Liability for A.I.:
Current Cover Situation in the U.S.

ATILA Lectures
Transatlantic Lectures on Insurance Law
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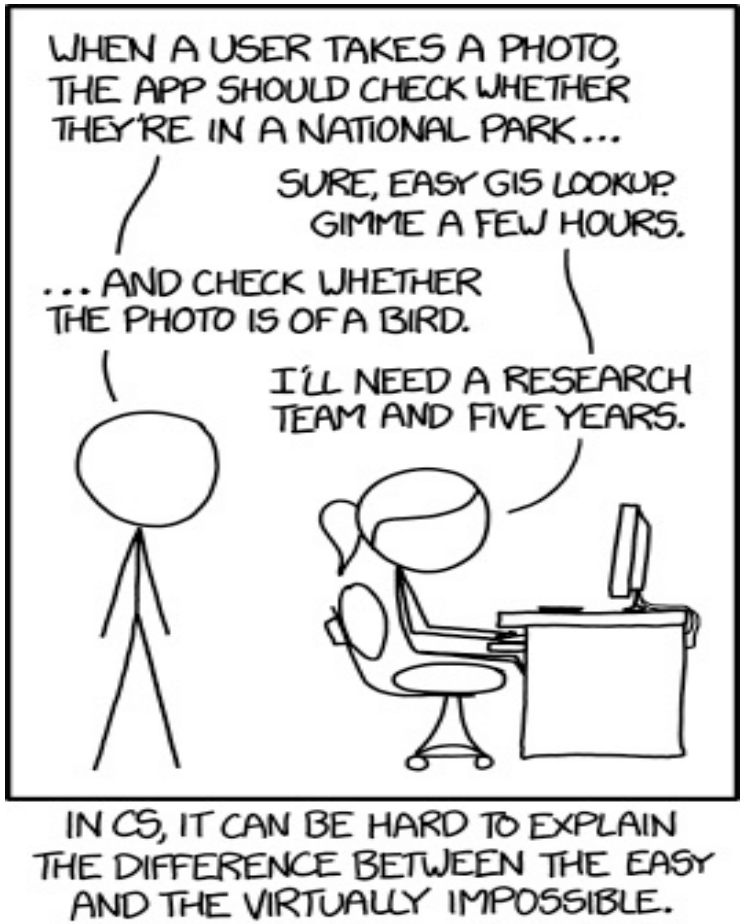
AI—Some Basics

An AI Vocab Lesson

- Artificial Intelligence: the capability of a machine to imitate intelligent human behavior.
  - Narrow ("ANI") vs. General ("AGI")—a spectrum
- Machine learning (subset of AI): application of AI that enables systems to learn automatically and improve from experience without being explicitly programmed.
- 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.



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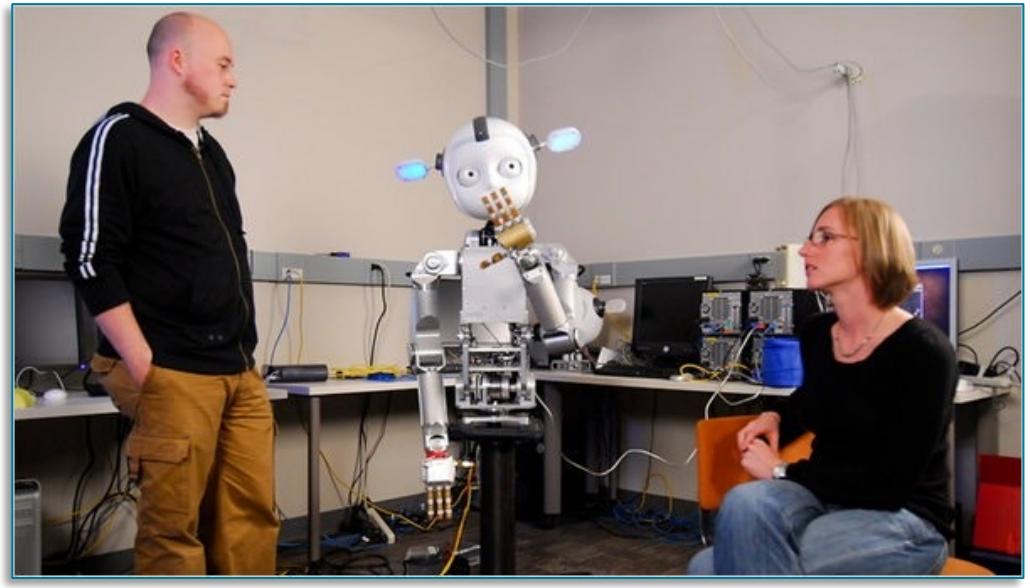
. . . But What Goes Into Machine Learning?

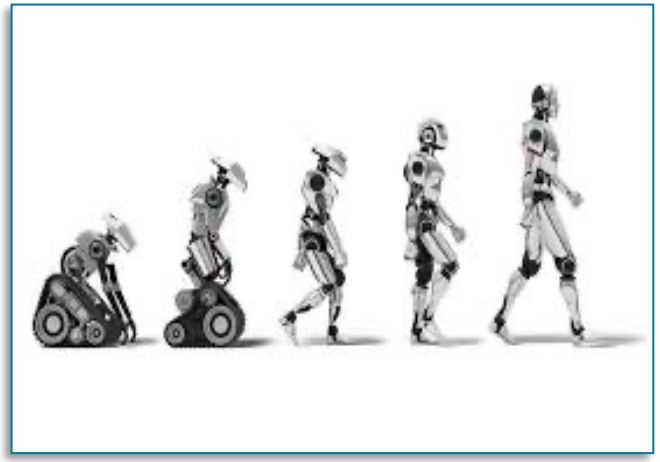


- Conceiving fundamental objective/business model for the AI
- Selecting & compiling AI training data set
- Devising AI model (algorithms to detect patterns or make predictions from data)
- Training, testing, reviewing and revising AI model
- Implementing the AI
- Lesson: "There's nothing artificial about AI…It's inspired by people, it's created by people, and . . . it impacts people." (Stanford Prof. Fei-Fei Li)

AI & Robotics—Applications & Exposures

AI & Robotics Examples

- Software as a Service/artificial intelligence as a service (AIaaS)
  - "Captcha" ("completely automated public Turing test to tell computers and humans apart") –used to fight automated abuses of site services.
- InsurTech for Underwriting & Claims (https://content.naic.org/-cmte_ex_ai_wg.htm)
- Drones (SEE: Risk, Product Liability Trends, Triggers, and Insurance in Commercial Aerial Robots: http://robots.law.miami.edu/2014/wp-content/uploads/2013/06/Beyer-Dulo-Townsley-and-Wu_Unmanned-Systems-Liability-and-Insurance-Trends_WE-ROBOT-2014-Conference.pdf)

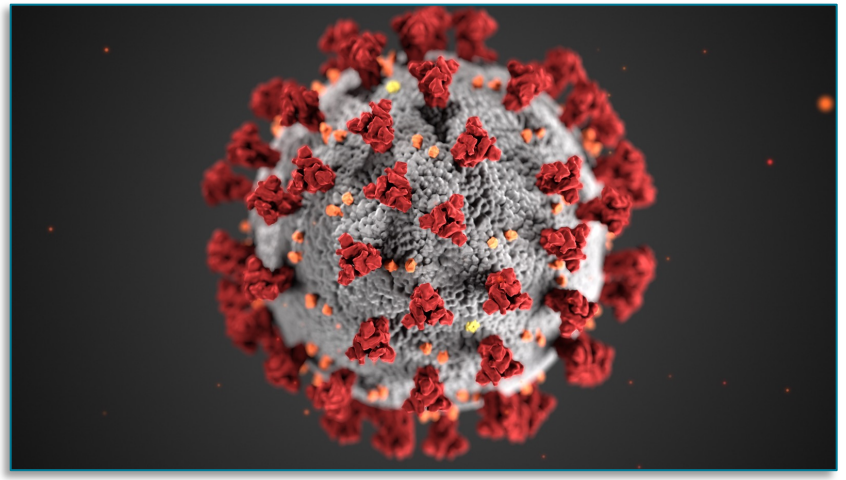


AI & Robotics Examples, cont.

- Autonomous vehicles (Protecting Inventions on Autonomous Vehicles)
- Manufacturing robots (Book review: 'The Reasonable Robot — Artificial Intelligence and the Law'); (Seegrid)
- Automated financial investing
- Virtual travel booking agent
- Social media monitoring; Inter-team chat tool
- Tenant and/or borrower screening (Obligo)
- Consumer monitoring (Avon True Lash Genius)

AI & Robotics Examples , cont.

- Proactive healthcare management (Are you ready (and protected) for the AI healthcare revolution? September 2020)
- Disease mapping (IBM's Watson cracks medical mystery with life-saving diagnosis for patient who baffled doctors (The super-computer powered by artificial intelligence prescribes leukemia treatment within minutes.)
- Fighting COVID-19 (virus genome mapping; outbreak monitoring)
- Managing and alleviating supply chain strains (Can artificial intelligence save America from the global supply chain disaster?)



AI & Robotics Risk Exposures

- **Potential causes of harms/losses include:**
  - AI coding or data input errors
  - Failure of artificial intelligence processing (Considerations and Challenges Regarding Patents for Drug Discovery Using Artificial Intelligence)
  - Failure of robotics' mechanical/electrical components
  - Infringement of IP-protected material in data set creation or machine-learning training
  - Intentional interference
  - Cyber-attack
  - Third parties

(See: Recent Developments in Artificial Intelligence and the Accompanying Liability Risks)

AI & Robotics Exposures, cont.

- **Potential damages/losses include:**
  - Bodily injury, death
  - Tangible property damage
  - Privacy violations (Facebook $650 MM facial recognition settlement)
  - Employment Law Red Flags in the Use of Artificial Intelligence in Hiring
  - Other discrimination: Tackling Bias Issues in Artificial Intelligence; A. Prince & D. Schwarcz, Proxy Discrimination in the Age of Artificial Intelligence and Big Data, 105 Iowa L. Rev. 1257
  - IP infringement
  - Economic/financial loss
  - Business interruption

AI & Robotics Exposures—Compensation Schemes?

- Can these AI/Robotics-related harms be compensated rationally and comprehensively?
- Academic proposals:
  - Kenneth S. **Abraham** & Robert L. Rabin, *Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*, 105 Va. L. Rev. 127, 134 (2019)—Manufacturer Enterprise Responsibility scheme collects federal fees from AV manufacturers to reimburse personal auto insurers for claims.
  - Tracy Hresko **Pearl**, *Compensation at the Crossroads: Autonomous Vehicles & Alternative Victim Compensation Schemes*, 60 Wm. & Mary L. Rev. 1827 (2019)—National Vaccine Injury Compensation Program model, with NHTSA processing and paying claims from manufacturer-funded compensation program.
  - Kyle D. **Logue**, *The Deterrence Case for Comprehensive Automaker Enterprise Liability*, 2019 J. L. & Mobility 1, 12 (2019)--enterprise liability extends compensation program to *all* transportation-related accidents, eliminating disparities between fully autonomous and conventional vehicles.

AI & Robotics Exposures—Compensation Schemes?

BUT—can Americans agree on a comprehensive solution for rational compensation of AI/Robotics-related harms?

- December 2020 RAND survey of industry participants (Karlyn D. Stanley, et al., Autonomous Vehicles and the Future of Auto Insurance, RAND Corp., xii (Dec. 2020), https://www.rand.org/pubs/research_reports/RRA878-1.html)—CONCLUSION:

Nein

Nyet

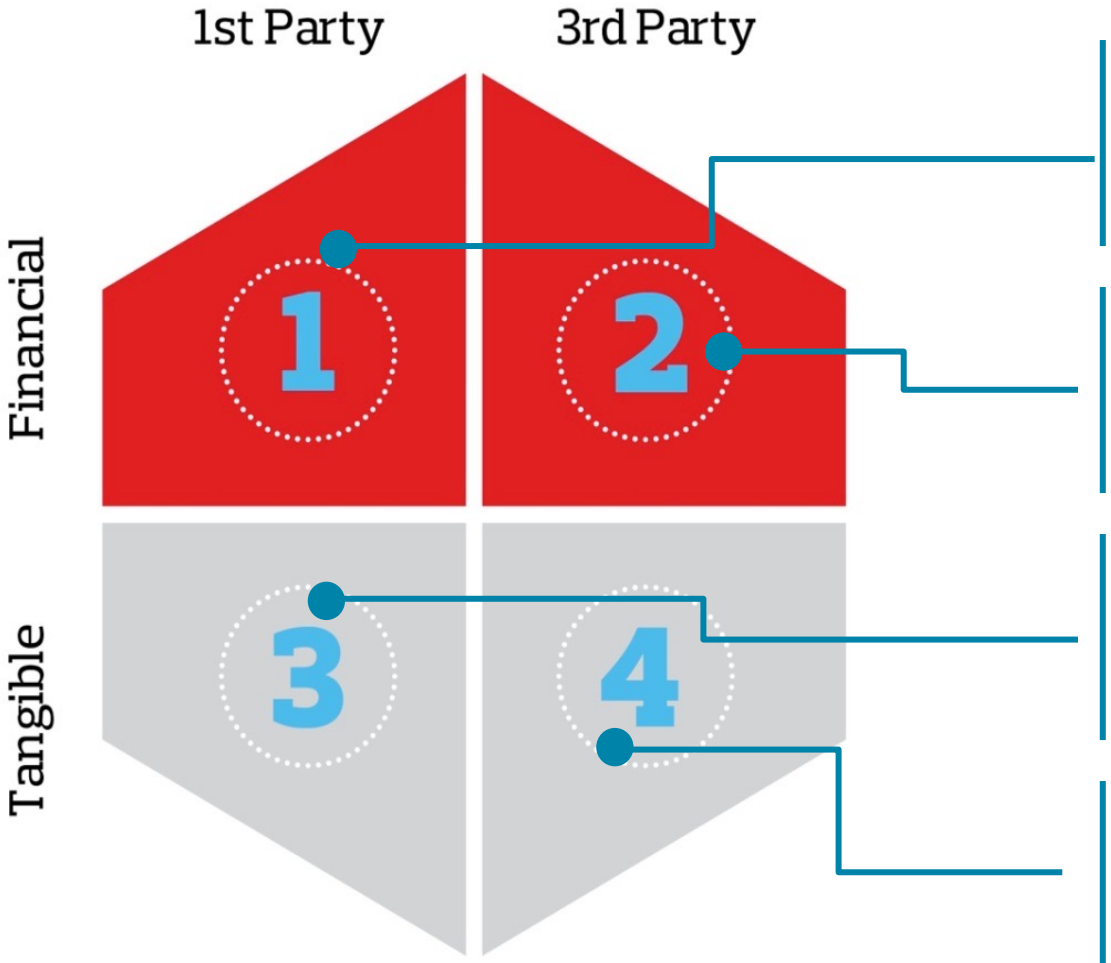
Non

Nope

AI & Robotics Exposures, cont.

- **Existing legal theories of potential liability, including:**
  - Tort: e.g., intentional harm, negligence, strict product liability, "abnormally dangerous activity" (*Rylands v. Fletcher*) liability
  - Breach of contract, including breach of warranty, breach of service terms
  - Intellectual property (IP) infringement
  - Privacy laws
  - Anti-discrimination laws
  - Other Statutory/Regulatory/Governmental (SEE: AI and Insurance: What's in That Black Box? Regulatory forecast 2020), including statutory private rights of action, e.g.:
    - Illinois Biometric Information Privacy Act ("BIPA") (740 ILCS 14)
      - *See, e.g.*, *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617 (7th Cir. 2020)
    - New York City Council Local Law 49
    - "Little FTC Acts" (state unfair trade practices/consumer protection laws)

Robotics & AI Risks Hit All Loss Quadrants



Robotics & AI Loss Spectrum

Any major robotics/AI event will result in

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

Third parties will seek to recover

- Civil penalties and awards
- Consequential revenue loss
- Restoration expenses

Physical damage is possible

- Property damage
- Bodily injury

Physical damage may cascade to others

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

AI & Robotics—Risk Management

Risk Management Best Practices

- Identify AI & Robotics assets
- Assess/quantify exposures
- Align commercial insurance with potential losses
- Consider vendors/supply chain
- Contractual allocation of liability
- Alternative insurance structures
- Enterprise risk management requires close study of:
  - Multiple lines of insurance collaboration
  - Insurance procurement clauses and indemnity agreements in vendor contracts
  - Interactive attorney engagement re exposure analysis and insurance policy wording customization

AI & Robotics Enterprise Risk Management: Commercial Insurance Products

- AI Systems: Technology Errors & Omissions (3rd party only)
  - Covers liability from " . . . Allegations of errors, omissions & negligent acts in the provision of AI System products & Services . . .+
  - ***But*** exclusions for bodily injury, tangible property damage & unauthorized financial transfers, etc.
- Robotics: Product Liability & Property (1st & 3rd party)
  - Property coverage for damage to robot and other insured's property & business interruption and extra expense
  - Covers liability for bodily injury to insured and others, as well as third party liability coverage for tangible property damages
  - ***But***, often exclusions for cyber related exposures (network, etc.), non-tangible property damages (data, privacy, etc.), violations of law, criminal or malicious acts, gross negligence, and "acts of nature" or "force majeure" (COVID-19 applicable?)

E & O and Cyber—Placement Analysis

Pricing

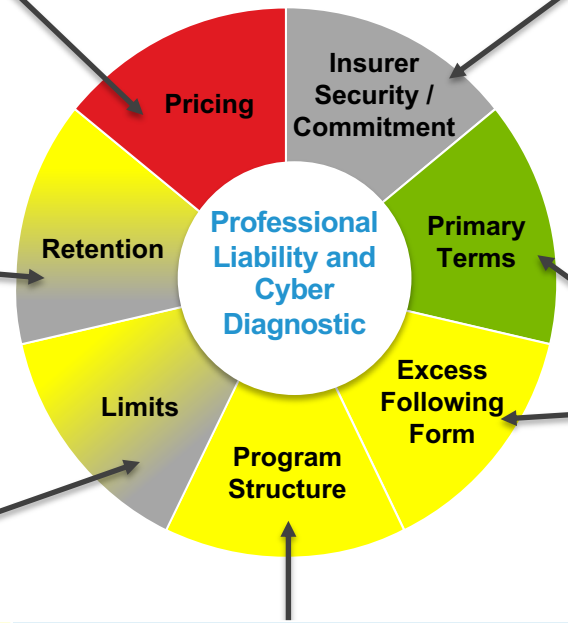
- Is primary pricing high (loss history, manuscript form)
- Is excess pricing high (loss history – Claims?)
- Is there a more competitively priced program with a different structure?

Retentions

- Retentions vary (loss history, manuscript form)
- The marketplace is flexible on retentions
- Higher retention can allow for broader coverage grants

Limits

- Primary $1M, $5 M or $10 M are common, though some insureds have larger primary layer capacity
- $500M+ in total limits is available



Program Structure

- Review the program structure with excess quota share layers versus single insurer capacity
- Consider alterative primary markets as part of the excess tower
- Evaluate the current mix of insurers and use of wholesalers

Insurer Security / Commitment

- Desire a top professional liability and cyber liability insurer that provides flexible terms and conditions
- Not all insurers have excellent financial ratings
- Some excess insurers have not paid claims
- Top professional liability markets do not have years worth of actuarial benchmarking for AI & Robotics

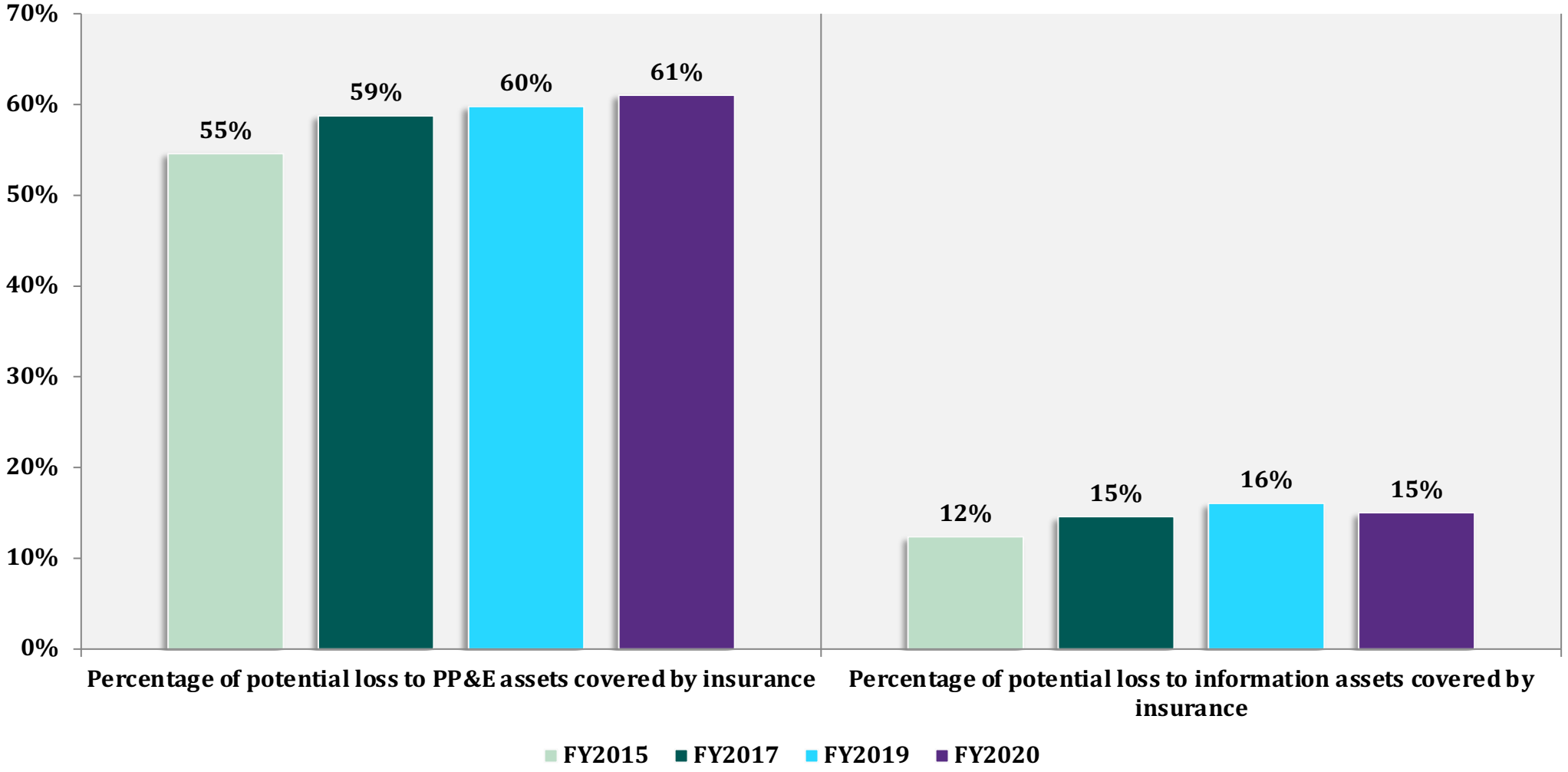
Primary / Excess Terms

- Manuscript or generic policy form?
- Limited exclusions?
- Waiting period for business interruption?
- Sub-limits for key coverages?
- Limited coverage for system failure?
- Settlement authority?
- "Named Perils" vs. "All Risk Policies"

Exceeds Aon Norms
Meets Aon Norms
Below Aon Norms
Unclear / Lack of Experience

COVERED PROPERTY, PLANT & EQUIPMENT VS. COVERED INTANGIBLE ASSETS

(2020 Aon-Ponemon Global Intangible Assets Report: https://www.aon.com/thought-leadership/ponemoninstitutereport.jsp)



AI & Robotics Insurance Best Practices

Mind the gaps, please!

- **Traditional** lines (e.g., CGL/Product Liability, Property, Employment Practices Liability) vs. **specialty** lines (e.g., cyber, tech errors & omissions)?
- **"All risk"** versus **"Named perils"** policies
- **Over**looked cyber-physical risks?
  - E.g., "internet of things" exposures for BI & PD
- **Under**looked/**under**insured risks?
  - E.g., Regulatory
- **Over**insured risks?
  - E.g., overlapping first-party coverages?
- **UNDER**WRITING LESSONS:
  - Study "dovetailing" language
  - Plug the cracks—between the lines and the "modules" within each line.
  - Think creatively and specifically:
    - Match the modules to the exposures
    - Match the limits to the exposures.

Contracts with Third Parties

- **Indemnities can allocate liability, but:**
  - Will the indemnitors have the financial resources to cover their indemnification obligations?
  - Will insurance be available and affordable for the indemnified risks?
  - While B2B contracts are generally enforceable, B2C contracts may not be enforceable due to unequal bargaining power
  - IBM, AI And The Battle For Cybersecurity, Forbes: September 17, 2020
    - Watson AI healthcare
    - Robotics
    - Are there Medical Malpractice issues? Is MedMal insurance coverage required?

(SEE: Artificial Intelligence Licensing: What You Need to Know)

Insuring AI & Robotics—Coverage Issues

Caution—Coverage Issues Ahead!

- Ill-fitting terms in common current policy forms
  - E.g., “data signals” equipment exclusions or restrictions in auto policies—do they apply to Connected/Automated Vehicles (CAVs)?
- Fortuity/“expected or intended” issues
  - The “Trolley Problem”—e.g., who intended the damage when a CAV’s algorithms choose whom or what to harm?
  - Who—or what—had the requisite “expectation or intent,” and does it rise to the level of intentionality required by the exclusion?
  - And how do we figure that out?
    - Discovery and evidentiary issues
- From “Silent Cyber” to “Cyber Silos”

Non-affirmative ("Silent") Coverage for AI & Robotics:

Potential perils under property, casualty & other insurance policies

Note that coverage in policy forms can vary materially from carrier to carrier, and base forms to manuscript policy forms

“Silent [aka Non-affirmative] Cyber” Initiatives

- Multiple lines of potentially applicable coverage for cyber risks, especially under traditional all-risk policy forms
- “Silent cyber” regulatory initiatives—to identify and address unquantified cyber exposures:
  - UK Prudential Regulatory Authority: 2017 Supervisory Statement (SS4/17), 2019 Survey Results
  - Insurance regulators in the US: e.g., NY Dept. of Financial Services, Insurance Circular Letter No. 2 (2021): Cyber Insurance Risk Framework (23 NYCRR 500)
  - Failed California Assembly Bill (AB 2320) requiring government contractors to carry cyber insurance
    - Criticism (leading to bill’s failure): duplicative “silent cyber coverage” may already exist in contractor's existing policies;
    - Necessarily vague & uncertain wording (illustrating difficulty of cyber coverage mandates)

"Silent Cyber" → Cyber Silos?

- Insurers' choices under "Silent Cyber" initiative:
  - Own the risk: quantify, price, and affirmatively cover the cyber risk
  - Evade the risk: add broad cyber-related exclusions
- New cyber exclusions in "all risk" policies → coverage disputes, gaps or finger-pointing between insurers in separate coverage "silos"?
- Need for seamless cyber-physical coverage for robots & CAVs?
- Market response:
  - "Lockton Launches Silent Cyber Property Solution for Businesses," Insurance Journal (Oct. 20, 2021)
  - Marsh Cyber CAT forms, including "Silent Cyber Bridge" extension

One Seamless Solution?

Silent Cyber Bridge (Optional)

coverage tailored to address claims and losses that are excluded by a "silent cyber" endorsement.

+ Property Damage
+ Bodily Injury liability

Non-Standard Cyber Coverages

Electronic Data Loss Liability

Claims Avoidance Costs & First Party Claims Preparation

Emergency Costs and Data Asset Protection

Receiver, Supplier and Service Interruption Income Loss

First Party Crime & Diverted Receivables

Silent Cyber Bridge (Property and Bodily Injury)

AI & Robotics—Illustrative Coverage Litigation

- **General liability coverage disputes arising from underlying litigation re Clearview AI facial recognition app:**
  - *Twin City Fire Insurance Co. v. Clearview AI, Inc.*, No. 7:20-cv-02570 (S.D.N.Y., filed Mar. 25, 2020, voluntary dismissal Apr. 3, 2020)
  - *Citizens Insurance Co. of America v. Wynndalco Enterprises, LLC et al.*, No. 1:20-cv-03873 (N.D. Ill., filed July 1, 2020)
  - *Calderon v. Clearview AI, Inc.*, No. 1:20-cv-01296 (S.D.N.Y., filed Feb. 13, 2020)
  - *Mutnick v. Clearview AI, Inc.*, No. 1:20-cv-00512 (N.D. Ill. 2020, filed Jan. 22, 2020)
  - *ACLU v. Clearview AI, Inc.*, No. 20-CG-4353 (Ill. Cir. Ct., Cook Cnty., Clearview's motion to dismiss denied in Aug. 27 2021)

AI & Robotics—Illustrative Coverage Litigation

- **General liability coverage dispute arising from underlying litigation re KISSmetrics automation (which allegedly "respawned" deleted cookies to track and share consumers' web-surfing habits):**
  - *Hartford Casualty Insurance Co. v. Hulu, Inc.*, No. BC482235 (Cal. Super. Ct., filed Apr. 4, 2012, vol. dism. July 2, 2012)
- **InsurTech Litigation**
  - *Green v. GEICO Gen. Ins. Co.*, 2021 WL 1328560 (Del. Super. Ct. Mar. 24, 2021)
  - *Strawn v. Farmer Ins. Co.*, 258 P.3d 1199 (Or. 2011)
  - *Sands v. State Farm,* No. 5:17-cv-4160 (E.D. Pa. 2018) – State Farm did not act in bad faith by relying on Xactimate claims valuation program, without investigating the assumptions behind the software, to calculate depreciation values in connection with her homeowner's insurance claim for hail damage. "Xactimate is a standard software in the insurance industry for estimating replacement costs." As a result, it was not bad faith for the claim handler to not second-guess that software's depreciation calculations..

Questions?

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