

Facebook: DC AG Racine's Suit Indicates States to Fill Federal Enforcement Gap; DC Law Previously Used by Privacy Advocates, Potentially Carries Multi-Billion Dollar Penalties

Regulatory Update

DC Attorney General Karl Racine [sued Facebook](#) today (Dec. 19) for privacy violations arising from the Cambridge Analytica scandal, using DC's consumer protection law. Marc Rotenberg, President and Executive Director of the Electronic Privacy Information Center (EPIC), which brought the 2009 case against Facebook that resulted in the 2011 FTC consent decree, said the suit is important because "in the absence of the FTC's work to safeguard consumer information, state AGs are stepping in."

Rotenberg expressed frustration that the FTC had not enforced the 2011 consent decree from the outset, saying enforcement could have prevented many of the issues that now may be threatening democracy. He noted that EPIC has used the same DC consumer protection law in its privacy [suit](#) against AccuWeather. That suit alleged AccuWeather tracked users location and gave it to third parties without their consent. Racine's suit, then, is not the first time the DC consumer protection law has been used for privacy issues.

Racine's suit seeks injunctive relief, damages, and penalties. The DC statute provides for [civil penalties](#) of \$5,000 for each initial violation and \$10,000 for each subsequent one. Commenting generally about consumer protection laws without discussing how such laws apply here or in any other investigation, Amy Mudge, co-leader of BakerHostetler's Advertising, Marketing and Digital Media team, said that what constitutes "a violation" is not well defined by the law.

"It may be fleshed out in case law, but as a practical matter it is whatever the AG believes it is and can get a company to agree to in a settlement or get a court to agree to in an order" Mudge told *The Capitol Forum*.

Racine's complaint indicates that 852 people in DC installed the application at issue, but "it collected the personal information of users' Facebook friends—including more than 340,000 D.C. residents who did not download the application."

By a back of the envelope calculation, penalties could amount to \$3.4 billion if each resident's data collection constitutes a single violation, giving Racine substantial bargaining power in settlement negotiations. The biggest risk to Facebook here, as in other enforcement actions, is not a fine but rather settlement terms that require it to change its business practices in a way that impacts its profitability.

If additional state AGs follow Racine’s lead, Facebook could have a multi-jurisdictional suit on its hands in addition to the ongoing FTC consent decree investigation. Mudge noted, however, “If a case is really not about monetary harm to consumers but about injunctive relief or changes to how a company does business going forward, one state can as a practical matter carry the load for all, as it is unlikely a national company would do business in one state in a different way from how it does business in a neighboring state.”

In this case, even in the absence of damages, states with statutory penalties may be incentivized to bring their own suits. Facebook did not immediately respond to request for comment. A Spokesperson for the DC AG pointed us to the prepared remarks from today’s [press call](#).