

Financial Services

Risk Management Newsletter

TO TWEET OR NOT TO TWEET: THE CHALLENGES OF USING SOCIAL MEDIA IN INSURANCE ADVERTISING

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During the last five years, the power of online social-networking sites ("SNS") has become a force to be reckoned with worldwide. The influence of the two most popular SNS—Facebook and Twitter—has been especially astounding. More than 65 million "tweets" are posted each day by Twitter subscribers, and Facebook's 500 million-plus membership would make the company the fourth-largest organization in the world, including countries. In addition to enhancing global connections, the rise of social media has created new opportunities for advertisers seeking to reach a wider audience online. While insurance companies are by no means left out of the social media revolution, stringent state laws regulating insurance advertising present unique challenges for the industry as it seeks to take advantage of Twitter and Facebook's increasingly broad sphere of influence.

Generally speaking, it is the overwhelming trend for state jurisdictions to subject internet advertising done by insurance companies and agents to the same stringent set of regulations that applies to print and radio advertisements. One of the most common requirements is that any insurance broker or agent posting an advertisement that refers to an insurer must also include the full legal name of the insurer and the city, town, or village where the insurer's principal officer is located. This is extremely important in the context of insurance advertising on Facebook pages and Twitter tweets, which often lack such disclosures. Disclosing such information has become easier in those states that allow certain required disclosures to be provided via a conspicuous, clearly labeled hyperlink.

Similarly, insurance producers and agents cannot lawfully use an insurer's logo in an online ad without

also providing the full name and principal business location of that insurer. This rule applies even if the insurer gives the agent permission to use the logo. As odd as it may appear, use of an insurer's logo without the full required information may violate provisions of insurance law which govern unfair methods of competition and unfair/deceptive acts or practices.

Further compounding the issue is that the specific types of information insurance advertisers are required to provide often vary state-by-state. For example, in Illinois, if any specific individual policy is advertised, the policy must be identified by either the form number or another "appropriate description." In Texas, if an ad is "institutional," meaning it is only intended to promote interest in the concept of insurance or to promote an agent or company while not referring to a specific policy, it is exempt from some of the regulations applying to agents' invitations to inquire or contract. The scope of regulations as they apply to online advertising is designed to protect consumers from misleading ads that could appear in a widely accessed medium that is not always policed as stringently as print and radio.

In addition, advertising online regulations have no safe harbor rules for insurance ads which do not conform to state law. Although there may be a need, state regulation provides no special, regulatory treatment for social media sites. Thus, offers made in an ad on sites such as Facebook or Twitter are judged the same as a print ad when determining whether the offer is a proper inducement. If an offer is improper in print, the odds are that it is improper online as well.

One of the most essential points for insurance producers to remember is that every insurer and their agents must maintain a system of control and management over the content, form and method of dissemination of their advertisements. For example, the Illinois Administrative Code provides that "[a]ll such advertisements, regardless of by whom written, created, designed or presented, shall be the responsibility of the insurer." If an ad is

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produced on an insurer's behalf, it is the insurer's responsibility to make sure that the ad does not run afoul of insurance-advertising regulations. Similarly, in Texas insurers are under a duty to maintain a "system of control" that requires agents (and any other entities preparing ads which name the insurer or advertise its policy) to submit the proposed ad to the insurer's home office for written approval prior to use.

The pitfalls insurers and their agents face in the context of online advertising are all the more difficult because insurers essentially have to create a well-regulated system to protect their brand when an agent takes to Facebook or Twitter to advertise. Granted, most states have regulations in place that place insurance agents under a duty to file the proposed ad to the home office, but the concern remains because insurers may ultimately be liable for their agents' mistakes. Nothing about online insurance advertising lessens the insurer's responsibility to assure that all ads that affect the company comply with state advertising laws and are not deceptive or misleading.

Another major trend nationwide that poses a particularly difficult obstacle for insurance agents is the requirement of record-keeping requirements for all ads. Indeed, states require insurers to maintain a complete file with a specimen copy of every printed, published or prepared ads disseminated in the state in question. Such files are subject to inspection and are typically required to keep all ads from the previous four to five years. Insurers must also maintain a certificate of compliance. Insurance agents, even when marketing a particular insurer's product online in social media are advised to also maintain records of these advertisements.

Accordingly, the practical problems that result from compliance with online advertising is challenging for anyone who consistently advertises on social-networking sites. As another authority has commented, "It remains to be seen what records of social media advertising insurance regulators will expect the industry to maintain and whether a copy of every tweet on Twitter or comment on Facebook will have to be kept."¹

In evaluating the potential landscape for insurance advertisers in social media, the key words of advice are *caution* and *consistency*. This is an evolving area of the law and insurance regulators have been slow to catch up with the unique challenges presented by online advertising. At the very least, insurers and their agents need to be careful that online ads referring to a product uniformly comply with state insurance laws, which apply with full force to this type of advertising. Without proper management and control, a single, solitary tweet can echo quite loudly in halls of justice and result in litigation for the unwary.

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¹-(Social Media Meets Insurance Regulation: Where Are We Headed?) *P&C Nat'l Underwriter*, June 7, 2010.



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