TransReflections
D&O/E&O Implications of Facebook
Jacqueline Nixon-Smalls

In addition to adjudicating and settling customer claims, our Claims experts keep up to date with major market developments. Originally developed for internal training and education purposes, they share their summaries and perspectives on topical issues. In this paper, Jacqueline Nixon-Smalls, AVP of D&O/E&O Claims, reflects on the threat to personal data posed by the Facebook/Cambridge Analytica story, and the implications for insurers.

It is amazing how seemingly simple retail purchases, clicks and "likes" on internet websites and visits to various social media platforms can result in exploitation of personal data. The Facebook/Cambridge Analytica case is a good example.

Facebook is a social networking website that allows people to communicate by sharing information, pictures, website links, and videos. Cambridge Analytica is a data mining and analysis company that allegedly used the personal information of up to 87 million Facebook users, without their permission or knowledge[1], and then deployed psychographics, a technique based on the psychological traits of data users.[2]

Used primarily by psychologists to study the behaviors and attitudes of people, Cambridge Analytica used psychographic techniques to manipulate the activities of millions of Facebook users and utilized psychometrics to measure the mental capacity of the activities.[3] For example, the company developed a 100 question quiz which relied on an app called myPersonality to access the personal information of Facebook users.[4]

The quiz assessed human behavioral traits such as openness, and agreeableness. According to the New York Times, many respondents who took the quiz authorized the myPersonality app to gain access to their Facebook profile data and information about their friends' network which were then cross-referenced, correlated and measured.

Through its unique data measurement strategies, Cambridge Analytica found that the more a Facebook user liked a particular movie, visited a particular website, or stayed on a website longer, the more insight one might gain into that user's behavioral characteristics. The use of psychometrics proved more reliable and accurate than getting personal data about the user from a friend, family member, or spouse.[5]

British and U.S. lawyers launched a joint class action against Facebook and Cambridge Analytica for allegedly misusing the personal data of more than 50 million people. In rebuttals, Facebook contends that Cambridge Analytica misled it as well as violated its policy for handling user data. Cambridge Analytica argues that the Facebook data it received was legally obtained utilizing a Facebook tool.[6]

On March 2018, a securities class action complaint was filed *Fan Yuan, individually and on behalf of all others similarly situated v. Facebook Inc., Mark Zuckerberg and David M. Wehner, U.S. District Court Northern District of California, 18-cv-01725.*

The complaint alleges the defendants made false and/or misleading statements and/or failed to disclose that:

i. Facebook violated its own purported data privacy policies by allowing third parties to access the personal data of millions of Facebook users without their consent;
ii. discovery of the foregoing conduct would foreseeably subject Facebook to heightened regulatory scrutiny; and
iii. as a result, Facebook's public statements were materially false and misleading at all relevant times.

Throughout the class period, the complaint alleges that Facebook concealed the extent to which its users' data was available to third parties without users' consent. After the Times article was published, the price per share dropped. It is claimed that damages may be excess of $70 billion. In addition to the complaints mentioned above, two derivative complaints have been filed in the U.S. District Court, Northern District of California.

These claims are presented for coverage under the Directors and Officers policy cover. Facebook has an ABC and a Side-A insurance tower in excess of $375M. The litigation is early in the discovery phase, and it is too early to predict the potential liability, if any, of Facebook. It is the writer's opinion that between defense expenses and possible settlement most if not all of the insurance tower maybe exhausted.

1-5. *How Researchers Learned to Use Facebook 'Likes' to Sway Your Thinking*. The New York Times, 20 March 2018..

6. *Facebook and Cambridge Analytica class action lawsuit*. The Guardian. 10 April 2018 n Web. 31 May 2018.

In addition, general liability coverage may also be triggered on claims where Facebook users alleged their privacy was violated. Coverage would be dependent on whether the alleged violation took place within the noticed policy period. One such lawsuit is *Price v. Facebook, U.S. District Court, Northern District of California, 18-cv-01732.*

A number of Facebook users and investors have subsequently filed suit as the regulatory scrutiny continues to grow.

Questions for
D&O/E&O Underwriters

Facebook isn't the only social media platform, and social media companies aren't the only ones deploying psychographic capabilities to profile its user/customer bases.

▶ As you underwrite a D&O/E&O policy, what questions are you asking about market research activities and data capture?

▶ How important is data capture and resale to the company's profitability?

▶ Is the company transparent about how it uses customer data?

▶ How easy is it for the company's customers to select higher privacy settings?

Contacts

Jacqueline Nixon-Smalls	**Cathryn Thom**	**Brian Finlay**	**David Scott**
Claims, AVP, D&O/E&O	Claims, VP, D&O/E&O	Treaty Underwriting, SVP D&O/E&O	Fac. Underwriting, SVP, D&O/E&O
jnixon@transre.com	cthom@transre.com	bfinlay@transre.com	dscott@transre.com
+1 212 365 2217	+1 212 365 2258	+1 212 365 2038	+1 212 365 2244