



## Insurance Law: Covered Events

### The Future of Insurance: Navigating Risks in the Era of Artificial Intelligence

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Nothing creates more intrigue and interest currently than the rise of artificial intelligence. What used to be fictitious plotlines in movies like *Terminator 2* have now become storylines splashed across media around the globe. It has been labeled a potential danger to society (Warren Buffet compared it to the invention of nuclear weapons), as well as a groundbreaking tool that will change the world forever (Jamie Dimon likened AI to the printing press). It has been praised as a tool that can solve medical mysteries, while at the same time it has created concern of human extinction. It could be both a panacea and plague.

The divergence of views on AI are based, at least in part, on a lack of understanding of the technology, but more importantly a fear for how it will develop and how it will be used. Industries of all types and sizes are now facing risks they never imagined whether they use AI or not. AI risk and exposure is therefore top of mind for the legal and insurance industries.

This article explores the explosive growth of AI, provides illustrations of the risk it creates and corresponding legal exposures, and addresses potential insurance coverage implications arising from the technology.

### The Beginning of AI

Artificial intelligence first made its appearance in the 1950s, when researchers developed a program that was designed to imitate a human's ability to problem solve. Following that program, "traditional" artificial intelligence emerged, which is capable of responding to a particular set of inputs, learning from the data, and making predictions based on that data. A subset of this "traditional" artificial intelligence developed, known as "generative" artificial intelligence, which is capable of generating new content such as text, images, and videos from large amounts of data.

With the launch of OpenAI's ChatGPT in November 2022, many technology companies pushed to further develop their own generative artificial intelligence software to capitalize on the surging market. Consequently, within the last few



years, the use of AI has grown at an impressive rate with no end in sight. According to a report by Grand View Research, in 2023, the global artificial intelligence market size was estimated at \$196.63 billion and is predicted to grow at a compound annual growth rate of 36.6% from 2024 and 2030, with its revenue forecasted to be \$1,811.75 billion in 2030. Grand View Research. (2024). *Artificial Intelligence Market Size, Share, Growth Report 2024-2030*. <https://www.grandviewresearch.com/industry-analysis/artificial-intelligence-ai-market>.

Artificial intelligence has become increasingly useful in various industries to analyze huge volumes of data which would otherwise be near impossible to process. In order to lower costs and increase efficiency, many industries have integrated AI into their businesses to complete a variety of tasks such as content generation, quality control, automation, data analysis, fraud detection, predictive analytics, and chatbots.

Industries in which artificial intelligence is particularly prominent include the finance sector, healthcare sector, and digital spaces. Among other uses, in the financial sector AI is utilized to detect changes in a person's spending habits to catch fraud, to predict and assess borrowers' risk levels, and automate trading. The healthcare sector uses artificial intelligence to aid in administrative tasks, assist in making medical diagnoses, and even automate surgeries. In digital spaces, companies are using artificial intelligence to create advertisements and marketing campaigns and analyze consumer behavior to better target their audience.

And this is just the tip of the iceberg. In 2023, the professional services firm, KPMG, reported that of 400 U.S. CEOs surveyed, 72% reported that generative AI is a top investment priority. According to estimates by Goldman Sachs Research, by 2025, AI investment could reach \$100 billion in the U.S. and \$200 billion globally. The flood of investments to companies that are developing the technology is bound to expand the manner in which consumers and businesses use AI.

### **The Use of Artificial Intelligence Poses Diverse Risks.**

With AI's entrance into the market came numerous legal concerns about how it might be used, including copyright infringement, data security, and discriminatory practices. In order for artificial intelligence to perform effectively, the software must be "trained" using large amounts of information that help it "learn." From its training, however, the AI software can develop bias which may result in discriminatory or offensive output, content may be created based on protected



intellectual property, or a person's private information could be used to train the software. Lawsuits by impacted companies and individuals have been filed based on these incidents, and that legal liability is likely to expand and evolve as the technology becomes more widespread.

### ***Privacy Risks To Individuals***

Safeguarding the privacy interests of individuals has become paramount in the age of cyber breaches and class action claims based on unauthorized use of or access to personal and medical information. It is therefore reasonable to expect that the use of artificial intelligence will increase claims arising out of data security and privacy breaches. Artificial intelligence relies on volumes of data, which can include private or protected data. Where AI software has access to protected personal information for training purposes, or where that information is input into AI software to generate consumer spending practices or otherwise, there is an increased risk that personal information falls into the wrong hands. Already, there have been lawsuits filed alleging that companies using artificial intelligence have stolen private and personal information from millions of people in order to train their generative AI tools. See *P.M. v. OpenAI LP*, No. 3:23-cv-3199 (N.D. Cal. 2023); *J.L. v. Alphabet Inc.*, No. 3:23-cv-03440 (N.D. Cal. 2023).

### ***Liability Risks To Companies***

Companies that access or use private or protected data in an unauthorized way can lead to legal liability and reputational harm. While the legal landscape is just starting to develop, intellectual property claims have also been part of the first wave of AI suits facing companies. Because generative AI technology generally relies on volumes of data, it is certainly foreseeable that such data may include copyrighted or patented material (regardless of whether its inclusion is inadvertent). Lawsuits have been filed relating to whether generative AI that is allegedly trained on copyrighted works constitutes actionable infringement. See *Kadrey v. Meta Platforms*, No. 3:23-cv-03417 (N.D. Cal. 2023); *Thomson Reuters Enterprise Centre GMBH, et al. v. Ross Intelligence Inc.*, No. 1:20-cv-613-SB (D. Del. 2020).

Directors and officers of companies also face potential exposure arising out of AI. The C-suite must remain aware of the regulatory landscape governing AI and potential vulnerabilities flowing from the use of AI. When implementing AI technology into their businesses, boards need to be aware of the risks that accompany the efficiencies created by AI. Public company directors should accurately disclose the use of AI in their business, or potentially face SEC



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enforcement actions or shareholder claims arising out of misrepresentations to investors (commonly referred to as “AI washing”). Directors should properly vet how AI impacts their business, which may include seeking legal counsel to guide the company on how to best use AI tools while mitigating risk.

Companies also face potential exposure to their employees. AI technology can create an algorithmic bias in hiring practices, where the artificial intelligence algorithms used may enhance biases existing in its training data. For instance, in *EEOC v. ITutor Group, Inc., et al.*, No. 1:22-cv-02565 (E.D. N.Y. 2022), the defendant was alleged to have used an artificial intelligence tool to automatically reject applicants because of their age. The *ITutor* lawsuit ultimately settled, but it provides an example of the type of employment-related claims companies should expect if they use their artificial intelligence technology in a similar manner to eliminate a subset of individuals based on protected status.

Claims against companies based on the improper use of AI is not limited to technology companies. For example, insurance companies have been the subject of class action lawsuits, alleging the use of certain algorithms in their claims handling process to discriminate. See *Huskey v. State Farm Fire & Casualty Ins. Co.*, No. 1:22-cv-07014 (N.D. Ill. 2022); *Kisting-Leung v. Cigna Corporation, et al.*, No. 2:23-at-00689 (E.D. Cal. 2023). Companies may be subject to false advertising or misrepresentation claims if AI-generated content in advertisements is incorrect or misleading. In 2023, actress Scarlett Johansson took legal action against an artificial intelligence app called *Lisa AI: 90s Yearbook & Avatar*, following the company’s use of her likeness and voice to promote their app, suggesting Johansson was a spokesperson for the app. The Federal Trade Commission filed a lawsuit against Automators LLC for a money-making scheme which purported to use artificial intelligence to boost earnings for its customers’ e-commerce storefronts. A settlement was reached, in which Automators agreed to pay over \$21 million. *FTC v. Automators LLC*, No. 23-cv-1444-BAS-LSC (S.D. Cal. 2023).

### ***Risks To The Legal Industry***

Vendors have started pitching law firms and their insurance company clients on how the use of AI might promote efficiency in legal research and writing, among other uses. In evaluating whether to take the plunge, firms are evaluating the return on investment on expensive technology. Questions remain about the ability to depend on the output from AI and whether it can be relied upon to provide an accurate answer to a legal question. Unique prompts from users might generate different results. Firms are also uncertain about how AI can be used in a



profession that is still heavily dependent on the billable hour. Incorporating charges for the use of AI through flat fees or alternative fee arrangements could be an option, but there is no “one size fits all” solution.

The legal industry must be particularly wary of misrepresentations made by generative AI technology. For instance, generative AI can create erroneous content that lacks legal support or is based on fabricated sources. In *Roberto Mata v. Avianca, Inc.*, No. 1:22-cv-01461-PKC (S.D. N.Y. 2022), an attorney was sanctioned for failing to review non-existent citations provided by ChatGPT, which were used in legal filings. As AI technology continues to develop and becomes more ubiquitous, the legal industry will need to evaluate how it fits within the services provided to clients.

### **Regulatory Enforcement**

Accompanying the increased use of AI came an increase in proposed legislation regulating the technology. In California alone there have been more than 30 bills proposed to the California state legislature attempting to regulate the use of artificial intelligence. Pennsylvania has also recently joined Alaska, Connecticut, Illinois, New Hampshire, Nevada, Rhode Island, and Vermont in adopting a statute governing the use of AI by insurers based on the NAIC AI Model Act. In May 2024, Colorado became the first state to pass a comprehensive AI bill when the legislature passed the Colorado Artificial Intelligence Act. Although not yet signed into law, the legislation would prohibit the use of algorithmic discrimination. The bill does not create a private right of action but would be enforced by the Colorado Attorney General. Other states will undoubtedly enact laws to regulate the use of AI, and potentially create private causes of action for consumers harmed by companies that violate those rules.

At the federal level, companies have been put on notice that their artificial intelligence algorithms may be targeted. Federal agencies have expressly warned the public through a joint statement that there is no exemption for the use of AI under U.S. law and that algorithmic bias can be targeted in litigation and in the regulatory context. See “Joint Statement on Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems,” <https://www.eeoc.gov/joint-statement-enforcement-civil-rights-fair-competition-consumer-protection-and-equal-0> (last accessed May 6, 2024).

On the international stage, the European Parliament passed the Artificial Intelligence Act in March 2024. The Act governs all companies deploying or using AI in the EU and requires companies using AI to disclose or label content



generated by the technology. Companies are also forced to abide by certain ethical standards, and the regulations proscribe the use of AI in generating facial recognition databases through scraping of facial images from internet sources.

### **Insurance Policies Responding to Claims Involving Artificial Intelligence**

With the increased use of artificial intelligence and the concerns surrounding its use, insurance companies must consider how these risks will interact with traditional insurance policies and how they might be updated to account for such exposures. When cyber risk started to materialize in losses suffered by insureds, traditional insurance products that were not designed to cover cyber risk would respond to those claims (sometimes referred to as “silent cyber”). There is a similar concern about “silent AI” - policies that may not be tailored to explicitly cover AI risk, but fail to exclude it from the applicable coverage.

For instance, data security and privacy breaches are commonly handled under cyber risk policies. With the increased automation of processes mimicking threat actors, not only will the quantity of claims rise, but the diversity of cyber claims will increase. One insurer has attempted to clarify its cyber policies by adding an artificial intelligence endorsement, which “expands the definition of a security failure or data breach to include an AI security event, where artificial intelligence technology caused a failure of computer systems’ security” and “expands the trigger for a funds transfer fraud (FTF) event to include fraudulent instruction transmitted through the use of deepfakes or any other artificial intelligence technology.” “Coalition Adds New Affirmative Artificial Intelligence Endorsement to Cyber Insurance Policies,”

<https://www.coalitioninc.com/announcements/coalition-adds-new-affirmative-ai-endorsement-to-cyber-policies#> (last accessed May 6, 2024).

Traditional E&O policies as well as technology E&O policies will likely be a source of coverage for professionals that are accused of improperly using AI. In the example discussed above where the law firm was accused of failing to confirm the sources identified by AI supported the position stated, that firm would likely be entitled to coverage under its professional liability policy in the absence of an AI exclusion. Technology companies would also rely on their E&O policies to respond to claims that they negligently used AI in providing technology services to their clients. In relation to copyright infringement claims, companies may find coverage within a media liability policy which covers claims relating to content creation, distribution, and publication.



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Directors and officers will likely be able to rely on both public and private company D&O policies to cover claims that the directors and officers breached fiduciary duties in implementing AI technology or violated securities laws in making improper AI related disclosures.

Commercial general liability (CGL) insurance policies could potentially provide coverage for artificial intelligence-related claims, as they generally provide coverage for personal and advertising injuries. There is, however, generally a professional services exclusion found within CGL policies that could encompass AI related exposure depending on the manner in which the technology is used.

It is only natural that new technology like artificial intelligence poses risks to the insurance industry as it transforms and grows. Though a new technology is at issue, some of the risks created by AI have been seen before and therefore, may be covered by policies already in existence. Over time, insurers wary of covering AI related exposures may add exclusions to preclude coverage under these traditional insurance products. As insurers begin to exclude claims based on the use of AI, the market is likely to demand tailored policies and endorsements to provide the best protection for responding to claims involving AI.



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