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Social Media as a Factor in Personal Injury Underwriting: Risk, Rate and Regulation

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Abstract

Social media claims against individuals are increasing, yet insurance coverage for individuals for such claims is rarely available unless the insured has a personal injury endorsement to the standard homeowners policy or the insured has an umbrella policy, or the rare company-specific insurer includes such coverage. This suggests a market opportunity to provide this coverage. Underwriting this exposure will likely require examining social media as a new rate factor. Obtaining relevant information on this and showing predictive indicators is one challenge, particularly where social media use liability might be correlated with other factors, including other external data. Such factors will have to be approved by state insurance regulators and shown to be reliable and not unfairly discriminatory. This will likely open these factors to underwrite other coverages and policies, even if not approved or reliable. Some social media use might actually be a business pursuit, thus requiring this added coverage. A media liability policy crafted for the new exposure might be more effective to provide coverage if underwriting the factors can be regulated.

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Introduction

With 3 billion social media users in the world (Clement, 2019), liability claims arising from social media use are increasing rapidly, and they are predicted to continue increasing (Mills, 2015). These claims may likely lead insureds to seek coverage under selected personal lines policies. Coverage in the typical homeowners policy is nonexistent for such personal injury claims that include defamation and invasion of privacy absent a personal injury endorsement. However, these endorsements are rarely purchased. Coverage is available in personal umbrella policies, which are also rarely purchased. This presents a possible market opportunity for insurers, including coverage for social media exposures in the standard homeowners policy or the creation of a new personal media policy. This also presents a regulatory challenge as it relates to the underwriting of social media exposures in personal lines coverages; i.e., identifying the rating factors that would be relevant and permissible in the pricing of such coverage.

The possibility of broadening the coverage is a business decision that insurers must make and that state insurance regulators must approve. We see no inherent problem with providing the coverage; however, we do see many issues with underwriting the exposure. Such underwriting has particular challenges for invasiveness and scope. Underwriting must isolate the factors that are predictive of personal injury-type losses, such as defamation and invasion of privacy. However, an insured's social media activities could be predictive, or more loosely informative, of other types of losses, complicating the issue. Of course, only state insurance regulator-approved rate factors can be used for underwriting. Expanding these is the promise and fear of big data in underwriting and a current concern of state insurance regulators.[1] Thus, the inquiry of rating social media exposure for insurance coverage does more than highlight a new coverage that insurers might develop. It provides a foreshadow of regulatory wariness related to unfair discrimination and possible restrictions on an individual's right of free speech—a right that always must be weighed against liability for defamation and invasion of privacy.

In this paper, we examine three key questions related to social media claims:

1. What types of social media-related claims are being presented against individuals?
2. What are the coverage implications of social media claims for insurers and state insurance regulators?

1. As of this writing, the NAIC has two different groups addressing these issues: 1) the Big Data (EX) Working Group; and 2) the Privacy Protections (D) Working Group. Source: Eversheds Sutherland's "NAIC Report – 2019 Fall National Meeting," retrieved from *https://us.eversheds-sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEqG3Em83!/fileUpload.name=/NAIC%20Legal%20Alert_US10135_122419_dr3.pdf.*

3. Assuming social media claims are a developing and discrete line of liability claims, what factors should be considered in rating this coverage, and can these comport with principles of fair discrimination in insurance?

Types of Social Media-Related Claims

Previously, a person's exposures for claims not resulting from bodily injury or property damage were garden-variety defamation and invasion-of-privacy claims: through-the-window spying or picture-taking; maybe showing those pictures to other people; breaches of confidence and gossip; the nastiness of defamation; and the occasional harassment and intentional infliction of emotional distress. These were largely confined to the neighborhood social circles, local business associations, Parent Teacher Association (PTA) meetings, and the occasional bullying and gossip of the schoolyard. The internet, and especially social media, has greatly expanded opportunities for mischief. Social media itself is evidence of such claims, and it is the method to accomplish the torts of defamation; invasion of privacy; harassment; intentional infliction of emotional distress; and modern variants of these, such as cyberbullying, copyright infringement, interference with prospective economic advantage, disparagement, food libel where disparaging comments about food are made, sexting, and others.

When claims are made against individuals for these torts, the individual will be exposed to legal expense and possible judgments. The individuals may seek defense and indemnity from their insurer under a homeowners insurance policy. Insurance is available for these "personal injury" torts if the individual has a personal injury endorsement to the homeowners insurance policy or the individual has a personal umbrella policy, which usually includes such personal injury coverage. The insured who is alert to the risk of such lawsuits should ideally avoid engaging in activities that lead to a lawsuit. Secondly, the insured should seek insurance, just as an insured who seeks to avoid other types of losses engages in appropriate precautions, including buying insurance.

There has been a variety of social media-related activity that has led to personal claims. One common source of cases against individuals relates to defamation. For example:

- Defamatory posting by falsely asserting the crime of theft of a vehicle on Facebook, $6,000 judgment being the maximum amount awardable under Indiana small claims court (*Charles v. Vest*, 2017; Stafford, 2018).
- Defamatory posting by falsely asserting the other got drunk and killed her son, $500,000 settlement in Asheville, NC, after the trial court awarded $250,000 in general damages and $250,000 in punitive damages (Boyle, 2017; WCNC, 2017).
- Defamatory post by newly married couple about the wedding photographer resulted in $1 million verdict (*Claims Journal*, 2017).

- Defamatory posting by former client of law firm, $557,918.85 default judgment (*Hassell v. Bird*, 2016).
- Defamatory posting about a physician, $12 million judgment (*Claims Journal*, 2011).
- Defamatory review of a wedding site, but judgment reversed as expressing a matter of opinion of public concern, thus protected by anti-strategic lawsuits against public participation (SLAPP)[2] statute (*Neumann v. Liles*, 2016). (Similar cases are *Wong v. Tai Jing*, 2010; *Jackson v. Mayweather*, 2017; and cases noted therein. More than 25 states have such anti-SLAPP statutes. (Ballon, 2018: § 37.02[3]; and Scott, 2018: § 10.10).
- Defamatory posting by non-resident of a person in California, held that California court lacked jurisdiction over the non-resident (*Burdick v. Superior Court*, 2015).[3]
- Defamatory posting by a blogger (*Obsidian Finance Group, LLC v. Cox*, 2014). (A blogger is a journalist when writing on matters of public concern).
- Defamatory posting about a neighbor who complained of the noise from the other party's water cascading over rock, loud parties, dog defecation visits, and other intrusions; the post was, "Mr. Pritchard was a 'nutter' and a 'creep,' and accusing him of using a system of cameras and mirrors to keep her backyard and her children under 24-hour surveillance." Subsequent comments suggested that Mr. Pritchard, a school music teacher, was a pedophile. In fact, there were no cameras, the mirror was small and only used for *feng shui*, and adverse actions resulted at school; the court awarded $50,000 in general damages and $15,000 punitive, in Canada (*Pritchard v. Van Nes*, 2016).
- Defamatory posting by former student against teacher on Facebook resulted in $105,000 damages verdict in Australia (Burke, 2015).

2. Anti-SLAPP, O.R.S. § 31.150.

3. Other cases that have encountered procedural or jurisdictional issues, whether by individuals or corporate actors, are collected in MacWilliam (2005–2018).

- Defamatory posting on a Facebook page one student created as fake and in the name of another student[4] held that the parents were liable for negligent supervision for failing to remove the post (*Boston v. Athearn*, 2014).
- Defamatory postings on various websites by an unhappy client against an ophthalmologist about overcharging and extended and frequent wait times (*Pham v. Lee*, 2014). Similarly, defamatory postings about a gynecologist; news accounts report that the patient-commentator incurred $20,000 in legal expenses to date (CBS News, 2018).[5]
- Defamatory posting alleged in lawsuit by a Chevrolet dealership against customer who posted video of the "alleged" actual time the dealer's mechanics worked on the car, 17 minutes, instead of the four-plus hours the dealer claimed was work time and billed for (*Automotive News*, 2014).
- Defamatory posting by Courtney Love against a designer, $430,000 settlement (Associated Press, 2011).
- Defamatory posting on a gripe website, *www.TaylorHomes-Ripoff.com*, about a home developer's bad construction, with related claims for tortious interference with business relationships and contract, and trade dress infringement; defamation claim allowed to proceed, other claims dismissed (*Taylor Building Corp. of American v. Benfield*, 2007).

4. In early May 2011, Dustin, who was 13 years old, and his friend, Melissa Snodgrass, agreed to have some fun at a classmate's expense by creating a fake Facebook page for that person. Dustin selected Alex, a fellow seventh-grader, as their target, and Melissa agreed. Melissa, posing as Alex created a Yahoo email account to use to create a new Facebook account, and she gave that information to Dustin. On May 4, 2011, using a computer supplied by his parents for his use and the family internet account, Dustin posed as Alex to create a new Facebook account, using the Yahoo email address and the password Melissa supplied. For the profile photo, Dustin used a photo he had taken of Alex at school, after altering it with a "fat face" application. After Dustin created the account, both Dustin and Melissa added information to the unauthorized profile, which indicated, inter alia, racist viewpoints and a homosexual orientation. Dustin and Melissa also caused the persona to issue invitations to become Facebook "friends" to many of Alex's classmates, teachers, and extended family members. Within a day or two, the account was connected as Facebook "friends" to more than 70 other Facebook users. Dustin and Melissa continued to add information to the persona's profile and caused the account to post status updates and comments on other users' pages. Some of these postings were graphically sexual, racist or otherwise offensive, and some falsely stated that Alex was on a medication regimen for mental health disorders and that she took illegal drugs.

5. As stated in the actual legal complaint, the patient wrote, "Very poor and crooked business practice. My review may be long, but you should read this so that you are not scammed in the same way they tried to scam me. … [¶] I suspect that this doctor gives unnecessary procedure to a lot of people and then charges the insurance sky high prices, and no one knows the difference. … [¶] I called the office today to try to reason with them. They said I went into the office complaining of severe pelvic pain that radiated down my legs. I said no I was there for an annual. She said you are not the one who decides what kind of visit you are in for. She continued to push the pelvic pain which was a total fabrication and a lie. It is bizarre and unbelievable that they are telling me I was there for a condition that I was not there for at all." (*Great Wall Medical P.C. et al. v. Michelle Levine*, 2017). The complaint alleges that defamatory postings were made on several web locations.

Other claims related to social media use include criminal prosecution for online impersonation (Ex Parte Bradshaw, 2016); cyberbullying and related criminal statutes; sexting and related criminal statutes for child pornography; and online amateur group sleuths, such as the search for the Boston Marathon bomber suspect that led to many false assertions of suspects (Petrecca, 2013). A Pew survey found that 41% of those polled had been personally subject to harassing behavior online,[6] of which 18% endured what they considered "severe forms of harassment online, such as physical threats, harassment over a sustained period, sexual harassment, or stalking" (Duggan, 2017).

Though the authors extensively searched, data on the volume of these kinds of claims made to insurers, but not publicly exposed in news stories or court cases, is not available.[7] Gen Re tracked cases prior to 2010 and noted that the average social media-related loss was more than double that of traditional personal injury losses (Burns and Kramer, 2013). Also indicative of a potential increase in social media-related claims is the growth in online harassment. According to the insurer, Chubb, online harassment claims rose 84% in 2018 and 15% in 2019 year-to-date (Sullivan, 2019).

To some extent, because insurance coverage for personal injury claims of defamation and invasion of privacy (non-bodily injury) does not exist under the homeowners insurance contracts, we suspect many claims are never even submitted to an insurer. Additionally, other claims may be reported but quickly denied without further action. As a result, not only is it not possible to ascertain the number of social media-related claims paid by insurers, it is unclear of the number of claims reported to insurers, as well as the overall number of events that go unreported.

Coverage Implications for Insurers and State Insurance Regulators

The Insurance Services Office (ISO) HO-3 and HO-5 homeowners policies, as well as the HO-2 renter's policy provide liability coverage for an "occurrence" that results in bodily injury or property damage. "'Bodily injury' means bodily harm, sickness or disease, including required care, loss of services, and death that results." (HO 00 03 05 11 and HO 00 05 05 11). Thus, claims for invasion of privacy, defamation, and what are generally referred to as economic losses—i.e., no property damage or bodily injury—are not covered under these forms.

6. Defined in the survey as offensive name-calling online, intentional efforts to embarrass someone, physical threats, stalking (7%), harassment over a sustained period of time, or sexual harassment (Duggan, 2017).

7. The authors contacted several major insurers and organizations, such as the ISO and Advisen, and they were told that there is no tracking done that classifies these social media claims so as to provide a data set. One insurer indicated that it was seeing an increase in such claims, but the claims are coded as liability claims and are not broken out individually between social media or personal injury claims.

Coverage for claims for invasion of privacy, defamation, and other types of economic losses is available on the personal injury endorsement, HO 24 10 05 11, which adds personal injury coverage as Coverage E on the HO forms.[8] If this personal injury endorsement is added to a homeowners policy, then coverage exists for:

1. False arrest, detention or imprisonment.
2. Malicious prosecution.
3. The wrongful eviction from wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.
4. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services.
5. Oral or written publication, in any manner, of material that violates a person's right of privacy.

The use of this endorsement appears to be limited, based on anecdotal evidence the authors obtained from various industry sources. Individual insurers using their own proprietary forms, which may include ISO provisions under license, may elect to include social media liability coverage as a matter of form.

The ISO form for the personal umbrella, DL 98 01 02 15, includes this personal injury coverage. Many insurers use a proprietary umbrella, based on our examinations and knowledge. Regardless, the use of umbrella policies is limited. For instance, only 10% of Allstate Insurance Company's homeowners policies include umbrella policies (Mosendz, 2017). Even the ultra-wealthy tend to shun the use of umbrella policies (Ebeling, 2012).

Though coverage for personal injury can be provided through endorsement or under the umbrella policy, there is an exclusion for intentional acts that may bar claimants from recovering. Specifically,

> "This insurance does not apply to: **1.** 'Personal injury':
> a. Caused by or at the direction of an 'insured' with the knowledge that the act would violate the rights of another and would inflict 'personal injury.'
> b. Arising out of oral or written publication of material, if done by or at the direction of an 'insured' with knowledge of its falsity."

The lack of coverage for an expanding exposure will likely disappoint insureds in the future and create an errors and omissions exposure for agents. If the claims are happening and insureds are finding that they have no coverage for them, they might hold their agents accountable by alleging failure to procure coverage and

8. This form is similar to Coverage B of the commercial general liability (CGL) policy.

negligence. This is the situation in *American Family Mutual Insurance Co. v. Krop* (2018), where the insured sued the agent for failing to obtain coverage for defamation and invasion of privacy claims that were now pending against the insured. While the insured lost the case, knowledge of this lawsuit might instigate agents to begin to elevate a practice of recommending the personal injury endorsement, both to protect agents and the insureds themselves.

To manage social media exposures, or at least some of them, insurers could add the personal injury endorsement as a standard endorsement to the HO forms or include such coverage in proprietary forms. This would make the homeowners policy more like the commercial general liability (CGL) policy with its secondary Coverage B for personal injury. Alternatively, insurers could offer such coverage in a separate media liability policy adjusted for individual and business-pursuits needs (we discuss this further below).

The second option requires that insurers are able to determine frequency, severity and loss trends. This means obtaining appropriate data that is predictive in general and predictive specific to an insured. This is where the caution for examining social media as a rate factor comes in due to public policy and thus regulatory concerns.

Rating Social Media Liability Coverage

If insurers offer social media liability coverage, and this is a separate developing line of liability exposure apart from the standard bodily injury and bodily damage coverage, then insurers must determine how to price such coverage—either as a separate charge or merely bundled with the existing coverage. Conceivably, insurers could include coverage in existing homeowners insurance policies at no additional charge, but this seems unlikely because they already offer such coverage through the personal injury endorsement or an umbrella policy, which are separately priced. Premiums should be based on relevant factors that are predictive of losses resulting from this narrow exposure, similar to other narrow exposures. For example, insurers adjust premiums for dog liability exposure based on the types of dogs and other pets in the house for homeowners policies. Insurers adjust premiums in automobile policies beyond the standard factors by in-car vehicle monitoring to more accurately price the risk of drivers. Without consideration of specific factors that affect ratings, the insured who is not active on social media, or only has a social media presence solely to follow, say, the grandchildren, may object to paying for a non-existent exposure and coverage. This would also be a form of cross-subsidization that would be discriminatory.

A. Social Media Potential Rating Factors

In offering social media liability coverage, insurers may want to consider actual social media usage by insureds to more accurately price the risk of individuals with this exposure. Time of day may also be important, as people's tendency to write

offensive material is probably related to both frequency of use and time of day; and likely the later the time the more hazardous the posting due to the likelihood of evening alcohol consumption, fatigue and irritability.[9] It should be noted that an insured whose otherwise non-harmful posts usually done late at night now trigger heightened underwriting scrutiny, even though late posts might instead be due to innocent reasons like helping children with homework followed by another round of online office work. People's social media use might also be related to how much free time they have, and this may correlate with career success, profession[10] and income level. Given the exposure from minors' use of social media in many different ways, the fact of having minor children in the household may be a separate rate factor; see the case *Boston v. Athearn* (2014) discussed earlier. Finally, people in happy and stable relationships (whatever that might be in particular cases) might post less, or post fewer incendiary things, than people who are in tumultuous relationships, or people who are single. As such, marital status could be a rating factor.

While there may be some rating factors that can be identified as relevant to social media risk, big data possibilities could lead to other possible factors, which combined might be more predictive. For example, people with a lot of social media activity combined with speeding tickets, high debt levels, affinity for sports, or illicit drug use (Kazemi et al., 2017)—to mention a few possible speculative combinations—may be better predictors of social media liability than pure social media activity alone would predict. We do not claim to know which factors among these, or others we have not identified, might be predictive of social media liability risk. We would like to see such results, which would allow a more informed analysis of the suitability and fairness of using these data points of social media for rate regulation.

Another aspect is that studying social media usage provides new information about the insured that the insurer otherwise would not have known. Social media can indicate attendance at popular events such as music festivals and sports events based on the content, even without geolocation tags (de Lira et al., 2019), which itself gives more information about the insured than an insurer would otherwise obtain from an application and beyond approved rate factors, so far as we know. This other information is then available for other underwriting purposes; and if predictive, it raises regulatory concerns about their use.

All of this relates to fairness in rating. It is axiomatic that insurance rates must be adequate, not excessive, and non-discriminatory (Borselli, 2011: 112;

9. Kanuri et al. (2018) find that time of day is relevant to profits for "targeted content advertising" using social media platforms because working memory varies during the day and evening, thus the person reacts in different ways to different stimuli (high-arousal positive emotions and high-arousal negative emotions) depending on the time.

10. It is possible that people with careers in particular fields—such as risk management, insurance, law or journalism—may be predictive of lower risk in social media use because they are generally more alert to the legal liability; although, there are the news stories of lawyers being confrontational and assertive in non-legal settings, thus triggering claims of defamation, harassment or intimidation.

New Appleman, § 11.03). This is standard terminology in insurance statutes; e.g., California Ins. Code § 1861.05, Georgia O.C.G.A. § 33-9-4, New York Ins. Law § 3201, and North Carolina Stat. § 58-35-10. Fair discrimination in insurance means persons with similar exposures are treated similarly, so that high-risk exposures are priced at a higher rate than low-risk exposures. The goal is to prevent differences in rates that do not reflect differences in risks underwritten.

Objectionable forms of discrimination include: (i) unfair individual discrimination, such as rebates, credits and misclassifications that favor one insured over another when the risk underwritten is the same; (ii) unfair group rate discrimination that usually involves rating plans that arbitrarily differentiate among the insureds without taking into account their risk; and (iii) unfair product discrimination that results in unreasonable overpricing or underpricing of one product compared to another. In this regard, insurance regulators aim to ensure that rates are fair for every class of insured and that the classes are fair and nondiscriminatory. … the standard of "not unfairly discriminatory" rates seeks to accomplish "equity" by ensuring that policyholders are not unfairly discriminated against. In order to achieve this objective, fair classifications of policyholders for premium calculation are necessary so that every insured will bear the cost of his or her own insurance. It is difficult to make fair classifications, however, because every risk is unique and theoretically could be uniquely rated. (Borselli, 2011: 130)

It is logical that a person without social media exposure should be charged less for this risk. A person with young teens in the house could be a higher risk and thus charged more. A person who posts a lot of things in many online social media venues might be a higher risk. Perhaps the particular media used might be indicative of risk. A person who is on the higher side of predictive loss (or trouble) might be even more likely to create liability exposure if he/she also has speeding tickets and drinks excessively. None of this by itself leads to unfair discrimination as to underwriting social media exposures, but it does have the potential to affect the pricing of other personal lines policies if these factors are considered. To further complicate the issue, insurers would have to consider this on a state-by-state basis and there could be considerable variation in what can be used across states. For example, we found that Maryland and New Jersey permit education and occupation as risk factors in underwriting; however, Florida rejects these rating factors (Thomas, 2018: § 11.03).

Social media rating could employ techniques similar to automobile telematics for rating because in both situations behaviors can be monitored continuously, rather than at policy inception. This is called trend detection for social media (Seifikar and Farzi, 2019) and usage-based insurance for telematics. For better or worse, the insurer then might have the ability and right to cancel the policy early due to increased hazard—a long-recognized ground to cancel a policy in other circumstances. Telematics are already used to influence driving behavior

(McKinsey & Company, 2017;[11] Meyers and Van Hoyweghen, 2018). Play this out a bit and pretty soon the insurer becomes the legal monitor that, by failing to alert the insured to potential liability, then loses its coverage defenses to intentional misconduct.[12] Alternatively, the insurer becomes the monitor in the car that urges more cautious driving, itself a good thing, yet perhaps a repressive censorious position for freedom of self-expression and privacy.[13] Thus, monitoring has risk management benefits and coverage defense demerits.

B. Other Sources of Information to Assess Social Media Exposures

Insurers are likely, and probably should consider, sources of information beyond what the insurer itself collects on its insureds. This can include data from data brokers (Roberts, 2019) and other "external data" sources (Berthelè, 2018; McKinsey & Company, 2017). According to Beckett (2012), "Acxiom, one of the nation's largest consumer data companies, said in its letter to lawmakers that it collects information about which social media sites individual people use, and 'whether they are a heavy or a light user.' The letter also says Acxiom tracks whether individuals 'engage in social media activities, such as signing onto fan pages or posting or viewing YouTube videos.'" Another company, Intelius, "offers everything from a reverse phone number look up to an employee screening service, said it also collects information from Blogspot, Wordpress, MySpace, and YouTube. This information includes individual email addresses and screen names, web site addresses, interests, and professional history, Intelius said. It offers a 'Social Network Search' on its website that allows you to enter someone's name and see a record of social media URLs for that person." A different company, Epsilon, "uses information from social media sites to 'provide companies with analytics insights' and 'help them better understand and interact with their customers'" (Beckett, 2012).

Although data brokers collect a great deal of information that could be valuable to insurers, there are reported instances of incorrect information contained in reports. One is a lawsuit brought by Mr. Ziv Gal against LexisNexis and its "compliance platform" called Bridger Insight for wrongfully tagging him for diamond smuggling and tax evasion. In fact, such charges were about a person with

11. "Insurers are fundamentally changing their relationship with consumers through the use of real-time monitoring and visualization. Consumers who agree to let insurance companies track their habits can learn more about themselves, while insurers can use the data to influence behavior and reduce risks."

12. Potentially, the problem extends beyond to the insurer now being an accomplice to the posting by not taking action to deter or rescind the post. While insurers are not liable when they provide, or fail to provide, risk control guidance to the insured, the barrier may fail when insurers do risk control on a continuous monitoring basis.

13. Harris (2013) notes the reluctance of Canadian consumers to adopt telematics because of privacy concerns. A similar point might therefore exist as to consumers having their insurer monitor their media exposures in order to obtain insurance. We take no position on whether insurers who bear the risk of such activities should in fact be allowed to monitor such activities.

a slightly different name, Ziv Gil. LexisNexis sells the service with the disclaimer that its records are not consumer reports under the federal Fair Credit Reporting Act (FCRA) and may contain errors (Land, 2019). *Newsweek* reported on another report compiled by LexisNexis in its Comprehensive Loss Underwriting Exchange (CLUE) report on a consumer who supposedly had a motorcycle incident when in fact he never owned a motorcycle, thus affecting his automobile insurance rates (Holbrook, 2019). A third instance is of a reporter who purchased a file on herself and found that half the information was wrong (Miller, 2017).

If permitted, and if shown to be predictive of risk, the question of fairness and suitability of using external data gathered by unverifiable sources should be a concern for state insurance regulators. The New York State Department of Financial Services has addressed this in its Insurance Circular Letter No. 1 (2019) pertaining to life insurers.[14] The reliability of information provided by data brokers should probably be presumed suspect. Investigative news reports have found serious errors in the information, even as to gender (Beckett, 2014). Data brokers also collect consumers' queries for health information for sale to health insurers (Becket, 2014) and from social media websites (Beckett, 2012).

As a result of concerns with accuracy of data, the problem is then to ascertain whether such external data fits within the requirements of "veracity" and "validity" of such data (Billot et al., 2018), and thus the regulatory concern of fairness in rating. Additionally, data brokers are unregulated. Vermont H.B. 764, 2018 Leg. Vt. and California Civil Code § 1798.99.80-82 require data brokers to register only, nothing more. In fact, the major credit reporting agencies have data broker subsidiaries (Beckett, 2014). Also, data brokers are not subject to the FCRA; therefore, the consumer has no right of correction under the FCRA. If data brokers do sell information to employers and landlords, which is within the bounds of a credit report, then data brokers are subject to the FCRA, as the Federal Trade Commission (FTC) noted in settlements with two companies for providing false information to such purchasers (FTC, 2014b). The FTC did a study on this problem, "Data Brokers: A Call for Transparency and Accountability," and sought to have the U.S. Congress bring data brokers under the FCRA (FTC, 2014a).[15]

14. "External data sources also have the potential to result in more the accurate underwriting and pricing of life insurance. At the same time, however, the accuracy and reliability of external data sources can vary greatly, and many external data sources are companies that are not subject to regulatory oversight and consumer protections, which raises significant concerns about the potential negative impact on consumers, insurers, and the life insurance marketplace in New York."

15. Although there are major concerns with data brokers, Aetna is already using data it obtained from a data broker, such as a "person's habits and hobbies, like whether they owned a gun, and if so, what type, … [and] included whether they had magazine subscriptions, liked to ride bikes or run marathons. It had hundreds of personal details about each person" (Allen, 2018).

C. Current Regulatory Restrictions on Non-Traditional Rating Factors

For personal lines property/casualty (P/C) insurers trying to accurately assess and price a person's social media exposure to provide insurance coverage, some very reliable data and data analysis will be needed. Yet, getting reliable data and showing the correlation or causality may be difficult, thus keeping high regulatory concerns over fair and non-discriminatory use of that information. New York's Circular Letter is explicit about this risk:

> …the Department has determined that insurers' use of external data sources in underwriting has the strong potential to mask the forms of discrimination prohibited by these laws. Many of these external data sources use geographical data (including community-level mortality, addiction or smoking data), homeownership data, credit information, educational attainment, licensures, civil judgments and court records, which all have the potential to reflect disguised and illegal race-based underwriting that violates Articles 26 and 42.
>
> Other models and algorithms purport to make predictions about a consumer's health status based on the consumer's retail purchase history; social media, internet or mobile activity; geographic location tracking; the condition or type of an applicant's electronic devices (and any systems or applications operating thereon); or based on how the consumer appears in a photograph. At the very least, the use of these models may either lack a sufficient rationale or actuarial basis and may also have a strong potential to have a disparate impact on the protected classes identified in New York and federal law.
>
> In light of the Department's investigation and findings, the Department is providing the following principles that insurers should use as guidance in using external data sources in underwriting.
>
> First, an insurer should not use an external data source, algorithm or predictive model in underwriting or rating unless the insurer has determined that the external tools or data sources do not collect or utilize prohibited criteria. …
>
> Second, an insurer should not use an external data source, algorithm or predictive model in underwriting or rating unless the

> insurer can establish that the underwriting or rating guidelines are not unfairly discriminatory …

Insurers already use social media in claims to evaluate claimants and their contentions of bodily injury and property damage claims, such as trips and falls, automobile accidents, and on-the-job workers' compensation. Claimants' lawyers routinely tell their clients to get off social media during the pendency of the lawsuit and to delete past posts (Wells, 2019). Investigators hired by defendants immediately scan for social media entries by claimants and "scrape" those for evidence to guide further investigations and surveillance. Investigatory firms specialize in the online surveillance of claimants. Provided that no professional ethics are breached, this is all in the nature of gathering evidence to confirm or impeach the claim of bodily injury and property damage (Mandel, 2017).

Insurers may also be using the internet to gather background information about insureds, even if such information is not an approved rate factor, as noted above in the New York excerpt. It is easy, and appropriate, to confirm some items in an application about occupation, duration of occupancy, condition of home, etc. Whether other factors should be allowed, because of predictive ability, is yet to be shown.

The market opportunity to offer coverage for social media liability necessarily requires determining valid and relevant predictive factors to price this exposure. Containing those factors to this narrow coverage will be hard, and maybe the factors should well be used in the other coverages. That is why the regulatory concerns start with social media liability and coverage and fast bleed out to the rest of the personal lines coverages.

The Categorization Problem: Personal Social Media Exposures Run into Business Pursuits

Because some activities are intertwined between personal and semi-business activities, a categorization problem develops due to the business pursuits exclusion. Two examples can be used to illustrate the categorization problem. Let us say that the insured endeavors to be an amateur journalist to expose alleged misconduct. This leads to questions of First Amendment rights; journalist privilege and shield laws; anti-SLAPP protections in those states that have such statutes to allow public exposure of matters of public concern;[16] and, crucially for insurance, the business pursuits exclusion. A separate problem of insurance coverage exists here because these activities may now run against the business pursuits exclusion in the homeowners and umbrella policies. There may be some noble intent to expose misconduct, at least misconduct toward the affected individual. Additionally, there

16. Anti-SLAPP statutes were designed for the pre-internet world. Whether such protections are still the right tool is questioned in Roth (2016). For more about the business implications of SLAPP suits, see Wells (2016).

may be some element of building public pressure and shame for the misconduct, as when insureds create websites that share domain names of the target company, such as *[COMPANY]sucks.com* (*Taylor Building Corp. of America v. Benfield*, 2007), or make assertions of poor service or product in online forums like Yelp to extract concessions. The corporate blowback, however, may be severe. The amateur journalist then asserts that he or she is acting as a journalist and thus has freedom of the press. However, the freedom of the press claim atrophies the smaller the journalistic scale, which may preclude the protection of state journalistic "shield laws" as protection and constitutional protection of freedom of the press. Guicheteau (2013) indicates that in *Obsidian Finance Group, LLC v. Cox* (2014), bloggers are not members of the media for the purposes of a defamation claim, thus they can be held strictly liable for defamatory comments. These are interesting legal questions that press against the problem of what is to be insured and how to rate it. The answer may be to avoid the categorization individual-business pursuits problem altogether and move the whole exposure to a separate media liability insurance policy that spans personal and business exposures.[17]

Another example that can be used to illustrate the categorization problem is where the insured exposes wrongdoing at work, or the wrongdoing of individuals at work, as with the #MeToo movement. Consider the lawsuit Stephen Elliott filed against Moira Donegan, who previously had shared a Google spreadsheet she titled, "Shitty Media Men," and invited women to add names to it (Cranley, 2018). We can simplify the problem and assume that Ms. Donegan's allegations about particular men were accurate. Still, we cannot easily categorize this specifically as a business or personal exposure, or even whether this is social media. One case did find that discussing wrongdoing with a reporter, which led to a lawsuit by the person at work so discussed, was *not* within the business pursuits exclusion of a homeowners policy that included personal injury coverage (*Aetna Casualty & Surety Co. v. Ericksen*, 1995).

Relevant to insurance, it may be that a narrow underwriting question can be whether insureds create gripe sites, or more generally own a website of any type, for which a separate media liability policy crafted for personal lines use might be adopted. Also relevant is whether the business pursuits exclusion requires a full-time business pursuit or part-time, or whether a hobby—as defined by Internal Revenue Service (IRS) rules on hobby losses under former tax law—qualifies as a business pursuit. Detailed discussion of these issues is beyond the scope of this paper.

A. Jurisdictional Issue for Claims and Defense

When covering social media-related claims, insurers must also worry about cross-border offenses and injuries. The nature of social media is "worldwide" today;

17. Although this is a new solution to the social media and public commentary exposures, a blended policy is not unknown, as insurers offer commercial automobile endorsements on personal automobile insurance policies.

therefore, the possibility of a cross-border defamation action is real. Mills (2015) observes, "As social media becomes increasingly important modes of socialization and communication, greater attention will need to be paid to the question of whose law governs standards of free speech on social media platforms." The appropriate venue for the lawsuit, and the choice of law that court applies, can create a conundrum when the opposing parties are from different legal environments. Naturally, there will be some "venue-shopping" that occurs.

There is considerable variability in media liability policies. Some offer worldwide coverage, while others do not. The defense costs associated with a foreign jurisdiction can be astronomical. Therefore, it stands to reason that the coverages for these offenses—whether provided by endorsement, an umbrella policy, or a separate social media policy—need to carefully prescribe where coverage does and does not apply. It may also mean that rather than append coverage to a homeowners policy, that the whole spectrum of losses should be in a stand-alone media liability policy adapted for personal lines.

Conclusion

Social media is a major factor in cases alleging personal injury, such as defamation and invasion of privacy, as insurance policies define it. Behavior on social media by both children and adults can ultimately result in a claim for damages; of particular concern is defamation. The expansion of this activity by individuals shows a market opportunity for insurers to expand the "personal injury" coverage on personal lines insurance with the challenge of how to separately underwrite this exposure. Underwriting this coverage will likely mean having to evaluate social media use, which requires insurers and state insurance regulators to determine how the coverage should be rated, what factors are predictive and allowable, and how to contain those factors to the new exposure without extension—directly or indirectly—to rating the rest of the personal lines coverages and policies. The use of social media by insureds opens new possibilities of discrimination in rating that should be considered before this coverage is promoted.

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