Insurance Coverage For ChatGPT Legal Fiasco: A Hypothetical

By **William Passannante** (July 20, 2023)

William Passannante

Artificial intelligence tools permit humans to make bigger and more grandiose mistakes. Native human intelligence, drawing on human experience, suggests that insurance companies are likely to make things even worse for those who face liability for such errors with improper claims practices.

AI is permitting customer service to vanish, industry by industry. For example, airlines are steering customers seeking help to chatbots rather than live customer service representatives.

As a recent article in The Atlantic summed up:

Airlines are leaning into A.I., betting that the latest wave of chatbots will be the most cost-effective way to support customers. The long-standing truth is that companies don't want to talk to you. First, they didn't want to do it in person, then they didn't want to do it by phone, now they don't want to do it online, and soon they won't want to do it at all. It's not personal — it just costs money.[1]

What could go wrong? When an airline chatbot provides grotesquely incorrect information and customers sue, will insurance respond to the airline's claim?

Even professional client service from a lawyer, Steven Schwartz of the firm Levidow Levidow & Oberman, was derailed by the use of predictive AI. A New York Times account of how the lawyer used ChatGPT to prepare a court filing shows how reliance upon AI tools can multiply the impact of errors.[2]

In an affidavit filed in the U.S. District Court for the Southern District of New York, Schwartz declares, "It was in consultation with the generative artificial intelligence website Chat GPT, that your affiant did locate and cite the following cases in the affirmation in opposition submitted, which this Court has found to be nonexistent."

In other words, ChatGPT appears to have invented six nonexistent cases for this lawyer to rely upon in a court filing. The affidavit also shows that the lawyer asked ChatGPT to confirm the existence of the imaginary cases, and it did so.

Insurance Companies and Claim Avoidance

ChatGPT drew various scraps of information from its unfathomably extensive database to create the case history and assemble an alternate reality.

As possessors of organic intelligence, we can do that too. While there is no public record of any insurance claim the lawyer in this case may have filed, let's draw on what we know about the insurance claims process and imagine how such claims might proceed. I'll start by saying that the scenarios spun are hypothetical.

My "database" of 30 years of insurance coverage litigation experience offers an organizing principle: Insurance companies may take unfair advantage when an insurance claim happens.

Imagine an attorney who files a claim seeking defense and indemnity for liability stemming from his citation of legal opinions invented by a chatbot. He provides notice to Insurance Company A, which sold his firm a cyber insurance policy, and Insurance Company B, which provided the firm's errors and omissions coverage. Insurance Company A rejects coverage because the claim is an E&O claim, and Insurance Company B rejects coverage because it's a cyber claim.

Insurance companies often point at each other in complex claims. The jaded among us may expect such behavior, but it is often bad faith.

In our AI case, the E&O insurance company might point to cyber exclusions in the policy, even though a human error multiplied by an electronic tool is not what most would think of as a cyberattack. The cyber insurance company might argue, conversely, that the attorney-policyholder was not hacked or otherwise cyber-assaulted or even the victim of a software error — as the chatbot's construction of fanciful information may be in accord with its current design.

The dispute may not be all-or-nothing. Rather than protect their policyholder as is their obligation, each insurance company may argue that the other insurance company is primary, and that its own coverage kicks in only when the alleged primary policy limits are exhausted. Or the two insurance companies may play ping-pong as to which should cover particular costs — say, the expense brought by a malpractice suit versus the expense of responding to regulatory inquiry or pleading against court sanction.

If the basic fact of coverage is indisputable, a claims-avoiding argument often turns to which limit of liability or which deductible. The latest thicket of claims avoidance and minimizing techniques involves asserting allocation, exclusion or sublimit regarding substantial claims.

That is, insurance companies may attempt to pare the broad duty to defend by claiming that another insurance company must bear the defense costs of some specific claims in a suit but not others, i.e., allocation; that it will provide a defense against some allegations but not others in a given suit, i.e., exclusion; or that sublimits that apply to indemnity costs also apply to defense costs.

In complex claims situations, such assertions provide a claims department with a false and improper narrative to distract from claims payment. These maneuvers cut against the near-universal rule when the defense of a claim is at issue: If a claim is both within and outside the coverage of the insurance policy, then the insurance company must defend the entire claim.[3]

In my experience, insurance companies often choose the policy, exclusion, limit or retention that suits their financial interests, even if the policyholder sought to buy broad seamless coverage. Such claims behavior over decades gave rise to generally policyholder-friendly rules of insurance policy construction and insurance bad faith law, which courts use to sort through claims disputes.

Insurance Policies' Unique Obligations

Insurance policies uniquely first require the policyholder to perform by paying insurance premiums. The insurance company delays payment of the claim — often excessively — at its option. Policyholders rely on the good faith and fiduciary nature of the insurance

company. This disjointed performance of the parties to the insurance policy can lead, particularly in novel matters such as those involving AI-multiplied harm, to wrongful claims practices.

Policyholders need not permit insurance companies to protect only their financial self-interest. Instead, policyholders can and should insist that policyholder interests in reducing liability and minimizing losses occupy the central position when facing an insurance claim.

Policyholders in most jurisdictions can recover some or all of: (1) policyholder attorney fees, (2) interest on the unpaid claim, (3) consequential damages for bad faith behavior, (4) damage for failure to settle, and (5) punitive or exemplary damages — often tort-related — on account of wrongful behavior.

Thus, the insurance companies' breach becomes less profitable.[4] Making insurance companies pay requires knowing how the insurance companies' exposure works in your case. Use that knowledge to obtain fair payment.

Conclusion

The future will permit artificial intelligence tools to help humans make bigger and more severe mistakes. Don't let insurance companies compound the fallout from technology-enhanced errors by failing to fairly pay your claim.

William G. Passannante is a shareholder at Anderson Kill PC.

[1] Mac Sherwin, Somehow, Airline Customer Service Is Getting Even Worse – Chatbots are taking over, and it's a mess, (June 14, 2023). https://www.theatlantic.com/technology/archive/2023/06/airline-customer-service-chatbot-ai/674412/.

[2] Trip Gabriel, Here's What Happens When Your Lawyer Uses ChatGPT, May 27, 2023. https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html?smid=url-share.

[3] E.g., Category 5 Mgmt. Grp., LLC v. Companion Prop. and Cas. Ins. Co., 76 So. 3d 20, 23 (Fla. Dist. Ct. App. 2011).

[4] See, e.g., William G. Passannante, 'Bad Faith Legislation: Good For Insurance Policyholders?, Propertycasualty360, National Underwriter—Perspective (September 12, 2019). https://www.andersonkill.com/Custom/PublicationPDF/PublicationID_1798_Bad-Faith-Legislation-Good-for-Insurance-Policyholders.pdf.