1998 with a decision known as [State Street](#). That ruling opened the floodgates for business-method patents like Amazon's one-click process to buy goods online.

And just to add to the ongoing legal drama, in June 2009 the U.S. Supreme Court, which had earlier signaled it favored narrower standards, agreed to review Bilski during its next term.

In the car insurance world, this shifting legal landscape has put a spotlight on a coveted series of patents held by Progressive, most of which apparently were granted during the decade when business-method patents were issued more indiscriminately.

**Progressive freezes out the competition**



Specifically in question are patents that relate to Progressive's [pay-as-you-drive \(PAYD\) system](#). Marketed today as the "MyRate" program, Progressive's PAYD car insurance policies are currently available in about a dozen states.

MyRate is rooted in Progressive patents dating to at least 1996 that establish a system to monitor driving behavior to compute the cost of insurance. Insiders say what distinguishes Progressive's system is its capability to crunch multiple variables instead of just one — like *how* and *when* you drive — to calculate rates.

Customers who volunteer for Progressive's MyRate program plug a wireless device about the size of a small garage-door opener into their car's OBD II port, often located near the steering column, said Progressive spokesperson Leah Knapp. The device does not include a GPS unit to track where drivers drive, but does record information about how people drive, how often and when the car is driven, she said.

To help calculate a driver's premium, the device measures speed and time of day — factors that Progressive uses to calculate things like how quickly the car accelerates and slows down, as well as mileage. Generally speaking, those who benefit most are low-mileage, defensive drivers who do most of their driving in daytime hours, Knapp said.

A number of other insurance companies would like to implement similar pay-as-you-drive systems but say they feel frozen out by

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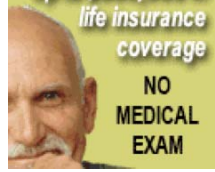
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Progressive's patents, Insure.com has learned.

For example, Esurance spokeswoman Kristin Brewe said, "The PAYD insurance patent issue represents an obstacle for all carriers who would like to implement PAYD, and there are many." She says mileage-based insurance programs like Progressive's are attractive both to consumers who can save money and to carriers with an environmental commitment.

In the meantime, Progressive spokesperson Leah Knapp expressed confidence the company's PAYD patents will stand up to legal scrutiny.

"While the Bilski decision changed the standard for granting business-method patents going forward, the decision affirmed that business methods remain patentable subject matter, and we feel good about our ability to enforce our patent portfolio should we need to," she said.

Under Bilski, the criteria for such patents were substantially narrowed. To stand up under the tougher standards, business-method patents must be tied to a machine — meaning if you can arrive at the process only in your head or with pencil and paper, the patent probably won't survive, legal experts say.

If the Supreme Court decides to further restrict business-method patents, or toss them out entirely, the ruling would not only curb new ones but also potentially invalidate thousands previously registered under looser criteria. That could open the door for other insurance companies to drive away with a piece of pay-as-you-drive insurance for their customers.

Sean O'Connor, a University of Washington law professor who specializes in intellectual property, said the Bilski ruling means that unless a would-be "business method" involves a new machine method, or transforms physical matter from one state to another, it can no longer be patented. Moreover, existing patents that don't meet those standards "are now quite likely invalid," he said.



non-obvious at the time the patent application was filed." O'Connor said. "In hindsight, even truly great inventions can seem obvious. This is not meant to defend this particular [PAYD] patent, but just to point out that the courts try to look beyond the intuitive sense that a patent seems silly now just because its innovation seems basic or obvious now."

### The data stream

Progressive's PAYD device measures different variables depending on the state, Knapp said. For example, in Michigan and Oregon, the device records

A property right granted by the United States Patent and Trademark Office to an inventor "to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States." Just what qualifies as patentable is currently under legal review, but inventions tied to a machine, or that transform matter from one state to another, are likely to endure. The invention of the telephone by Alexander Graham Bell is a famous invention.

### Copyright

Protection provided to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works, both published and unpublished. Author J.L. Rowling owns the copyright to the *Harry Potter* books.

### Trademark

Protects words, names, symbols, sounds, or colors that distinguish goods and services from those manufactured or sold by others and to indicate the source of the goods. A famous example: Coca-Cola.

### Service mark

A word, name, symbol or device that indicates the source of the services, and to distinguish them from services offered by others. Examples: the symbols used by Microsoft Windows or Macintosh to identify their brands.

*Source: USPTO and other online sources.*

O'Connor couldn't say definitively whether Progressive's PAYD patents would stand up under Bilski. "They might survive a challenge," he said, "but they might also be invalidated simply because they may be too broad."

Patents involve "formal claims" that are spelled out in the application process. As the law now stands, it is up to the U.S. Patent and Trademark Office (USPTO) to determine whether business-method claims encompass a "machine" or a method of using a machine.

When examiners evaluate a patent, "the test is whether it was novel and

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how much and when the vehicle is driven. In Minnesota, it also tracks how much time is spent driving over 75 miles per hour.

Other insurance companies have introduced programs and systems that use tracking devices or cameras, but most are aimed at monitoring teen driving, such as Safeco's "Teensurance Safety Beacon" program and American Family Insurance's "DriveCam." And GMAC's "Low Mileage Discount Program with OnStar" records odometer readings to offer discounts for drivers of GM vehicles.

More recently, Travelers introduced its "IntelliDrive" system in a handful of states. It, too, involves a device plugged into the OBD II port, but it's only a mileage-based discount system. None of these other programs collect the variety of data that Progressive's PAYD system does to derive a customer's insurance rate.

Progressive's Knapp said that the company has "licensed our systems and methods for implementing usage-based insurance to other companies, and we are open and willing to discuss licensing with additional insurance carriers on reasonable terms."



Progressive's MyRate device.

Asked to elaborate, Knapp replied, "Reasonable terms reflect our investment in the research and development of the product as well as the costs for a potential licensee to launch their product."

But so far, no U.S.-based insurers have taken Progressive up on licensing. The only companies that have licensed Progressive's systems are based in the U.K. — Norwich Union and Aviva.

In business, it's generally not a "great idea to roll out a product feature that is controlled by one of your largest competitors."

— Kristin Brewae, Esurance

Esurance's Brewae said that Progressive doesn't do auto insurance business in the U.K. and vice versa for Norwich Union and Aviva. She said Esurance has not considered licensing Progressive's system — and there's even less reason to think of doing so now that the PAYD patent is in question.

In business, it's generally not a "great idea to roll out a product feature that is controlled by one of your largest competitors," Brewae added. "As with all licensing arrangements, the owner could revoke use at any time or not renew the license at a critical juncture, meaning that a company licensing the 'system,' after spending considerable effort to implement and market the initiative, had wasted resources."

### A roadblock or a test case?

Interestingly, even before the *Bilski* decision was delivered, a Federal Highway Administration (FHA) transportation planner named Allen Greenberg questioned the validity of Progressive's patents.

The FHA declined to make Greenberg available for comment. In another research paper, Greenberg praised Progressive for its "extensive work" to advance PAYD systems.

Agency spokeswoman Nancy Singer said that the views expressed in Greenberg's papers were not those of the FHA, adding the government would not comment "on the practices of a private insurance company named Progressive."

Progressive's patents stand in the way of widespread adoption of insurance policies that could substantially decrease "congestion, greenhouse gas

But in [a paper presented last year](#) to the Transportation Research Board, a division of The National Academies, Greenberg wrote that Progressive's patents "seem vulnerable."

"In the case of PAYD insurance," Greenberg wrote, "the literature (or 'prior art' as it is known in patent law) contains many examples of it being contemplated, potentially making the patents covering such insurance vulnerable to reexamination or court challenge."

In Greenberg's paper, titled "Lowering the Patent Barrier to Pay-As-You-Drive Insurance," he concluded that Progressive's patents stand in the way of widespread adoption of insurance policies that could substantially decrease "congestion,

emissions, air pollution, crash injuries and fatalities and insurance claims."

— Allen Greenberg,  
FHA

greenhouse gas emissions, air pollution, crash injuries and fatalities and insurance claims."

In a footnote, he said he based that conclusion on "interviews and discussions with multiple senior executives of automobile insurance companies."

Not everyone agrees with Greenberg.

Mark Nowotarski, president of Connecticut-based Markets, Alliances & Patents, a firm that specializes in business-method patents, describes

himself as "pro inventor." He does not agree that Progressive's PAYD patents have had a "chilling effect" on other insurance companies. Rather, he believes that competitors are "holding back to wait and see if Progressive is successful commercially or not."

Initially he said he had no "insider information" on which to base that opinion. Then he added cryptically, "I have reasons for the belief, but I can't go into what they are."

But Esurance believes that Greenberg's point about barriers is on the money.

"With one company holding a patent to the technology required to deliver PAYD, this stops all other carriers from being able to proceed with their own implementations, reducing competition," said Esurance's Brew.

"Any time there's less consumer choice, this is a negative for auto insurance consumers. Consumers should be able to purchase the widest array of products from the largest variety of companies, so that consumers benefit from multiple price points and service options."

### The inside story

Then there's Robin Harbage, an actuarial consultant in the Ohio offices of EMB, an international consulting firm, who worked at Progressive for 20 years and helped develop the patents that led to MyRate. He believes usage-based systems are well-suited to assess individual risk because they provide real-time data about the behavior of a particular driver, which in his opinion trumps putting drivers in with whatever demographic buckets they otherwise fall into, such as vehicle type, driving history, marital status, gender, age, credit history and so on.

Progressive has said its "take rate" for the program is about one in four among eligible drivers — an adoption rate Harbage characterized as "astounding" considering it's relatively new and that it's perceived by the driving public as "a little bit strange."

"I'm very much in favor of Progressive protecting whatever rights they have," Harbage says, and hastens to add, "I'm also very much in favor of usage-based insurance being greatly expanded within the industry."

Without question, he and others say, Progressive's patents have formed a barrier against adoption of usage-based insurance systems, leaving drivers with less choice and possibly bigger insurance bills.



*Progressive's patents are blocking drivers with other insurance companies from accessing "pay as you drive" policies.*

Harbage said he's made multiple presentations about usage-based insurance at actuarial and insurance conferences. At those venues and in client meetings, "If you ask, 'Why haven't you moved faster on this?' . . . the common answer is, 'Well, we're reluctant because of [Progressive's] patents.'"

Of the upcoming Supreme Court review, Harbage said, "It puts everybody on edge for the time being."

### Allstate marks its territory

Progressive's PAYD patents aren't the only ["business-method" patents that could be at risk](#).

Take [Allstate's "Your Choice Auto" program](#). Allstate's Web site features a list of coverage options, including a "Safe Driving Bonus" and "Accident Forgiveness."

A note in tiny type at the bottom says "patent pending." Asked what, exactly, is being patented, Allstate spokesman Mike Siemienas said he was not at liberty

to say because the status is "patent pending" and the application is not yet public information.

Asked how potential infringers are supposed to know they're infringing if details are unavailable, Siemienas had this lawyerly reply: "No potential liability will exist until the patent is approved." At that point, an infringer could be obliged to "undo" whatever it did that is deemed to be infringing.

Speaking of enforcement actions, Allstate made news last year when its boss, Thomas Wilson, [threatened to sue Farmers Insurance for alleged patent infringement](#), contending that the "Farmers Flex" product was infringing on "Your Choice Auto."



Asked recently what became of that threat, Siemienas said Allstate followed up by sending Farmers a letter notifying them that "we'd submitted a patent application in this area." He had no further information about how the matter was resolved.

Asked about the letter, Mark Toohey, Farmers senior vice president for media relations, said, "I don't know if we ever received the letter." He added, "We never saw this as a patent issue. Absolutely nothing has happened. We absolutely stand behind the integrity and uniqueness of all of our products."

EMB's Harbage said Allstate's "Your Choice Auto" package looks awfully familiar to what every other insurance company offers. For

example, the "Accident Forgiveness" feature is hardly unique, he said, because "almost every carrier offers some variant of 'accident forgiveness.' Progressive had something like that for about 10 years, and I don't think Progressive was the first."

Similarly, he observed that the "'Safe Driving Bonus' sounds a lot like a renewal discount, which is something that almost every insurer offers."

He added, "You look at the pieces [of "Your Choice Auto"] . . . it's been done in the marketplace many times in many different ways. . . . Is it unique packaging? I don't know."

"Obviously they feel there is something patentable there. We'll see when the patent's approved, if it is. . . . It's hard to imagine, other than some kind of unique package or offer here that isn't already sort of 'prior art.'"

### Other insurers watch and wait quietly

O'Connor, the law professor, said it might make sense for Progressive's competitors — or anyone who believes a patent is questionable under *Bilski* — to petition the USPTO to re-examine questionable business-method patents in light of the latest legal ruling.

But don't hold your breath. Esurance's Brew noted that insurance companies are by nature "risk averse." The default attitude, she said, "is to let someone else do the heavy lifting of a test case."

Meantime, Allstate's Siemienas said his company is pushing ahead with research to develop its own usage-based insurance program. Earlier this year, he noted, Allstate purchased a patent originally granted in 2005 to a Texas-based company called Innosurance.

Based on the abstract published on the USPTO Web site, the Innosurance product sounds very similar to Progressive's MyRate:

"A method and apparatus for collecting, uploading and evaluating motor vehicle operation utilizing on-board diagnostic components (OBD II) and ground positioning satellite (GPS) systems whereby operator identifiable behavior can be rated for driving safety and other characteristics."

Progressive's Knapp said the company is aware of the development.

"We can't speak to why the USPTO does what it does," she said via e-mail. "But I can tell you that our patent claims pre-date the Innosurance claims by as much as eight years; and to the extent their patent claims may be interpreted to overlap with ours, those claims should not have been issued."

Stay tuned.

*About the author: Peter Lewis was a Seattle Times staff reporter for many years and now writes for regional and national publications.*

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