American College of Coverage Counsel 2024 Insurance Law Symposium University of Minnesota Law School Minneapolis, MN November 15, 2024 AI Risk Management: Gee, What Could Possibly Go Wrong?

. . . Uh, Is That Covered?

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#### Content:

AI Applications & Opportunities

AI Related Risks

Managing AI Risks

Traditional Insurance

Specialty AI Insurance





## Some AI Applications & Opportunities—the Medtronic Example





#### Why Medtronic Is Bullish on the AI Opportunity in Medtech

Medtronic CEO Geoff Martha makes a strong case for AI-enabled care at the J.P. Morgan Healthcare Conference.

#### Engineering AI Solutions | Transforming how we deliver innovation

Al Center of Excellence driving a cohesive and purposeful strategy to advance our leadership position in Al-enabled care

Harnessing the power of Al today Clinical decision support | New indications | Personalized treatment

#### GI Genius™

#### intelligent endoscopy with AI

Aids the detection of colorectal polyps, potentially preventing colorectal cancer; significantly decreases miss rate (2x) of polyps and adenomas<sup>1</sup>

#### Touch Surgery Enterprise<sup>™</sup> Al-enabled surgery

Processes surgical videos to identify surgical phases for procedure optimization; provides detection of surgical instruments and anatomy identification

#### AiBLE™

#### digital ecosystem for Neurosurgery

Creates seamless workflows, new capabilities, automation to reduce surgical cognitive load, closed loop predictive planning through outcomes tracking

#### MiniMed 780G System™

#### with Meal Detection Technology™ Algorithm

Simplifies diabetes management & improves outcomes by applying machine learning to automatically adjust insulin delivery every 5 minutes to deliver more Time in Range

#### LINQ™

#### insertable cardiac monitor with AccuRhythm™ AI

Long-term heart monitoring that includes AI-enabled algorithms to reduce burden and increase insights for patients, physicians and hospital system

Uniquely positioned to advance AI; establishing Center of Excellence



1. Gastroenterology, March 15, 2022; https://doi.org/10.1053/j.gastro.2022.03.007

### Scope of AI at Medtronic

Four pillars to drive cost savings (internal) and business growth (external)

#### CIO (internal)



#### **Employee Productivity**

- Major productivity increase potential
- Across the board HR, finance, sales, customer support



#### **Clinical Decision Support**

**CTO** (external)

- Predictive analytics
- Precision medicine
- Medical image recognition
- Surgical planning
- EHR analysis
- Diagnostic support/devices



#### **Process Automation**

- Product design & engineering
- R+D execution
- Safety surveillance
- Speed of innovation



#### **Therapeutic Interventions**

- Medical robotics
- Surgical instruments
- AI enabled embedded devices
- Intelligent closed loop therapies

#### **All Four Elements Have Common Platform and Talent Requirements**

## ... Gee, What Could Possibly Go Wrong?— AI-Related Risks





#### **Privacy**

Vast amounts of data used in development and collected during use - personal data has privacy implications.

## Regulatory

**Explainability** 

"Black box" nature of complex algorithms = hard to decipher, and leads to overreliance on Al recommendations.

#### **Mismatch**

Al training can be Al in one environment can fail to meet objectives in another

**Uncertainty** and legal frameworks

#### Hallucinations

Non-factual and erroneous results. raising issues of safety and efficacy.

#### Liability

Exposure to new risks.

#### Validation

Requires expertise to test and ensure AI product functions as intended.

#### **Security**

Complexity of AI into company systems poses new cybersecurity challenges.

#### **Ownership**

IP Concerns re- inputs and outputs of AI.

#### **Bias**

Training algorithms on historical data sets can propagate past unlawful or harmful bias and discrimination.

#### Unintended Consequences

Continuous learning of GenAl can cause Al solution to veer off course - challenges in post-market vigilance.



Inputs to train AI: is fair use a shield when training AI with copyrighted content?
 Examples: Thomson Reuters v. ROSS Intelligence (D. Del.)
 Outputs of AI: can outputs from AI models be infringing derivative works?
 Examples: Kadrey v. Meta Platforms (N.D. Cal.)



Invasion of Privacy claims (private text or images scraped from social media)

Example: Leavy v. Google (N.D. Cal.)

State Privacy Statutes: Al-based apps use private images for facial or bio-recognition

Example: Illinois class action against Clearview AI



Hiring claims: use of AI in hiring decisions

Examples: Mobley v. Workday (N.D. Cal.), EEOC v. iTutor Group (E.D.N.Y.) Business output claims: Allegations of bias in amounts paid for claims or treatment provided Examples: Huskey (N.D. Ill.), UnitedHealth Group (D. Minn.)



Litigation sanctions: AI can generate fake cases and citations for lawyers or pro se litigants
 Examples: sanctions against lawyers in NY, warnings to other litigants
 Court rules: Requirements that litigants disclose or describe use of AI
 Examples: Several court orders, state bar ethics opinions



Training AI with Confidential Data: Client information used to train AI may appear in outputs

**AI-Based Phishing and Deep Fakes:** More convincing attempts to trick employees into disclosing information or transferring money



#### Statutes - U.S. and International

Examples: EU Artificial Intelligence Act, Colorado AI legislation

State and Federal enforcement actions and opinions:

Examples: SEC enforcement actions, state AG opinions

## Managing Al Risks—Non-Insurance Strategies





### Legal Organization's AI Support

## Intellectual Property

- IP strategy
- IP related aspects of vendor, customer and partnering relations involving AI and data initiatives.

#### $\mathbb{A}$

#### Labor & Employment

 Advise on AI laws and regulations that address the use of AI - e.g., in HR setting, tools used in recruiting and hiring.



- Interpret AI regulations and authoritative guidelines.
- Provide advocacy input.

## Data & Privacy

- Data use for AI purposes.
- AI R&D PbD, PIA and privacy advising.
- Al Supplier Privacy risk assessment.
- IT Data Architecture/Support

## Contract Support

- AI Supplier agreements
- Customer agreements
- Support risk assessments

#### Legal Op<mark>s</mark>

- Legal Technology Roadmap.
- Record retention schedule.
- Systems and tools for internal Legal use.

## Litigation

- Al Litigation and investigations.
- Document retention and eDiscovery
  preservation and collection of data

## Ethics & Compliance

- Ethical use of AI
- Ensure Corporate Compliance Programs include AI and emerging technologies

### **Gov Affairs**

- Advocacy on upcoming AI regulations
- Represent MDT's AI strategy and activities.

#### Some Practical Steps to Manage AI Risks



Technical Controls & Monitoring – tailored to level of risk, supportive and enable innovation, and ensure continued compliance with evolving regulations and legal landscape.



Risk Assessments –3<sup>rd</sup> party AI solutions and MDT AI solutions, benchmarked to industry standards, adaptive and evolutionary to meet changing regulatory and industry standards.



Contract – address AI-specific matters such as IP, privacy, allocation of liability/indemnity, and AI-tailored "insurance procurement" terms.



Al Training – appropriate to level or role in oversight, business, and legal fields.



**Overarching Guidance – AI Compass and AI Guidelines.** 



Insurance—AI-tailored "other people's insurance" (via vendor & customer contracts) and own company insurance.

## Transferring AI Risks-Traditional Insurance?





### A Broker's Analysis: AI Risks and Loss Quadrants

#### **AI Risks Hit All Loss Quadrants**



#### Any major AI event will result in

- Public relations, response, and continuity costs
- Immediate and extended revenue loss
- Defense costs

#### Third parties will seek to recover

- Civil penalties and awards
- Consequential revenue loss
- Damages and possible equitable claims for relief

### Physical damage is possible (depending on nature of AI use)

- Property damage
- Bodily injury

#### Physical damage may cascade to others

- 3rd party property damage
- 3rd party bodily injury

AI Loss Spectrum

### Insurance for AI Liability - Today

- Liabilities from AI resemble some risks and problems covered under standard polices
  - Current policies may therefore provide coverage
  - Exclusions and limitations must be scrutinized
- Very limited AI coverage litigation to date

### Insurance for AI Liability

Untested in courts, BUT several possibilities:

### (1) General Liability

- Could be advertising injury for copyright violations
- Could be personal injury for invasion of privacy
- Many potential exclusions and limitations

#### Early examples:

- Wynndalco Enterprises, 70 F.4th 987 (7th Cir. 2023)
- Twin City Fire Ins. Co. v. Clearview AI (S.D.N.Y)

### Insurance for AI Liability

#### (2) Cyber Polices

- Cyber-related issues like hacking, data loss, cyber attacks
- May also address adverse publicity & business interruption

#### (3) Technology E&O policies

Claims relating to provision of technology services

### **Insurance for AI Liability**

#### (4) Other policies

- Directors & Officers (claims against Ds & Os and certain securities claims)
- Professional Liability
- Employment Practices Liability Insurance
- Media Liability
- Property/Business Interruption (first-party)

### Insurance for GenAI Liability - Today

#### Currently, few express exclusions for AI

- Notable exception: Optional endorsement to media coverage; excludes "content created or posted for any third party that you created using generative artificial intelligence in performance of your services." (Philadelphia, Musical Composition and Generative Artificial Intelligence Exclusion, PI-IT-036 (09/23).)
- Defines generative AI to mean "content created through the use of any artificial intelligence application, tool, engine, or platform."

(source: IRMI)

### Insurance for AI Liability - Future Hiccups?

- ► "Silent Cyber" coverage for uncontemplated cyber risks under traditional "all-risks" policies → "Silent Cyber Initiative" by insurers and insurance regulators to exclude or restrict cyber perils.
- Is a "Silent Al Initiative" next?
  - Will insurers add AI exclusions?
  - Will insurers offer express AI coverage, either standalone or in other policies?
  - Will AI coverage be sub-limited?
  - Will underwriters explore the use of AI through specific questions or expect it to be described in applications as part of exposure?

### How are policies updated?

### Second Exclusion

"Media incident means [...], except in your advertisement or in content created or posted for any third party that you created using generative artificial intelligence in performance of your service." Philadelphia Insurance Companies

#### Inclusion

"[...] Losses arising from Technology Product Supply Services where Technology Product means any computer hardware, firmware, software (including AI) or related electronic product, equipment or device" a major insurance company

#### Endorsement

"The new cyber policy endorsement addresses the following new Gen AI risks that clients may face:

- Data poisoning
- Usage rights infringement
- regulatory violations"
  AXA XL

## Insuring AI Risks— Underwriting Considerations





### Question 1: Human or AI Risk?



#### **Example: E-Commerce Fraud Detection**

Based on product, time, address, employee blocks transaction		Based on those features, AI outputs "likely fraud". Employee blocks transaction		Based on those features, AI outputs "likely fraud". Rule system blocks transaction		Based on features, AI expects fraud, AI calls customer, AI confirms authenticity
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"AI gone wrong" looks very different in each case which creates diverse loss scenarios and technological exposure for insurers.

### **Question 2: Liability**



#### Who is liable for a loss?

#### Example: Copyright Infringement

A marketing agency uses an AI model to create a campaign for a big sports brand. A competitor sees the campaign and believes it infringes on their copyright as it looks like their campaign two years ago.

- > Who can they successfully sue for damages?
- > Who can subrogate against whom?



Alcon Entertainment vs. Tesla, Elon Musk and Warner Bros.

### **Question 3: Exposure**

#### What is my exposure to AI risks?

- Where is Al used?
- > Does that increase or decrease my risk?
- > Am I exposed to AI risks without knowing?
- > Do my underwriting questions still fit?
- Does my policy wording reflect my coverage intent?

Mobley v. Workday: Court Holds Al Service Providers Could Be Directly Liable for Employment Discrimination

UnitedHealth uses faulty AI to deny elderly patients medically necessary coverage, lawsuit claims

Mortgage underwriting algorithm at heart of Wells Fargo's racial disparity lawsuit

#### **Example: Discrimination**

Usually covered under EPLI. Risk stems from lack of people training or oversight and bad individual humans' decisions. With AI, risk becomes a training data- and model monitoring-risk. The exposure becomes an accumulation risk. EPLI was not priced and drafted for this type of risk.

## Transferring AI Risks– Specialty AI Insurance Examples



![](_page_29_Picture_2.jpeg)

### Insurance Products Specific To Al Risks

- Munich Re: Affirmative coverage to insure the performance of Al solutions.
  - > aiSure: Aimed to insure Al Providers.
    - "If your [AI] solution does not perform as promised, we will step in and help you to compensate your clients."
    - Claims it has helped businesses providing cybersecurity, antifraud, battery analytics and autonomous operations solutions.
  - aiSelf: Aimed to insure companies developing their own AI solutions.
    - With aiSelf, you can implement your self-developed AI solution with confidence and convince your decision makers about its reliability and financial benefit. This new cover enables you to mitigate the underperformance, unreliability and drift of machine learning models."

### Insurance Products Specific To AI Risks

#### Vouch Al Startup Insurance:

- "Covers critical AI risks including errors, discrimination, regulatory mistakes, and intellectual property disputes"
- Claims that AI Insurance covers the following areas not covered or affirmatively covered by standard Tech E&O Coverage:
  - Claims alleging algorithmic bias
  - Claims that AI product violated IP laws
  - Defense costs for investigations concerning AI-specific regulatory violations
  - Losses caused by AI products or algorithms
  - Damages from services provided by AI

Source: Vouch Insurance website, https://www.vouch.us/verticals/ai

### Novel Affirmative Policies in the Market

![](_page_32_Figure_1.jpeg)

Insured Warranties

Al vendors offer indemnifications to customers if the Al is not accurate. Insurance policies cover the risk of payouts.

![](_page_32_Picture_4.jpeg)

Liability Policies

Narrow policies filling market gaps focused on AI-caused lawsuits for IP infringement, discrimination and more.

![](_page_32_Picture_7.jpeg)

Own Damage Policies

Policies focused on the accuracy of AI and consequential financial losses for protection from the potential downside of rolling out AI.

## But Remember the Moral of Every AI-Related Story:

![](_page_33_Picture_1.jpeg)

## Questions?

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![](_page_34_Picture_6.jpeg)

## APPENDIX—Additional Reference Materials

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## **Al–Some Basics**

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![](_page_36_Picture_2.jpeg)

### An Al Vocab Lesson

- Artificial Intelligence: the capability of a machine to imitate intelligent human behavior.
- Machine learning (subset of AI): application of AI that enables systems to learn automatically and improve from experience without being explicitly programmed by humans.
- Robotics: the intersection of computer science, engineering and technology that produces machines, called robots (including design, construction, operation, and use), that substitute for (or replicate) human actions.
- AI spectrum: Narrow ("ANI")→General ("AGI")
  Recent focus on AGI by "<u>AI Doomers</u>": "<u>the Singularity</u>," "<u>existential risk</u>," "<u>Oppenheimer moment</u>," etc.
   Why all this recent angst?

![](_page_37_Picture_5.jpeg)

https://www.studyiq.com/articles/generative-ai/

### Al Vocab, cont.: Generative Al Spotlight

"Generative artificial intelligence (AI) describes algorithms (such as ChatGPT) that can be used to create new content, including audio, code, images, text, simulations, and videos." (McKinsey, What Is Generative AI? (1/19/23))

#### Examples:

- ChatGPT (OpenAI)
- DALL-E (OpenAl)
- Bard (Google)
- LLaMA2 (Meta)
- Make-A-Video (Meta)
- ► GPT-4 (OpenAI)
- Perplexity (private startup)
- Large Language Models (LLMs)
- A type of machine learning, trained by analysis of huge volumes of data . . .

![](_page_38_Picture_12.jpeg)

https://www.studyiq.com/articles/generative-ai/

### ... But What Goes Into Machine Learning?

![](_page_39_Picture_1.jpeg)

- Conceiving fundamental objective/business model for the AI
- Selecting & compiling AI training data set
- Devising AI model (algorithms to detect patterns or make predictions from data)
- Training, testing, reviewing and revising AI model
- Implementing the AI

Lesson: "There's nothing artificial about Al...It's inspired by people, it's created by people, and . . . it impacts people." (Stanford Prof. Fei-Fei Li)

# Liability associated with GenAI - Output

#### Special Risks for Insurers: AI in underwriting

- Potential discriminatory outcomes in underwriting, pricing, marketing
- State governmental responses
  - NAIC model bulletin (Dec. 2023) on use of AI
  - Colorado regulation aimed at insurance algorithms (2023)
  - New York DFS: draft circular letter with guidance for insurers using AI in underwriting and pricing (2024)
  - Several states have begun investigations into potential discrimination in insurance models & data

# Liability associated with GenAI - Output

- Special Risks for Insurers: AI in claims handling
  - Potential claims for discrimination or errors in claims decisions, payment amounts
  - Risk of bad faith claims over lack of analysis
  - Several lawsuits already filed
    - Lokken v. UnitedHealth Group (D. Minn.): alleges use of AI to determine appropriate level of care, overriding physician determinations
    - Huskey v. State Farm (N.D. Ill.): alleges use of algorithm that discriminate against black homeowners in first party claims

# Liability associated with GenAI - Output

- Other potential claims
  - Privacy disclose private information in the GenAl output
  - Product Liability if a product developed with GenAI causes injury or damage
  - Misrepresentation and consumer protection
    - E.g. Gamers alleged they believed they were playing other humans

Vast am used in de and collect use – perso has priva implication

#### Liability Exposure to new risks.

![](_page_43_Figure_3.jpeg)

**Ownership** IP Concerns re- inputs

#### Unintended Consequences

Continuous learning of GenAl can cause Al solution to veer off course - challenges in post-market vigilance.

### Liability associated with GenAI -Directors & Officers or Securities Suits

- Did the Directors and Officers err in using GenAl?
- "What is the civil liability of the directors of a company if their AI-developed drug turns out to be the next thalidomide, or the outputs of AIML tools prompt the directors to pursue a business strategy that fails spectacularly?"

Stuart Irvin, Seth Tucker, David Engvall & David Dapaah-Alfriyie, AI Comes to the Board Room in a Black Box: Are the Personal Assets of Directors at Risk in AI-Related Claims?, JOLT Dig. (Sept. 15, 2023)

### Liability associated with GenAl -Directors & Officers or Securities Suits (continued)

- Did the Directors and Officers err in not using GenAl?
- Did the Directors and Officers adequately and accurately disclose any use of GenAI?
  - Stockholders have sued companies for inaccurate representations about AI
    - Alich v. Opendoor Tech. Inc., 2024 WL 839146, No. CV-22-01717-PHX-MTL (D. Ariz. Feb. 28, 2024)
    - Opendoor, a public company, buys and resells homes using an AI model to predict resale value and optimal buying prices
    - Stockholders sued Opendoor for securities fraud, arguing Opendoor overstated the accuracy of its model and understated how much humans were involved

### Liability associated with AI -Regulatory

#### Regulatory liability

#### New regulations seemingly every day

- EU Artificial Intelligence Act (March 2024)
  - applies to both providers of AI and certain users of AI
- Tennessee "ELVIS" Act (January 2024)
  - Ensuring Likeness Voice and Image Security Act bars GenAI from unauthorized use of a person's voice (including a GenAI recreation of the voice), in addition to name and likeness
- Utah Artificial Intelligence Policy Act (March 2024)
  - consumer-protection law
- Connecticut Insurance Department Bulletin No. MC-25 (Feb. 2024)

### Liability associated with GenAI -Intentional Bad Actors

#### Deepfakes can be used in scams

- Spoof video of a company's CEO allegedly led to a money transfer to a scammer (some wonder whether that's what happened)
- Question of whether GenAI system can be held responsible in part
  - Cf. Mark Walters v. OpenAI (Ga. Sup. Ct.): radio host alleges OpenAI produced report of fake lawsuit that defamed him
- Deepfakes can be used for political chicanery or fake pornographic images
  - Already being used in both spheres
- Use of GenAI can also make cyber crime easier or more available

### Al Insurance Placements - Tips & Traps

#### Mind the gaps, please!

- Consider both specialty lines (cyber, media, technology E&O) and traditional coverages (CGL/Product Liability, Property, D&O)
  - Match specialized policies to gaps in traditional coverage
  - Pay attention to data and statutory violation exclusions
- Consider risks from government action
  - Regulatory investigations are increasing
  - Consider coverage for fines
- For property policies:
  - Consider benefit and cost of "All Risk" versus "Named Perils" policies
  - Remember physical cyber risks

![](_page_48_Picture_11.jpeg)

### Insurance Products Specific To AI Risks

- Mosaic: Primary technology errors and omissions (E&O) coverage to protect tech companies.
  - "The launch builds on Mosaic's primary cyber offering [] and activates primary Tech E&O as a blended product globally []. Coverage mitigates against rising threats facing businesses contracted to provide tech products, including artificial intelligence, virtual reality, edtech, IT consulting, data analytics, software as a service (SaaS), and peer-to-peer platform services."

Source: Mosaic Insurance website, https://www.mosaicinsurance.com/news/press-releases/mosaiclaunches-15m-in-primary-tech-eo-coverage/

### Insurance Products Specific To AI Risks

#### Coalition Affirmative AI Endorsement

- Modifies the Coalition Cyber Policy to expand the definition of a "security failure" to include an AI security event.
- 1. The following is added to the definition of "security failure" in SECTION IX, DEFINITIONS:

Security failure includes an AI security event, which results in:

- 1. acquisition, access, theft, or disclosure of **personally identifiable information** or **third party corporate information** in **your** care, custody, or control and for which **you** are legally liable;
- 2. loss, alteration, corruption, or damage to software, applications, or electronic data existing in **computer systems**;
- 3. transmission of **malicious code** from **computer systems** to third party computer systems that are not owned, operated, or controlled by the **named insured** or **subsidiary**;
- 4. a denial of service attack on the named insured's or subsidiary's computer systems; or
- 5. access to or use of **computer systems** in a manner that is not authorized by **you**, including when resulting from the theft of a password