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# Protecting Policyholders as AI Is Developed for Insurance Claims Handling: Ensuring "Decency and Humanity" in the Digital Age

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*Abstract:* *The integration of artificial intelligence (AI) within the insurance industry raises concerns that insurance companies might use the technology to unfairly curtail or deny policyholders' claims. Drawing on the historical example of the Colossus software, this article outlines the potential consequences of diminished human oversight in AI-driven claims handling. In the past, technology was used to boost insurance companies' bottom lines while undervaluing policyholders' claims. We may be seeing a similar situation unfold in real time with recent investigations into and lawsuits against certain health insurance companies for their alleged algorithm-driven claim denials. This article highlights the need for watchdogs and regulators to demand that AI tools under development afford "explainability" and protect policyholder rights. Insurance companies must stand by their fundamental duty of good faith to policyholders, and courts must maintain long-standing precedent that demands "decency and humanity" in insurance company claims operations.*

## Introduction

Technology rules the day, and it is being adopted across the insurance industry. Functions such as risk assessment, claims processing, and customer service are increasingly powered by artificial intelligence (AI). While AI has great potential for efficiency gains

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that will yield benefits for insurance companies and policyholders alike, it also can be used to violate policyholders' rights. We have seen insurance companies do this before and it already appears to be happening again. The time for vigilance is now.

Recent use of new algorithms to deny medical claims by seriously ill and elderly patients underscores the need to carefully examine what is at stake for policyholders. Insurance companies must uphold their duty of good faith and fair dealing. Insurance companies must not use AI and algorithms to prioritize operational efficiency at policyholders' expense.

Insurance (and banking) regulators already are highlighting problems posed by the "lack of explainability" in AI tools under development.[1] Watchdogs should take stock of past misdeeds and ensure that they are not repeated to an even more harmful extent by AI.

## Lesson from the Past

Twenty-five years ago, an emerging technology called Colossus was used as a claims-adjusting tool by many insurance companies, including Allstate. This database system evaluated personal injury claims and generated a range of potential settlement amounts based on comparable past injuries. Colossus allowed claims adjusters to use their discretion when using the software, and some insurance companies leveraged the software to fine-tune results in order to increase profits at the expense of injured policyholders.

An in-depth investigation by policyholder attorney David Berardinelli revealed that Allstate tweaked the software to produce lowball claim estimates and incentivized claims adjusters to depend exclusively on the estimates recommended by Colossus. Allstate was sued for its claims-settling protocols and ended up paying millions in damages and penalties for its bad faith practices, thanks to Berardinelli's hard work and persistence in forcing Allstate to turn over incriminating documents.

In the mid-1990s, Allstate hired McKinsey & Company to redesign Allstate's claims system in a project termed the Claims Core Process Redesign (CCPR).[2] This revamping aimed to bolster Allstate's profits through an aggressive reduction of claim payouts.

The plan for the CCPR was summarized in a series of more than 12,000 PowerPoint slides used by McKinsey to explain the plan to Allstate personnel and executives.

Berardinelli sought to uncover the McKinsey slides, but Allstate fought the disclosure tooth and nail. Berardinelli, however, eventually convinced a judge to compel Allstate to turn over the slides and, eventually, to make the documents public. Allstate still resisted these court orders and was held in contempt and fined for its willful disobedience in refusing to turn over the slides.

Once the McKinsey slides went public, it was glaringly apparent as to why Allstate was determined to keep them hidden. Part of McKinsey's strategy—known as "Good Hands or Boxing Gloves"—created a dual approach to handling claims: offering a seemingly quick settlement option for compliant policyholders, while aggressively litigating against those who challenged the claims. The strategy under the CCPR emphasized a zero-sum game approach; namely, it aimed to reduce Allstate's claim payments by an estimated 15-20 percent.[3] The McKinsey slides emphasized Allstate's benefits under the CCPR: "Improving Allstate's casualty economics will have a *negative economic impact* on some medical providers, plaintiff attorneys, and claimants.... Zero-sum economic game—*Allstate gains—Others must lose*."[4]

If technology like Colossus can be misused with human claims handlers at the controls, imagine the potential for wrongdoing with AI making judgments using multilayered algorithms when assessing the reasoning behind a given claim decision is not transparent. Allstate's misuse of the Colossus software serves as a critical historical example, forecasting the potential consequences of AI in the insurance industry.

## Insurance Companies Sued Over the Use of AI to Deny Medical Claims

Recent medical claim denials driven by algorithmic calculations highlight the drastic consequences for policyholders when claims are assessed with little to no human oversight. In March of 2023, ProPublica published an article titled "How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading

Them."[5] The article detailed allegations by Cigna policyholders that the company had used an algorithm to systematically reject their medical claims en masse, with little or no human assessment of the claims. According to the article, policyholders were left in the dark about the reason for their claim denials, unaware that their insurance coverage was governed by AI and made without a medical doctor reviewing their patient files. Cigna doctors were involved at the final stage of the claims-handling process, often to sign off on automatic denials in batches—dispensing with hundreds of claims at a time in a matter of seconds. ProPublica offered a reason for Cigna's reliance on AI—it boosted the corporate bottom line.[6]

Blind reliance on AI without careful human oversight has proven detrimental to policyholders who find themselves at the mercy of an automated decision-making system. The insurance companies' economic interests are put ahead of the policyholder, and patients' medical care is placed in jeopardy. A class action suit against Cigna soon followed, making the same allegations of improper use of algorithms by Cigna in its claims review process.[7]

Cigna is not the only insurance company to be sued for using algorithms to assess claims. On July 11, 2023, Stat News revealed troublesome details about UnitedHealth's use of algorithms to assess patients' medical rehabilitation stays: "[P]redictions about when a given patient would be ready to leave a facility weren't used as a guidepost. They were a target discharge date the company tried to hit."[8] A former employee of the insurance company alleged that UnitedHealth and its sister company, naviHealth, "have a clear financial incentive to get patients out of rehab as fast as possible."[9] But even when staffers disagreed with the algorithm's recommendation for expedited discharge, "physician medical reviewers deferred to the algorithm, fueling internal dissent that the denials were inappropriate and contrary to clear medical evidence."[10]

On November 14, 2023, Stat News published yet another article, describing how UnitedHealth's algorithm allegedly was used to cut off Medicare patients' rehab care.[11] The article detailed a training document from 2020, which offered "case managers with talking points to counter resistance from nursing homes to discharging patients."[12] The training document exemplifies how relying on AI

to justify medical decisions overshadows the patient-centered care traditionally provided by human practitioners. Not surprisingly, UnitedHealth and Humana also have been sued for these practices.[13] Oregon Senator Ron Wyden voiced his apprehension about the misuse of AI in health care: "[I am] increasingly concerned by the potential for abuse when it comes to the use of big data and algorithms in healthcare."[14] He continued, "[i]f insurance companies are getting bigger, and buying companies that specialize in developing algorithms, it strikes me that they are going to be in a position to invest in new ways to deny care."[15] This mounting unease emphasizes the necessity of upholding core principles of fairness and accountability in the insurance process, so that technology does not eclipse insurance companies' contractual and ethical responsibilities.

## Upholding "Decency and Humanity" in Insurance Claims Handling

The increasing reliance on AI by insurance companies, ostensibly to streamline operations and make the claims process more efficient, raises significant concerns. The National Association of Insurance Commissioners aptly explained AI's unique risks to consumers: "the potential for inaccuracy, unfair discrimination, data vulnerability, and lack of transparency and explainability."[16] The use of AI by large health care insurers is particularly alarming to patients, as the alleged improprieties described above illustrate. The same risks of abuse exist in the property and casualty context.

Even in cases where a human actor challenges the AI's decision on a claim, an insurance company may be economically motivated to disregard human input. This allegedly was the case with the medical claims discussed above, just as David Berardinelli uncovered with Allstate and Colossus. Such actions are against an insurance company's fundamental duty of good faith owed to each and every policyholder.

Courts rightly have protected policyholders against such wrongful insurance company conduct. In the late 1970s, the California Supreme Court recognized that:

> Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing *encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary*. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.[17]

Adherence to "decency and humanity" in the claims-handling function must not be curtailed. In an age increasingly dominated by AI, it becomes even more crucial that these principles guide the integration of technology in insurance company operations.

## Conclusion

The insurance industry must adhere to its responsibilities and ethical obligations when using AI. This is particularly important in claims-handling operations, as made starkly clear in seeing claim denials involving sick or elderly patients. Neglecting these responsibilities will lead us down a path reminiscent of the ending of *2001: Space Odyssey*, where the machine, HAL 9000, refuses critical help to its human partner, coldly asserting, "I'm sorry, Dave, I'm afraid I can't do that." Insurance companies' software trying to do the same must meet the same fate as HAL, and it is up to regulators and policyholder advocates to make sure of that.

## Notes

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1. National Association of Insurance Commissioners, NAIC Model Bulletin: Use of Artificial Intelligence Systems by Insurers at 1, 4 (Dec. 2, 2023) ("AI, including AI Systems, can present unique risks to consumers, including the potential for inaccuracy, unfair discrimination, data vulnerability, lack of transparency and explainability."); *see also* Office of the Comptroller of the Currency, Semiannual Risk Perspective at 3 (Fall 2023) ("Many risks can arise from all types of AI, such as lack of explainability, reliance on large volumes of data, potential bias, privacy concerns, third-party risk, cybersecurity risks, and consumer protection concerns.").

2. David J. Berardinelli, An Insurer In the Grip of Greed, TRIAL (July 2007), https://www.leeherndon.com/An%20Insurer%20in%20the%20Grip%20of%20Greed.pdf.

3. *Id.*

4. *Id.* (emphasis in original)

5. Patrick Rucker, Maya Miller & David Armstrong, How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading Them, ProPublica (Mar. 25, 2023, 5:00 a.m.), https://www.propublica.org/article/cigna-pxdx-medical-health-insurance-rejection-claims.

6. *See id.*

7. Kisting-Leung et al. v. Cigna Corp. et al., 2:23-cv-01477-DAD-KJN (E.D. Cal. July 24, 2023).

8. Casey Ross & Bob Herman, How UnitedHealth's Acquisition of a Popular Medicare Advantage Algorithm Sparked Internal Dissent Over Denied Care, STAT (July 11, 2023, 8:10 a.m.), https://www.statnews.com/2023/07/11/medicare-advantage-algorithm-navihealth-unitedhealth-insurance-coverage/.

9. *Id.*

10. *Id.*

11. Casey Ross & Bob Herman, UnitedHealth Pushed Employees to Follow an Algorithm to Cut Off Medicare Patients' Rehab Care, STAT (Nov. 14, 2023), https://www.statnews.com/2023/11/14/unitedhealth-algorithm-medicare-advantage-investigation/.

12. *Id.*

13. *See* Estate of Gene v. Lokken et al. v. UnitedHealth Grp., Inc. et al., 0:23-cv-03514 (D. Minn. Nov. 14, 2023); Barrows et al. v. Humana, Inc., 3:23-cv-00654 (W.D. Ky. Dec. 12, 2023).

14. Rylee Wilson, Federal Lawmakers Concerned AI Gives Payers "New Ways to Deny Care," Payer Issues (June 8, 2023), https://www.beckerspayer.com/payer/lawmakers-concerned-ai-gives-payers-new-ways-to-deny-care.html#:~:text=Federal%20lawmakers%20concerned%20AI%20gives%20payers%20'new%20ways%20to%20deny%20care',-Rylee%20Wilson%20%2D%20Thursday&text=Federal%20lawmakers%20are%20continuing%20to,hearing%20on%20healthcare%20consolidation%2C%20Sen.

15. *Id.*

16. National Association of Insurance Commissioners, NAIC Model Bulletin: Use of Artificial Intelligence Systems by Insurers at 1, 4 (Dec. 2, 2023).

17. Egan v. Mutual of Omaha Insurance Co., 620 P.2d 141 (Cal. 1979) (quoting Goodman Seaton, Forward: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court (1974) 62 Cal. L. Rev. 309, 346-47) (emphasis added).