

Artificial Intelligence



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From its recognition as a discipline in the 1950s, the goal of true artificial intelligence ("AI") was the creation of systems that simulate actual human reasoning. AI has also come to include "machine learning" processes that do not actually simulate human reasoning but nevertheless speed decision-making results. This type of AI employs computer-based algorithms and statistical models that use predictive analytics and voice, word, speech and pattern recognition to perform tasks without requiring specific instructions. The breadth of these applications is already staggering, ranging from the operation of our mobile phones and voice-controlled assistants, to medical diagnosis and billing, to autonomous vehicles, and to the organization, preservation, and discovery of electronically stored information.

The Legal Liability Problem

Suppose the input to an AI system is flawed or the algorithm itself is not well programmed. What happens when someone claims injury from a misdiagnosis, or the government or private party argues that false claims have been paid, or that protected health information has been used or disclosed in an unauthorized manner as to a patient, an insured, an employee, or an applicant?

In one sense, the answer is elusive. There is no general regulatory framework, either in the health care space or elsewhere, that provides definitive answers across the range of AI applications. Moreover, AI capabilities are constantly evolving and notions of responsibility are likely to evolve with them, as is the emergence of novel causes of action. At this point, there are few litigation trends in the AI space that can be observed.

In another sense, however, particularly in the health regulatory or employment space, the answer to the liability question is functionally simpler. Viewing AI in terms of its outcomes with respect to products and processes, traditional notions of liability, particularly that of *respondeat superior* (the responsibility of a principal for the acts of its subordinates), clearly can apply.

Potential Avenues for Liability

In the broadest sense, regulatory action or litigation with respect to AI could be premised on virtually anything that might apply in matters that don't originate with AI. Looking just to the health regulatory space (but equally applicable elsewhere), a number of potential liability risks come to mind. They include, but are hardly limited to:

- strict product liability (meaning, a manufacturer or seller will be held responsible for harm caused by a product or process defect regardless of whether the manufacturer or seller was at fault in allowing the defect to arise)
- breach of contract
- general negligence or medical malpractice
- cybersecurity and data privacy protection (for example, with respect to breaches, ransomware, etc., facilitated by AI error)
- employment discrimination (when an automated system produces adverse selection in hiring or other personnel matters)
- suits under federal or state fraud and false claims acts (where automated claims review or billing and coding AI produces error rates above stated norms)
- legal issues arising from improper disclosure of electronically stored information of a confidential or trade secret nature

At EBG, we understand that each form of liability suggests how it might be prevented or mitigated. For example, when a company markets a composite package including an algorithm, as well as devices that it doesn't manufacture, it could, under the doctrine of "joint and several liability," be held liable along with the manufacturer, besides individually with respect to marketing defects, as to those devices. In this case, EBG attorneys would negotiate provisions in the company's contracts with manufacturers and distributors, as well as insurers, designed to help protect the company from such liability.

How We Can Help

EBG has deep experience with respect to product- and process-related cases involving prevention or response to alleged injuries related to AI, defense of matters involving issues of billing and coding, and successful defense of matters related to data protection, including defense of class actions and other litigations involving data breaches, as well as health care, employment, and other claims involving AI. We have proved to be aggressive and successful in what we consider to be the three phases of dealing with legal liability issues:

- **Inception and Prevention:** In conjunction with staff and expert consultants, we support cyber risk assessment; creation of security and related policies for customers, patients, and employees; the development of necessary insurance programs assuring coverage of all relevant risks, including AI (which might otherwise be considered uncovered because it isn't a person); packaging and promotion of products and services; representations to government agencies and consumers; review of contracts with customers and sub-contractors, including assuring, to the extent possible, mandatory arbitration of claims and class action waiver; and initial regulatory compliance.
- **Operational:** We monitor ongoing system compliance and evolution, stay abreast of constantly changing regulatory requirements, provide training, and assure resilience of systems through methods such as "table top" exercises.
- **Litigation Defense:** In matters alleging AI-related harm (whether individual or class-action cases or government enforcement actions), our litigators bring to bear the extensive trial experience necessary to build a successful defense or negotiate a favorable settlement.