



ARTIFICIAL INTELLIGENCE AS FRIEND (WALLE!) AND FOE (HAL!): AN EXPLORATION OF GENERATIVE AI CONCEPTS; AI ASSISTED POLICY DRAFTING AND UNDERWRITING; AND THE USE OF AI IN INSURANCE CLAIMS INVESTIGATION AND HANDLING

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I. Artificial Intelligence in the Legal Space vs. the Insurance Space

The propriety and accepted uses of artificial intelligence in the context of legal disputes and legal representation is evolving and in a present state of uncertainty. Several courts abroad have acknowledged the presumably acceptable use of AI tools and resources in considering and reaching case outcomes (https://www.theguardian.com/technology/2023/sep/15/court-of-appeal-judge-praises-jolly-useful-chatgpt-after-asking-it-for-legal-summary; https://www.vice.com/en/article/judge-used-chatgpt-to-make-court-decision/; https://www.livemint.com/news/india/this-indian-court-has-used-chatgpt-on-accriminal-case-11679977632552.html), and one judge of the U.S. Eleventh Circuit Court of Appeals has made a "modest proposal" for the use of AI in deciding legal questions of contract meaning and ambiguity (acknowledging that he did just that before reaching his conclusions on the question in dispute). *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208 (11th Cir. 2024).

In a more sweeping measure, the judicial oversight body in England and Wales issued guidance in late 2023 to judges that authorized the use of AI tools to obtain non-definitive confirmation of something, while at the same time cautioning against their use "for research or finding new, unverifiable information." (See https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/; https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/; https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-guidance/; https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf). The Federal Courts of Canada issued two separate written guidance documents respecting the use of AI. (https://www.fct-cf.gc.ca/content/assets/pdf/base/2023-12-20-notice-use-of-ai-in-court-proceedings.pdf; https://www.fct-cf.gc.ca/en/pages/law-and-practice/artificial-intelligence).

In August 2024, the National Center for State Courts published its own guidance for the use of AI and Generative AI in the court system, noting that this technology "has the potential to change the practice of law and how courts operate." (https://www.ncsc.org/ data/assets/pdf file/0014/102830/ncsc-artificialintelligence-guidelines-for-courts.pdf). Among the concerns of the guidance was to maintain public trust and confidence and not have it eroded by errors or bias, with identified proper uses of AI technology being the summary, organization and location of information in large data sources; to create a first draft of something; and as a starting point for suggestions about presentation topics. Id. The American Association for the Advancement of Science (AAAS) is behind a separate initiative in the form of guidance to judges confronting the use of artificial intelligence in legal proceedings. (See https://www.aaas.org/ai2/projects/law; https://www.aaas.org/ai2/projects/law/judicialpapers?adobe mc=MCMID%3D2818440 2771370035972070700203311801975%7CMCORGID%3D242B6472541199F70A4C98A6%254 0AdobeOrg%7CTS%3D1664555375; https://www.nvd.uscourts.gov/wpcontent/uploads/2023/04/AI-and-Trustworthiness-NIST.pdf). Still another organization - the Center for Security and Emerging Technology - issued its own guidance in a white paper entitled "AI for Judges: A Framework".

(<u>https://www.armfor.uscourts.gov/ConfHandout/2022ConfHandout/Baker2021DecCen</u> <u>terForSecurityAndEmergingTechnology1.pdf</u>).

Various states have also issued individual guidance for the use of AI. (See https://www.njcourts.gov/sites/default/files/attorneys/attorney-resources/guidance-courts-ai.pdf (New Jersey); https://www.njcourts.gov/sites/default/files/attorneys/attorney-resources/guidance-courts-ai.pdf (New Jersey); https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf (California), as have individual courts within states too numerous to identify here.

At the same time, separate U.S. federal courts have issued edicts prohibiting, limiting or at the least subjecting to disclosure a lawyer's use of AI technology in civil proceedings¹, including courts in:

California (<u>https://www.cand.uscourts.gov/wp-</u> content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf; <u>https://www.cand.uscourts.gov/honorable-karen-e-scott;</u> <u>https://www.cand.uscourts.gov/wp-content/uploads/judges/kang-phk/Civil-</u> <u>Standing-Order-PHK-001.pdf;</u> <u>https://www.cand.uscourts.gov/wp-</u> content/uploads/2023/03/2024-09-18-Civil-Standing-Order.pdf; <u>https://www.cacd.uscourts.gov/sites/default/files/documents/SB/AD/1.%20Ci</u> <u>vil%20Standing%20Order%20%283.1.24%29%20[Final].pdf;</u> <u>https://www.cacd.uscourts.gov/honorable-rozella-oliver;</u> <u>https://www.cand.uscourts.gov/wp-content/uploads/judges/lee-</u> ekl/EKL_CivilStandingOrder-8-16-2024.pdf);

Colorado (<u>https://drive.google.com/file/d/1vjhGwUZiFBq48cY2uGCBSxQBIp-BDqYF/view</u>);

Hawaii (https://www.hid.uscourts.gov/cms/assets/23a3ee72-c96c-42c4-b184e8a748a00f64/General%20Order%20on%20the%20Use%20of%20Unverified%20Sour ces.pdf; https://www.hid.uscourts.gov/cms/assets/95f11dcf-7411-42d2-9ac2-92b2424519f6/Al%20Guidelines%20LEK.pdf);

Illinois

(https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/ /Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20r evision%201-9-24.pdf,

https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Arti ficial%20Intelligence%20standing%20order.pdf;

https://www.ilnd.uscourts.gov/judge-info.aspx?Bt1LmR2QgBbCj2VD6w9tXA==; https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=626);

¹ For a running list of all orders issued by state, federal and foreign courts issuing AI-related orders, *see* <u>https://airtable.com/appKUCriCQDI1BxIV/shrfIAPpNKaNMnacR/tblNmp6mff8CzLuQD</u>.

Michigan

(https://www.mied.uscourts.gov/PDFFIles/notice_proposed_LocalRules_amend ments_12-2023.pdf);

Missouri (https://www.moed.uscourts.gov/self-represented-litigants-srl);

New Jersey (<u>https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf</u>; <u>https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prap</u> <u>ol2.pdf</u>);

New York

(<u>https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%2</u> <u>OSubramanian%20Civil%20Individual%20Practices.pdf</u>);

North Carolina

(<u>https://www.ncwd.uscourts.gov/sites/default/files/Standing%20Order%20In%2</u> <u>ORe-%20Use%20of%20Artificial%20Intelligence2.pdf</u>);

Ohio

(https://www.ohsd.uscourts.gov/sites/ohsd/files/MJN%20Standing%20Civil%20 Order%20eff.%2012.18.23.pdf;

https://www.ohnd.uscourts.gov/sites/ohnd/files/Boyko.StandingOrder.Genera
tiveAI.pdf);

Oklahoma (<u>https://www.okwb.uscourts.gov/sites/okwb/files/GenOrder23-01.pdf;</u>

https://www.oked.uscourts.gov/sites/oked/files/AI%20Guidelines%20JAR%209. 27.23.pdf; https://www.okwd.uscourts.gov/wpcontent/uploads/AI Guidelines JudgePalk.pdf);

Pennsylvania

https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/standor d/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf; https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/hodp ol.pdf);

Texas (https://www.txnd.uscourts.gov/judge/judge-brantley-starr; https://www.txnd.uscourts.gov/judge/judge-matthew-kacsmaryk; https://www.txnb.uscourts.gov/sites/txnb/files/news/General%20Order%2020 23-03%20Pleadings%20Using%20Generative%20Artificial%20Intelligencesigned.pdf); https://txed.uscourts.gov/sites/default/files/goFiles/GO%2023-11%20Amending%20Local%20Rules%20Effective%20December%201%2C%202023.p df):

https://www.bloomberglaw.com/external/document/XCN3LDG000000/litigatio n-comparison-table-federal-court-judicial-standing-orde; https://www.pamd.uscourts.gov/content/judge-karoline-mehalchick); Consequently, the parameters of fair and proper use of AI in the legal context is unknown.

In contrast, the question in the insurance space is not *if*, but *how* AI is and will be utilized within the myriad facets of the business of insurance, and to what end. The National Association of Insurance Commissioners reports that artificial intelligence is transforming the areas of insurance underwriting, customer service, claims, marketing and fraud detection because of its ability to analyze "a treasuretrove of big data" which would otherwise be beyond human capability. (https://content.naic.org/insurance-topics/artificial-intelligence). In January 2024, Wolters Kluwer described the use of AI technologies in claims processing as not just a trend, but "a strategic imperative for insurance companies looking to stay ahead in a rapidly evolving landscape." (https://www.wolterskluwer.com/en/expertinsights/five-takeaways-claims-professionals-using-ai-today). A 2022 study by Accenture based upon data provided by 7,000 personal lines policyholders in 25 countries, more than 100 insurance claims executives in 13 countries, and 434 U.S. based underwriters stated that AI was "the transformative technology and critical differentiator in the insurance industry." (https://www.accenture.com/usen/insightsnew/insurance/ai-transforming-claims-underwriting; https://www.accenture.com/content/dam/accenture/final/accenturecom/document/Accenture-Why-AI-In-Insurance-Claims-And-Underwriting.pdf#zoom=40).

For one carrier - the liability insurer Lemonade - the entire company is built on behavioral economics and artificial intelligence. According to the company's CEO, the company was formed with the plan to "disrupt" the centuries-old model for insurance by harnessing AI and big data to power insurance products, with the goal of making insurance fairer, cheaper, and faster.

(<u>https://www.forbes.com/sites/garydrenik/2022/09/27/how-ai-is-changing-the-game-in-insurance/</u>) The company boasts that a claims bot handles policy placement (two minutes from quote to policy issuance) and every first notice of loss through predictive and machine learning models that informs the company's targeted book of business and that predicts, deters, detects, and blocks fraud. *Id*.

Among the touch points in effectively using AI tools are explainability, transparency and the avoidance of model bias. (<u>https://www.businessinsider.com/insurance-fraud-artificial-intelligence-detection-</u>2023-10).

II. Artificial Intelligence in Underwriting

The use of AI in risk underwriting can minimize manual processing, reduce errors and assist in the detection of application fraud. (<u>https://equarium.hannover-re.com/4498-5-use-cases-for-ai-in-insurance</u>). A 2023 analysis of existing and potential AI technology in the insurance space published by SwissRe, however, noted that efficiency and new solutions were possible only with a smart combination of AI models and the important element of human interaction.

(https://www.swissre.com/risk-knowledge/advancing-societal-benefitsdigitalisation/opportunities-ai-insurance.html). Which is to say that artificial intelligence "remains a tool to assist underwriters and intermediaries rather than be their replacement". (https://www.businessinsurance.com/ai-creates-efficiencieswont-replace-underwriters-es-

executives/#:~:text=AI%20can%20help%20underwriters%20visualize%20and%20analyze% 20data%20quickly,%20but). In the view of many then, human judgment remains an important component of the process.

In a futuristic prediction about the use of AI in underwriting, however, McKinsey predicted something far different:

In 2030, underwriting as we know it today ceases to exist for most personal and small-business products across life and property and casualty insurance. The process of underwriting is reduced to a few seconds as the majority of underwriting is automated and supported by a combination of machine and deep learning models built within the technology stack.

(https://www.mckinsey.com/industries/financial-services/our-insights/insurance-2030-the-impact-of-ai-on-the-future-of-insurance).

Whether today or in the future, generative AI as a tool in gathering and analyzing data and evaluating underwriting submissions can create the potential for inadvertent discrimination in the underwriting process and implicate privacy concerns. (<u>https://www.businessinsurance.com/ai-creates-efficiencies-wont-</u> <u>replace-underwriters-es-</u>

executives/#:~:text=AI%20can%20help%20underwriters%20visualize%20and%20analyze%
20data%20quickly,%20but).

Insurance is acknowledged to be inherently discriminatory: through the purposeful classification of insureds into differing pools of risk based on subjective risk profiles, "insurers openly discriminate among individuals based on observable characteristics . . . so that they can charge different premiums to different groups of insureds . . ." (Ronen Avraham, Kyle D. Logue, and Daniel Schwarcz, Understanding Insurance Antidiscrimination Laws, 87 S. CAL. L. REV. 195 (2014), at 198; available at <u>https://scholarship.law.umn.edu/faculty_articles/576</u>). It is discrimination of the unlawful type that is prohibited, including prohibitions embodied in the Patient Protection and Affordable Care Act of 2010 ("ACA"), the Health Insurance Portability and Accountability Act of 1996 ("HIP AA"), the Genetic Information Nondiscrimination Act of 2008 ("GINA"), and the Fair Housing Act ("FHA"). *Id.* at 198-199.

In 2022, the Casualty Actuarial Society acknowledged the potential impact of systemic racism on insurance underwriting, rating and claims practices in a white paper entitled Methods For Quantifying Discrimination On Protected Classes In Insurance (<u>https://www.casact.org/sites/default/files/2022-03/Research-</u><u>Paper_Methods-for-Quantifying-Discriminatory-Effects.pdf</u>). In 2024, the organization

issued four additional reports on race and bias

(<u>https://www.casact.org/article/casualty-actuarial-society-releases-new-reports-race-insurance-pricing-series</u>), including one entitled "<u>Regulatory Perspectives on</u> <u>Algorithmic Bias and Unfair Discrimination</u>".

(https://www.casact.org/sites/default/files/2024-

<u>08/Regulatory_Perspectives_on_Algorithmic_Bias_and_Unfair_Discrimination.pdf</u>). These efforts mirrored work by the National Association of Insurance Commissioners which noted historic discrimination on the basis of race in the insurance industry. (See <u>https://content.naic.org/sites/default/files/cipr-report-milestones-racialdiscrimination.pdf</u>)

Reflecting this recognition, a 2022 Bulletin by the California Insurance Commissioner noted nationwide revelations about racial discrimination by insurers in marketing, rating, underwriting, and claims handling, and reminded insurers of their obligations under California's Civil Rights Act. (Cal. Civil Code section 51). (https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletinnotices-commiss-opinion/upload/BULLETIN-2022-5-Allegations-of-Racial-Bias-and-Unfair-Discrimination-in-Marketing-Rating-Underwriting-and-Claims-Practices-by-the-Insurance-Industry.pdf). The California Act mandates full and equal accommodations, advantages, facilities, privileges, or services, regardless of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. *Id*. The Bulletin instructed:

[I]nsurance companies and other licensees must avoid both conscious and unconscious bias or discrimination that can and often does result from the use of artificial intelligence, as well as other forms of "Big Data" (i.e., extremely large data sets analyzed to reveal patterns and trends) when marketing, rating, underwriting, processing claims, or investigating suspected fraud relating to any insurance transaction that impacts California residents, businesses, and policyholders.

Id. While acknowledging that insurers' responsible use of data can improve customer service and increase efficiency, the Bulletin noted that "algorithmic data are susceptible to misuse that results in bias, unfair discrimination, or other unconscionable impacts among similarly-situated consumers". *Id.* According to the Bulletin,

[t]he greater use by the insurance industry of artificial intelligence, algorithms, and other data collection models have resulted in an increase in consumer complaints relating to unfair discrimination in California and elsewhere.

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In late 2023, the National Association of Insurance Commissioners approved a Model Bulletin on the Use of Artificial Intelligence Systems by Insurers to set clear expectations for state Departments of Insurance regarding the utilization of AI by insurance companies, including potential data inaccuracies, unfair biases leading to discrimination, and data vulnerabilities. (<u>https://content.naic.org/article/naic-members-approve-model-bulletin-use-ai-insurers</u>).

III. Artificial Intelligence in Claims Handling

One basic use of AI tools is to automate rote tasks that free up claims professionals for more meaningful work. <u>https://www.wolterskluwer.com/en/expert-insights/five-takeaways-claims-</u> <u>professionals-using-ai-today</u>). Three main functions of Narrow AI in insurance have been identified as 1) automation of respective knowledge tasks (classification of submissions and claims); 2) drawing conclusions from large complex data sets to assist decision making (portfolio steering; risk assessment) and 3) enhancing parametric products and risks solutions. (<u>https://www.swissre.com/risk-knowledge/advancing-</u> <u>societal-benefits-digitalisation/opportunities-ai-insurance.html</u>).

When claim automation expedites the acceptance and payment of claims, there is little room for criticism by policyholders and their representatives because technology is facilitating claim processing and payment rather than being used to limit it. Technology that improves customer interaction and brings greater efficiency to the claims process is a win-win for insurers and insureds alike. In Accenture's research, one third of all claimants were not fully satisfied with their most recent claim experience, with criticism centering on the speed of claim settlement. https://www.accenture.com/content/dam/accenture/final/accenture-com/document/Accenture-Why-Al-In-Insurance-Claims-And-

<u>Underwriting.pdf#zoom=40</u>). And satisfaction matters in terms of renewal premium. *Id.* One case study highlighted by Accenture is Compensa Poland's implementation of a self-service claims-handling solution using data analytics to automatically process claims from first notice through segmentation, assessment and settlement, including the adjustment of claims reserves. The system resulted in a 73% increase in claims process cost efficiency, a 10% increase in claim accuracy, with 50% of customers favorably reviewing it. *Id.*

In the case of Lemonade, nearly half of all claims are reportedly managed purely electronically, without any human involvement, thereby meeting the promise of a seamless, delightful and "breezy" claim experience.

(https://www.forbes.com/sites/garydrenik/2022/09/27/how-ai-is-changing-thegame-in-insurance/). With this in mind, in the same McKinsey report previously addressed in the underwriting context, the claims landscape is also dramatically changed in the year 2030 being predicted - in a manner not far off from the present. (https://www.mckinsey.com/industries/financial-services/our-insights/insurance-2030-the-impact-of-ai-on-the-future-of-insurance). Specifically, the vision for claims handling is wide use of data-capture technologies (like drones for example) in replacement of first notice of loss, and streaming video of accident conditions automatically triggering claims triage and repair services, including automated loss descriptions and damage estimates. *Id*. In the auto-based accident envisioned, an autonomous vehicle is automatically dispatched to the accident scene to replace the car left undriveable. *Id.* Claims resolution time "is measured in minutes rather than days or weeks", and policyholder interactions are app-based and automated, with human interaction limited to complex, unusual and contested claims only. *Id.*

According to the Hartford, aerial images in combination with AI technology are used to assess physical property conditions in lieu of making physical inspections in the case of insureds with properties in the tens and hundreds in number. (https://www.thehartford.com/insights/technology/artificial-intelligence-insurance-considerations). The company hastens to say that the technology then ends up in the hands of a human underwriter who interprets the information to decide proper pricing. *Id*.

As addressed in the context of insurance underwriting, the use of AI tools can be risky and potentially subject to significant criticism when used for claim validation and there is insufficient human involvement and oversight. Human input must test AI solutions to avoid coded racial, gender and other socioeconomic biases and disparities. (<u>https://www.accenture.com/content/dam/accenture/final/accenturecom/document/Accenture-Why-AI-In-Insurance-Claims-And-</u> Underwriting.pdf#zoom=40).

The same potential for discrimination and bias exists in the use of AI and Big Data in the claims process. California Insurance Department Bulletin 2022-5 identified as one example allegations of insurers unfairly flagging claims from certain inner-city ZIP Codes resulting in disproportionate referral to Special Investigative Unit teams for investigation of fraud, denial of claims, and offers of unreasonably low settlements. (<u>https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200bulletins/bulletin-notices-commiss-opinion/upload/BULLETIN-2022-5-Allegations-of-Racial-Bias-and-Unfair-Discrimination-in-Marketing-Rating-Underwriting-and-Claims-Practices-by-the-Insurance-Industry.pdf)</u>

IV. Artificial Intelligence in Fraud Detection

The sophistication of fraud schemes and the exploitation of commercial vulnerabilities across all industries increases exponentially with each passing day, and the insurance sector is no exception. In fact, it is estimated that fraudulent claims cost insurers more than \$300 billion annually, translating into 12% of premium dollars being paid to dishonest claimants. (https://www.businessinsider.com/insurance-fraud-artificial-intelligence-detection-2023-10). Fraud also has been and continues to be fertile ground for deceiving underwriters as well, and AI has a role in reinforcing and enhancing existing fraud checks and methodologies.

(<u>https://equarium.hannover-re.com/4498-5-use-cases-for-ai-in-insurance</u>). "Machine learning and deep learning systems can examine large datasets and identify anomalies and fraud patterns that may not be apparent to human reviewers, and predictive analytics can identify the likelihood of fraud." *Id*.

According to a 2021 study by the Coalition Against Insurance Fraud (comprised of among 100 insurers along with other organizations) (*See* <u>https://www.sas.com/content/dam/SAS/documents/marketing-whitepapers-</u> <u>ebooks/third-party-whitepapers/en/coalition-against-insurance-fraud-the-state-of-</u> <u>insurance-fraud-technology-105976.pdf</u>), 80% of member insurers utilized predictive analytics to detect fraud, an increase of more than 55% compared to 2018. (https://www.claimsjournal.com/news/national/2022/01/26/308256.ht)

V. Artificial Intelligence in Legal Services Bill Review

If third party bill review was not already the bane of the existence of insurerpaid defense counsel, automating this process via electronic means continues to be augmented with AI technology, with the goal of locating purported non-compliant or improper billing and reducing defense fee reimbursement. One third party bill review vendor promises that its "A-I driven legal invoice review solution" eases the timeconsuming burden on claims staff, saving clients "up to 10% in legal spend and increas[ing] billing guidance compliance by up to 20%." (https://www.wolterskluwer.com/en/expert-insights/five-takeaways-claimsprofessionals-using-ai-today).

As respects the process of legal invoice review by insurers - whether by AI technologies or human means - the perception at least is that HAL and not WALLE is running the show.