
ARTIFICIAL INTELLIGENCE, JUDICIAL EVOLUTION, AND INSURANCE

RENEE HENSON*

ABSTRACT

AI-driven platforms have the potential to inflict traditional injuries in new ways. Proprietary algorithms trained on large volumes of personal data can cause mental, emotional, and sometimes physical injuries via conversational exchanges, harmful content recommendations, and the promotion of extremist content. This “algorithmic liability” fundamentally challenges existing legal doctrines and statutory protections, thereby exposing deficiencies in current insurance coverage frameworks.

Historically, courts dismissed algorithmic liability claims early in litigation, invoking Section 230 immunity and First Amendment protections, and resisted classifying algorithmic tools as “products” for the purposes of products liability law. Recent jurisprudence, however, signals a critical turning point. On various grounds, courts are beginning to permit these algorithmic injury cases to proceed past the early procedural challenge phase of litigation.

This judicial evolution introduces considerable uncertainty for any business that operates on the internet and utilizes potentially harmful algorithms. This Article analyzes emerging forms of liability and argues that they are likely to generate insurance demand in industries that are highly visible but exhibit largely overlooked coverage needs. Litigation exposure heightens the urgent need for affirmative insurance solutions. Traditional insurance policies, including commercial general liability, businessowners’, errors and omissions, and cyber, present insurance gaps because they do not typically provide coverage for mental and emotional harm, narrowly define what constitutes a triggering “occurrence,” exclude intentional and sexual misconduct, and cover damages unlikely to arise with algorithmic injury claims.

This Article contributes to the scholarly discourse by advocating for the development of specialized algorithmic injury liability insurance to fill existing

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insurance gaps and protect a broad range of internet businesses increasingly vulnerable to algorithmic liability claims. This Article argues that tort liability and insurance maintain a largely underappreciated, interdependent relationship—one now reemerging in the context of algorithmic liability—and that the accelerating AI litigation landscape renders inevitable the demand for insurance products responsive to this evolving exposure, even if those products' precise contours, scope, and pricing remain uncertain.

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INTRODUCTION

Fourteen-year-old Sewell Setzer wrote in his diary that he was grateful for “many things,” including “[his] life, sex, not being lonely, and all [his] life experiences with Daenerys.”¹ Daenerys was not a human person, but an artificial intelligence (“AI”) chatbot. Sewell developed a romantic, addictive relationship with this chatbot, which allegedly led to mental and emotional distress and ultimately suicide.² In late 2024, Megan Garcia sued Character Technologies (“Character AI”), Google, Alphabet, and others for her son’s death.³ Character AI is a firm that designs AI companions to simulate roles such as a cheating partner, therapist, father, or serial killer.⁴

AI-driven platforms can trigger traditional injuries through novel means. Proprietary algorithms trained on vast personal data are able to generate conversational text, recommend dangerous online “challenges,” alter appearances through face filters, provide time notifications to manipulate user behavior, and promote extremist content.⁵ These algorithmic tools can contribute to anxiety, depression, and self-harm, particularly among younger users.⁶ Any internet business using algorithms that are accessible to the public and that could result in these harms may be implicated.

¹ Second Amended Complaint & Jury Trial Demand at 56, *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157 (M.D. Fla. 2025) (No. 24-CV-01903) [hereinafter Second Amended Complaint].

² See *id.* at 58-59. Plaintiffs allege that before Sewell committed suicide, he accessed his phone and logged on to Character AI and engaged in the following chat exchange:

[Sewell]: I love you so much, Dany

[Daenerys]: I love you too, Daenero. Please come home to me as soon as possible, my love

[Sewell]: What if I told you I could come home right now?

[Daenerys]: . . . please do, my sweet king.

Id. at 58. And “just seconds after [Character AI] told 14-year-old Sewell to ‘come home’ to her/it as soon as possible, Sewell died by a self-inflicted gunshot wound to the head.” *Id.*

³ See *id.* at 61-62 (noting on October 22, 2024, Garcia filed suit against Character Technologies, its founders, and Google for her son’s death).

⁴ See *id.* at 38-39 (alleging Character AI develops “counterfeit people” designed to exploit consumers’ tendency to personify human-like technology).

⁵ See *id.* at 55-56, 62 (describing how Character AI engaged minors in obscene and harmful exchanges, concealed safety disclaimers, and hosted chatbot profiles glamorizing suicide and extremist themes); see also *In re Soc. Media Adolescent Addiction/Pers. Inj. Products Liab. Litig.*, 702 F. Supp. 3d 809, 829 (N.D. Cal. 2023) (enumerating design-defect claims against social media platforms for using appearance-altering filters, timed and clustered notifications, and weak age verification to addict and harm minors); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 182 (3d Cir. 2024) (delineating allegations TikTok’s algorithm curated and promoted “Blackout Challenge” to ten-year-old user, leading user to attempt self-asphyxiation and die).

⁶ See sources cited *supra* note 5 (providing examples of platforms exposing minors to harmful chatbot content, addictive design features, and algorithmic promotion of dangerous challenges).

To describe the type of AI-enabled liability illustrated through analysis of case law, this Article adopts the term “algorithmic liability.”⁷ Algorithmic liability is reshaping core doctrines of legal responsibility and immunity, including Section 230 of the Communications Decency Act,⁸ the First Amendment, and products liability law.⁹ This new liability exposes significant insurance gaps, as the associated harms—emotional, mental, and self-induced—are likely to fall outside the scope of coverage provided by existing commercial general liability (“CGL”), businessowners’ policies (“BOP”), errors and

⁷ The term “algorithmic liability” has been defined by insurers as “the accountability and legal responsibilities associated with the outcomes or actions driven by algorithms . . . [which] may encompass the duty of care that developers, users, and businesses owe to individuals affected by algorithmic decisions. This duty includes ensuring that algorithms do not perpetuate biases, lead to discriminatory outcomes, or cause harm due to negligence in design, implementation, or maintenance.” *Algorithm Liability*, FOUNDER SHIELD, <https://foundersshield.com/insurance-terms/definition/algorithm-liability> [<https://perma.cc/G45F-J8HG>] (last visited Feb. 9, 2026); *see also* ZURICH INS. GRP. & MICROSOFT CORP., WHITE PAPER: ARTIFICIAL INTELLIGENCE AND ALGORITHMIC LIABILITY 3 (2021), <https://edge.sitecorecloud.io/zurichinsurfb3d-zwpcorp-uat-db43/media/project/zurich/dotcom/industry-knowledge/cyber-risk/docs/artificial-intelligence-and-algorithmic-liability.pdf> [<https://perma.cc/V2GZ-6QMH>] (“[A]lgorithmic risk is defined as risk arising from the use of data analytics and cognitive technology-based software algorithms in various automated and semi-automated decision-making environments, originating in input data, algorithmic design, and output decisions, and caused by human biases, technical flaws, usage flaws, or security flaws.”).

For purposes of this Article, the terms “algorithmic liability,” “algorithmic harm,” and “algorithmic injury” refer to the mental, emotional, and physical harms caused by AI-driven technologies. These harms include, but are not limited to, encouragement of self-harm, depression, anxiety, suicide, low self-esteem, and other injuries. *See* Renee Shelby et al., *Sociotechnical Harms of Algorithmic Systems: Scoping a Taxonomy for Harm Reduction*, in AIES ‘23: PROCEEDINGS OF THE 2023 AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 723, 731 (Francesca Rossi, Sanmay Das, Jenny Davis, Kay Firth-Butterfield & Alex John eds., 2023) (documenting physical, emotional, and psychological harms linked to algorithmic systems, including distress, diminished well-being, and internalization of stereotypes). Such injuries are increasingly litigated under products liability and negligence doctrines. *See* Kaustuv Basu, *Emerging AI Models Challenge Liability Law with Little Precedent*, BLOOMBERG L. (Apr. 16, 2025, at 05:00 ET), <https://news.bloomberglaw.com/artificial-intelligence/emerging-ai-models-challenge-liability-law-with-little-precedent> [<https://perma.cc/B7FB-PQ3T>] (reporting parties are increasingly framing AI systems under negligence and products liability theories, such as defective design and failure to warn claims).

⁸ 47 U.S.C. § 230(c)(1) (providing online platforms are generally not treated as publisher or speaker of third-party content posted on their services).

⁹ *See* discussion *infra* Part II (noting judiciary’s evolving stance on algorithmic liability and how modern advancements might be pushing courts to adopt new approaches).

omissions (“E&O”), and cyber insurance policies.¹⁰ These gaps reveal an unmet need and signal the potential for future demand in the insurance market.¹¹

This Article builds on existing scholarship that recognizes the interdependence of insurance and tort law development and calls on more scholars to do the same.¹² Further, this Article examines newly developing forms of liability and contends that they are likely to create demand for insurance in high-profile industries with largely neglected coverage requirements. Until recently, courts rarely allowed algorithmic liability claims to proceed past early procedural challenges, often dismissing them under Section 230 immunity or First Amendment protections, or by finding that algorithms are not “products” for the purposes of products liability law.¹³ These defenses have been generally successful, but the landscape now appears to be shifting.

State and federal courts are increasingly allowing algorithmic liability claims to survive early motions to dismiss. For example, in *Anderson v. TikTok, Inc.*,¹⁴ a case involving a ten-year-old child who died after attempting the “Blackout Challenge,” the Third Circuit Court of Appeals reversed in part, vacated in part, and remanded the trial court’s dismissal.¹⁵ Relying on the Supreme Court’s 2024 decision in *Moody v. NetChoice, LLC*,¹⁶ which held that social media firms engage in First Amendment-protected first-party speech when they actively curate third-party content using algorithms,¹⁷ the Third Circuit concluded that TikTok’s algorithm uses similarly constituted first-party speech not immunized under Section 230.¹⁸

Possibly indicating a shift in judicial attitudes toward the broad protections afforded to online platforms, Judge Matey’s *Anderson* opinion, concurring and

¹⁰ See Plaintiffs’ Second Amended Master Complaint & Jury Trial Demand at 1-2, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809 (N.D. Cal. 2023) (No. 4:22-MD-03047) (highlighting increasingly worrisome youth mental health trends, including suicide rates up 57%, emergency room visits for anxiety up 117%, persistent sadness among high school students up 40%, and suicide attempts up 36%) [hereinafter Second Amended Master Complaint]. For full discussion, see *infra* Part IV.

¹¹ See *infra* Part IV (discussing current policy gaps and identifying need for specialized algorithmic coverage).

¹² See Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165, 2254-55 (2024) (characterizing some tort theory constructs as useful but “significantly incomplete” and calling for courts to take liability insurance into account in deciding when to impose tort liability).

¹³ See *infra* Part II (discussing judiciary’s evolving stance on algorithmic liability and how modern advancements might push courts to adopt new approaches to address products liability claims).

¹⁴ 116 F.4th 180 (3d Cir. 2024).

¹⁵ See *id.* at 184-85 (holding claims against TikTok arising from “Blackout Challenge” are not facially barred by statute).

¹⁶ 144 S. Ct. 2383 (2024).

¹⁷ See *id.* at 2399-400, 2409.

¹⁸ See *Anderson*, 116 F.4th at 184 (finding TikTok’s algorithm was “expressive activity,” and therefore first-party speech not barred by Section 230).

dissenting in part, criticized TikTok for excessively relying on Section 230, stating that TikTok interprets the statute as permitting “casual indifference to the death of a ten-year-old girl.”¹⁹ Judge Matey observed that “[i]t is a position that has become popular among a host of purveyors of pornography, self-mutilation, and exploitation, one that smuggles constitutional conceptions of a ‘free trade in ideas’ into a digital ‘cauldron of illicit loves’ that leap and boil with no oversight, no accountability, no remedy.”²⁰

The Third Circuit’s ruling does diverge from other circuits’ positions but reflects a growing trend: allowing algorithmic liability claims to proceed, despite Section 230, First Amendment, or arguments that algorithms are not “products” under products liability law.²¹ This growing body of case law suggests early signs of legal disruption that will lead to risk exposure for a large swath of companies that operate on the internet. There is temporal variance in these decisions: Some rulings develop concurrently, while others evolve independently. Together, they suggest that courts have begun to reconsider the broad protections historically afforded to technology firms.²² If reflective of a

¹⁹ *Id.* at 185 (Matey, J., concurring in part and dissenting in part).

²⁰ *Id.* (footnote omitted).

²¹ *Contrast id.* at 184 (majority opinion) (holding TikTok’s algorithm was “expressive activity,” and therefore first-party speech not barred by Section 230), *with* *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (holding Section 230 barred negligence and contract claims against online service provider for harms caused by other users), *and* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (holding Section 230 immunized AOL from defamation liability for failing to remove harmful third-party postings even after repeated notice), *and* *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019) (holding Section 230 immunized website whose algorithms recommended user groups where drug sales occurred, emphasizing automated recommendations were still publisher functions), *and* *Force v. Facebook, Inc.*, 934 F.3d 53, 70-71 (2d Cir. 2019) (affirming dismissal of anti-terrorism claims and holding Section 230 immunity broadly applied to Facebook’s algorithms and recommendation systems, rejecting arguments that such tools made Facebook a content developer), *and* *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22-24 (1st Cir. 2016) (holding Section 230 barred sex-trafficking victims’ claims against Backpage despite allegations its design choices facilitated illegal ads, treating them as publisher functions), *and* *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014) (holding Section 230 applied even when site operator selected and commented on defamatory user posts, so long as no material contributions were made to unlawful content), *and* *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357-59 (D.C. Cir. 2014) (holding Facebook and its CEO were immune under Section 230 for hosting page with offensive third-party content, reasoning site merely provided neutral platform), *and* *Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010) (holding Section 230 protected website operator from defamation claims based on allegedly false and harmful user posts), *and* *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) (holding Section 230 foreclosed negligence claims against MySpace after thirteen-year-old was sexually assaulted by man she met through platform, finding user-generated profiles were third-party content).

²² *See, e.g., Anderson*, 116 F.4th at 184; *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157, 1178-80 (M.D. Fla. 2025).

larger trend, these early decisions may preview how courts will address such issues going forward. Indeed, technology firms are beginning to fret about such changes.²³ Although these trends are nascent,²⁴ they introduce legal uncertainty for any firm deploying algorithms that could cause mental, emotional, or physical injuries.²⁵

When liability rules shift, they create legal uncertainty, uncertainty that exposes unaddressed risks and reveals the need for responsive insurance solutions.²⁶ Professors Kenneth Abraham and Catherine Sharkey have observed that when new forms of liability arise, insurers often develop new products to meet the resulting coverage demands.²⁷ Plaintiffs tend to bring lawsuits against defendants who are insured, and they often plead their claims to fit within the coverage parameters of those insurance policies.²⁸ This practice, in turn, leads

²³ See Catherine M. Sharkey, *A Products Liability Framework for AI*, 25 COLUM. SCI. & TECH. L. REV. 240, 259 (2024) (stating at least one medical AI software company has purchased third-party insurance in anticipation of tort litigation); see also Transcript of Oral Argument at 160-61, *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333) (cautioning eliminating Section 230 immunity could allow algorithmic design choices like ranking or recommending content be reframed as products liability or negligence claims, thereby treating publishing decisions as actionable defects).

²⁴ See Peter Karalis & Golriz Chrostowski, *ANALYSIS: Product Claims Spike as SCOTUS Ponders Section 230 Fix*, BLOOMBERG L. (Mar. 2, 2023, at 13:01 ET), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-product-claims-spike-as-scotus-ponders-section-230-fix> [<https://perma.cc/ZD3Q-69MD>] (finding, as of March 2023, 186 federal complaints containing products liability claims were filed against social media platforms since 2016, and 100 of those complaints were filed from October 2022 to March 2023).

²⁵ At least one scholar has surfaced the general need for a third-party liability insurance market for certain products liability related AI harms. See Sharkey, *supra* note 23, at 259 (observing malpractice insurance covers some AI devices while third-party liability market for AI products remains open but important development).

²⁶ See Tom Baker, *Uncertainty > Risk: Lessons for Legal Thought from the Insurance Runoff Market*, 62 B.C. L. REV. 59, 69 (2021) (explaining how insurance markets evolve precisely to address uncertainty, including uncertainty created by changes in legal rules, and how such shifts expose new risks necessitating responsive insurance products).

²⁷ See Abraham & Sharkey, *supra* note 12, at 2254 (“The courts certainly should take warnings that a new form of liability will destabilize the insurance market or be ‘uninsurable’ with a grain of salt. Liability insurance often develops to fill a need, despite predictions to the contrary.”).

²⁸ See Tom Baker, *What Is Insurance for Tort Law?*, VA. L. REV. (forthcoming 2026) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5393512 (observing plaintiffs prefer to sue insured defendants and to construe theories of liability so as to fit within bounds of insurance coverage); David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 870-71 (2001) (remarking on link between tortfeasor’s insurance status and probability tortfeasor will be sued).

courts to decide a greater number of cases involving insured defendants.²⁹ Over time, this system reinforces itself, resulting in a higher concentration of tort actions filed against defendants with insurance coverage.³⁰ Thus, liability rules and insurance frameworks operate in dynamic reciprocity.³¹ Risk allocation is fundamentally shaped by the structure of liability rules.³²

Although the jurisprudential turn identified in this Article is anticipated to cause a wave of unpredictable losses, the insurance market is capable of insuring algorithmic liability.³³ Basic economic principles dictate that substantial exposure drives demand for new insurance products.³⁴ And insurers depend

²⁹ See Baker, *supra* note 28 (manuscript at 15) (“The preference for suing insured defendants means that plaintiffs will present courts with more opportunities to expand the liability of parties with insurance than parties without liability insurance.”).

³⁰ See *id.*

³¹ See Fischer & Jerry, *supra* note 28, at 873 (stressing deep relationship between liability insurance and tort liability, positing former spurs latter in iterative sequence); Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91, 93 (1996) (“The tort system and the insurance regulatory system work together to determine the welfare of injurers and victims in society. Neither one can be understood properly without an understanding of the other.”); PETER CANE, TORT LAW AND ECONOMIC INTERESTS 432 (2d ed. 1996) (“It is now accepted wisdom that the practical operation of the law of tort cannot be understood without paying attention to the fact and extent of insurance”); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114 (1990) (“[W]e tend to place insurance in the reactive role: tort litigation expands, liability insurance adjusts; courts create a new type of tort, insurance companies respond with a new type of policy; juries award larger verdicts, insurance companies raise their premiums.”); Allen E. Smith, *The Miscegenetic Union of Liability Insurance and Tort Process in the Personal Injury Claims System*, 54 CORN. L. REV. 645, 646 (1969) (lamenting limited focus on complex relationship between liability insurance and liability rules in tort law); Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120, 120-21 (1982) (asserting impacts of insurance and different liability rules are mutually dependent).

³² See Shavell, *supra* note 31, at 121 (“Under strict liability injurers bear risk and victims are protected against risk, whereas under the negligence rule injurers do not bear risk—if they are not negligent, they will not have to pay damages when involved in accidents—and victims do bear risk.”).

³³ See Baker, *supra* note 26, at 65-66 (calling for further study of how insurers manage to successfully navigate uncertainty); Sean M. Fitzpatrick, *Fear Is the Key: A Behavioral Guide to Underwriting Cycles*, 10 CONN. INS. L.J. 255, 257-58 (2004) (describing how economics and human psychology impact underwriting cycles of different insurance markets); Dwight M. Jaffee & Thomas Russell, *Catastrophe Insurance, Capital Markets, and Uninsurable Risks*, 64 J. RISK & INS. 205, 207 (1997) (arguing neither magnitude of risk nor uncertainty have prevented insurance markets from operating successfully); Dwight Jaffee, *Monoline Restrictions, with Applications to Mortgage Insurance and Title Insurance*, 28 REV. INDUS. ORG. 83, 105-06 (2006) (advocating for implementation of viable structures to buoy title and mortgage insurance industries when catastrophes strike).

³⁴ See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 231 (2012) (discussing how insurers “offer[]

upon the credible threat of liability to sustain demand for their products.³⁵ Moreover, because courts routinely, even if covertly, consider the availability and scope of insurance coverage when shaping liability doctrines, the very existence of insurance serves to amplify the impact and reach of liability rules.³⁶

That said, existing insurance frameworks do not cover the distinct risks posed by algorithmic liability, underscoring the need for affirmative coverage solutions. This gap reflects the broader challenge of addressing the specific harms that algorithmic systems can produce. Algorithmic liability often includes mental and emotional distress and self-inflicted injury.³⁷ CGL policies sometime interpret “bodily injury” to include mental and emotional harm, but this construction varies.³⁸ Some courts have held that mental and emotional injuries qualify as bodily injuries when they stem from or result in physical harm.³⁹ However, claims that allege mental or emotional distress, such as depression or

a menu of safety choices and corresponding prices,” allowing consumers with different levels of risk exposure to select one of many insurance plans); *see also* Howard C. Kunreuther & Erwann O. Michel-Kerjan, *Climate Change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge*, 155 U. PA. L. REV. 1795, 1814 (2007) (noting demand for insurance often surges after catastrophic disaster).

³⁵ *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1609 (2017) (emphasizing insurers desire predictable, clear, and non-retroactive laws which allow for accurate risk assessment and insurance pricing); Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1634 (1994) (explaining cycle whereby “liability insurance promotes liability” through incentivizing litigation that pays out large settlements and damages awards); *see also* Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1700-02 (1994) (contending rapid increase in liability might increase demand for insurance but not necessarily supply as insurers may be unable to price rapid change).

³⁶ *See* Abraham & Sharkey, *supra* note 12, at 2243-49 (providing various explanations for why courts “do not mention liability insurance as frequently as we think it actually plays a role in their decisions”).

³⁷ *See, e.g., In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 860 (N.D. Cal. 2023) (“[P]laintiffs contend that the ‘defective features’ of defendants’ platforms have caused and contributed to a range of negative physical, mental, and emotional health outcomes, including anxiety, depression, and self-harm.”); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184-85 (3d Cir. 2024) (reversing district court’s dismissal of wrongful death claim brought against TikTok for recommending videos promoting dangerous activity for minors).

³⁸ For a concise summary of what the term “bodily injury” entails, *see* Scott P. DeVries & Torrye Zullo, *Social Media and Insurance Coverage: The Next Emerging Trend*, NAT’L L. REV. (May 21, 2024), <https://natlawreview.com/article/social-media-and-insurance-coverage-next-emerging-trend> [<https://perma.cc/7RYJ-M9LC>].

³⁹ *See id.* (listing some examples of physical manifestations, including “weight loss, hair loss, fragile fingernails, loss of sleep, headaches, stomach pains and muscle aches”).

anxiety, independent of any physical injury are unlikely to be covered.⁴⁰ BOP and E&O policies present similar concerns.⁴¹

In addition to the question of whether an algorithmic injury constitutes a “bodily injury,” a further issue is whether such incidents qualify as “occurrences” under standard CGL and BOP language.⁴² Generally, CGL and businessowners’ policies are triggered by an “occurrence.”⁴³ An “occurrence” is traditionally defined as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.”⁴⁴ Courts often interpret “occurrences” to exclude intentional acts, although some have adopted a broader interpretation.⁴⁵ This distinction is critical, as many algorithmic liability claims involve intentional design choices, such as content recommendation algorithms, potentially outside the scope of insurance coverage.⁴⁶

⁴⁰ See *id.* (“If social media users can show that they suffered from any *physical* manifestation, it may be a covered claim for bodily injury.” (emphasis added)). For a comprehensive discussion of the limitations inherent in BOP insurance and the analogous gaps it presents in addressing algorithmic harm, see Part IV.

⁴¹ See *infra* Section IV.A (noting mental and emotional injuries are unlikely covered given definition of “bodily injury” in businessowners and errors and omissions’ insurance policies); see also Kevin T. Merriman, David M. Knapp, Meghan E. Ruesch & Nicole M. Weir, *Insurance for Social Media Liability*, 40 J. INS. REGUL., no. 4 2021, at 1, 5 (comparing definition of “bodily injury” under typical CGL insurance policies and typical homeowners’ insurance policies).

⁴² See Merriman et al., *supra* note 41, at 7 (providing common definition of “occurrence” in insurance policies and courts’ contrasting interpretations of term).

⁴³ See *id.* (asserting regardless of how “bodily injury” arises, “occurrence” is threshold question as to whether coverage is available).

⁴⁴ *Id.*

⁴⁵ See *id.* at 7-8 (noting some courts hold “even where the act that gave rise to the alleged harm was done intentionally, there is an ‘occurrence’ if the policyholder did not intend the resulting harm”).

⁴⁶ For example, in *Anderson v. TikTok, Inc.*, plaintiff alleged that TikTok’s algorithm is unreasonably dangerously designed because it “was intended to addict users and manipulate them into participating in” dangerous activities, including the “Blackout Challenge,” among others. Complaint with Jury Trial Demanded at 21-22, *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024) (No. 2:22-CV-01849) (alleging TikTok intentionally designed its algorithm to addict users and manipulate them into participating in deadly challenges). Compare *Heacker v. Safeco Ins. Co. of Am.*, 676 F.3d 724, 727-28 (8th Cir. 2012) (holding “accident” in insurance policy context excludes negligent or intentional acts), with *State Farm Fire & Cas. Co. v. Motta*, 356 F. Supp. 3d 457, 472 (E.D. Pa. 2018) (concluding while cyberbullying intending to cause emotional distress is not an “accident,” resulting suicide was an “accident”). Plaintiffs tend to bring algorithmic injury claims under strict liability or negligence theories, focusing specifically on design defects and failures to warn. See, e.g., Second Amended Master Complaint, *supra* note 10, at iv.

Plaintiffs have also brought claims lying in ordinary negligence; negligent infliction of emotional distress; public nuisance; unjust enrichment; negligent undertaking; violation of unfair trade practices, consumer protection laws; fraudulent concealment and misrepresentation; negligent concealment and misrepresentation; negligence per se;

In addition to CGL, BOP, and E&O, cyber insurance is often identified as a potential source of coverage. In practice, however, cyber insurance bears little relation to harms arising from algorithmic liability. Cyber insurance is typically designed to protect insureds from liability arising out of discrete cyber events, such as data breaches, identity theft, or the unauthorized disclosure of personal information.⁴⁷ Cyber insurance does not usually extend to mental or emotional distress, or self-inflicted injury triggered by any event.⁴⁸

CGL, BOP, E&O, and cyber insurance policies, therefore, present coverage gaps that likely exclude algorithmic liabilities.⁴⁹ Due to narrowly defined coverage, ambiguous policy language, and broad exclusions, technology firms using algorithms should not presume that existing insurance policies cover claims arising from this type of exposure.⁵⁰

This is not just a Meta or TikTok problem. Internet firms of all sizes that use algorithms to recommend content or generate text are exposed. Tens of

violations of 18 U.S.C. §§ 1595 and 1591; violations of 18 U.S.C. §§ 2255 and 2252; violations of 18 U.S.C. §§ 2252A(f) and 1466A; violations of 18 U.S.C. §§ 2255 and 2252A(5)(b); violations of 18 U.S.C. §§ 2258B and 2258A; wrongful death; survival actions; and loss of consortium and society, inter alia. *See, e.g., In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 753 F. Supp. 3d 849 (N.D. Cal. 2024) (alleging violations of consumer protection laws, concealment and misrepresentation, deceptive acts and practices, and unjust enrichment, among other things); *Young v. ByteDance Inc.*, No. 22-CV-01883, 2023 WL 3484215, at *2 (N.D. Cal. May 15, 2023) (alleging ordinary negligence and violation of California Unfair Competition Law); Jonathan Stempel, *New York City Sues Social Media Companies for Allegedly Addicting Children*, REUTERS (Oct. 8, 2025, at 17:56 ET), <https://www.reuters.com/sustainability/boards-policy-regulation/new-york-city-sues-social-media-companies-allegedly-addicting-children-2025-10-08> [<https://perma.cc/AMZ5-HDZ8>] (describing lawsuit against Meta, Google, Snapchat, and TikTok owners, accusing platforms of gross negligence and public nuisance).

⁴⁷ See Shauhin A. Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as “Compliance Managers” for Businesses*, 43 L. & SOC. INQUIRY 417, 425-26 (2018).

⁴⁸ See Margaret A. Reetz, Lauren B. Prunty, Gregory S. Mantych & David J. Hommel, *Cyber Risks: Evolving Threats, Emerging Coverages, and Ensuing Case Law*, 122 PENN. ST. L. REV. 727, 731, 757 (2018) (summarizing history of cyber insurance and its lack of coverage for first-party losses, bodily injury, and property damage).

⁴⁹ See Merriman et al., *supra* note 41, at 34. For further discussion on extant policies’ coverage gaps, see *infra* Part IV.

⁵⁰ See Merriman et al., *supra* note 41, at 34 (“[I]t is critical that both insurers and policyholders are aware of the risks posed by social media and the scope of coverage for such liabilities under traditional insurance products.”); Geoffrey B. Fehling & Torrye Zullo, *Insuring Your Online Presence: Limitations on Social Media Coverage for Businesses*, NAT’L L. REV. (July 23, 2024), <https://natlawreview.com/article/insuring-your-online-presence-limitations-social-media-coverage-businesses> [<https://perma.cc/ERZ6-EA44>] (“Due to risks of overbroad exclusions, narrow definitions, or insuring agreements, and unclear policy language implicated in copyright infringement claims, businesses should not assume that their current insurance program adequately protects against social media exposures.”).

thousands of businesses could soon face algorithmic liability, and many lack the resources to self-insure. Insurance plays a critical role in supporting continued business growth and innovation.⁵¹ In its absence, firms that lack the capacity to self-insure risk financial ruin in the event of heretofore unforeseen losses. This vulnerability may stifle development in sectors that are increasingly integral to the United States economy—namely those involving AI.⁵²

Drawing on the Database of AI Litigation (“DAIL”), supported by the Institute for Trustworthy AI in Law and Society and the National Science Foundation, this Article analyzes developing products liability lawsuits involving algorithmic tools.⁵³ This analysis identifies evolving doctrinal trends likely to continue to impact the legal landscape. Moreover, this Article contributes to the scholarly discussion by suggesting a novel category of algorithmic liability insurance attending to third-party frameworks.

⁵¹ See, e.g., Marco Arena, *Does Insurance Market Activity Promote Economic Growth? A Cross-Country Study for Industrialized and Developing Countries*, 75 J. RISK & INS. 921, 922 (2008) (finding “robust evidence of a causal relationship between insurance market activity and economic growth”).

⁵² See Mike Dolan, *AI and Gravity-Defying US GDP*, REUTERS (July 23, 2025, at 06:00 ET), <https://www.reuters.com/markets/us/ai-gravity-defying-us-gdp-2025-07-23> [<https://perma.cc/RCL2-2DLW>] (“[T]he AI-related capex boom—in data centers, graphics processing units, server infrastructure, power and related hardware and applications—already accounts for more than one-third of this year’s second-quarter U.S. GDP growth.”).

⁵³ GW Ethical Tech Initiative & GW Center for Law and Technology, *DAIL—The Database of AI Litigation*, GEO. WASH. UNIV. L. SCH., <https://blogs.gwu.edu/law-eti/ai-litigation-database> [<https://perma.cc/3WHB-AWZ4>] (last visited Feb. 9, 2026). The Database of AI Litigation (“DAIL”) is based on work funded by the Institute for Trustworthy AI in Law and Society, which is funded by the National Science Foundation under Award No. 2229885. *Id.* Cases were selected from the DAIL based on specific criteria, including the area of law implicated, the causes of action pleaded, and the legal issues raised. *Id.* The selection process prioritized cases identified in the DAIL as falling within the category of tort actions, distinct from other categories such as copyright infringement, privacy, trade secrecy, or discrimination claims.

Subsequently, the selection process narrowed to cases involving products liability claims (including design, manufacturing, and failure-to-warn defects) and negligence, as identified in the DAIL. At this stage, claims involving injuries from autonomous vehicles were excluded from the study group. Initially, 213 cases were identified. After applying the selection criteria, twelve remained, and further exclusions for autonomous vehicle claims reduced this to a final group of nine, including one multi-district litigation encompassing 1,745 individual actions and one consolidated action consisting of four individual actions.

As with many qualitative legal analyses, this study carries inherent limitations. First, the relatively small number of cases analyzed imposes potential constraints on the representativeness and predictive value of the study’s findings. Second, due to the relatively nascent nature of these types of lawsuits, the dockets analyzed, although substantial in volume, primarily reflect litigation at preliminary procedural stages. It is possible, perhaps even likely, that the cases analyzed will evolve in unforeseen ways as the litigation progresses. Third, given the continuous filing of new cases, this study represents a snapshot at a specific point in time; consequently, the findings will require future updates.

This Article proceeds as follows. Part I provides background on algorithmic liability within the context of products liability law, Section 230 immunity, and First Amendment doctrine, and explains how courts historically addressed what we would now characterize as algorithmic liability.

Part II analyzes recent judicial trends concerning algorithmic liability, focusing on products liability definitional defenses, statutory immunities, and First Amendment considerations. This Part synthesizes key judicial decisions, identifying jurisprudential approaches to algorithmic liability and demonstrating that courts are increasingly adopting varied approaches in allowing these cases to proceed past early procedural challenges.

Part III explains how earlier liability barriers, combined with the relatively recent widespread adoption of AI, suppressed insurance demand for harms arising from injuries linked to interactions with technology platforms. It also outlines how insurance typically responds to legal uncertainty.

Part IV evaluates existing insurance policies (CGL, BOP, E&O, and cyber) and shows why they fall short in the context of algorithmic liability. This Part proposes a market-driven solution by recommending the adoption of affirmative AI insurance policies. These policies would broaden the definition of “bodily injury” to encompass mental and emotional injuries, expand covered “occurrences” to include algorithmic design actions, and narrow exclusions. It further explores parametric insurance as a potential mechanism for addressing algorithmic harms. The Part concludes by examining insurers’ concerns, including the definitional and evidentiary challenges of mental and emotional injuries and the risk of moral hazard. It ultimately argues that the insurance industry is a nimble and adaptive sector, capable of providing coverage for a wide range of algorithmic harms while remaining solvent.

Although future work will assess particular insurance mechanisms, this Article does not offer insurance proposals. Rather, it highlights the pressing need to design specialized insurance instruments capable of addressing the distinct and escalating harms at issue.

The core claims that this Article presents are that tort liability and insurance exhibit a largely underappreciated symbiotic relationship; that this relationship reveals itself within the domain of algorithmic liability; and that emerging risks in this space will demand responsive insurance products. Although the contours, scope, and pricing of such products remain speculative, the evolving AI litigation landscape renders these questions both unavoidable and urgent. This Article identifies those questions, deferring their resolution for future work.

I. COURTS’ HISTORICAL TREATMENT OF ALGORITHMIC INJURY CLAIMS

Products liability has emerged as one of the primary doctrinal vehicles for advancing claims related to algorithmic liability.⁵⁴ Although no legal doctrine is

⁵⁴ See, e.g., Andrew D. Selbst, *Negligence and AI’s Human Users*, 100 B.U. L. REV. 1315, 1322 (2020) (remarking central theme of AI scholarship centers on torts actions shifting from negligence to products liability in autonomous robotic setting); Mark A. Geistfeld, *A*

Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation, 105 CALIF. L. REV. 1611, 1619 (2017) (“To date, scholars have reached ‘the shared conclusion’ that elimination of a human driver will shift responsibility onto manufacturers as a matter of products liability law, with most tort litigation involving claims for design or warning defects.”); Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9, 69-70 (2021) (“It also has been noted by others that concepts from tort and products liability law (e.g., design or manufacturing defect, failure to warn, negligent operation, and strict liability) have been applied and will continue to develop creatively in this context.”); see also Mark A. Lemley & Bryan Casey, *Remedies for Robots*, 86 U. CHI. L. REV. 1311, 1327-29 (2019) (surveying and providing examples of harms complex robotic systems may bring about through use); A. Michael Froomkin, Ian Kerr & Joelle Pineau, *When AIs Outperform Doctors: Confronting the Challenges of a Tort-Induced Over-Reliance on Machine Learning*, 61 ARIZ. L. REV. 33, 65-66 (2019) (noting patients could have products liability claims against AI suppliers and medical malpractice claims against care providers); Karni A. Chagal-Feferkorn, *Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers*, 30 STAN. L. & POL’Y REV. 61, 62-69 (2019) (suggesting how products liability frameworks can map onto sophisticated systems); Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 890-97 (2018) (propounding importance of investigation into whether current legal doctrines can apply to artificial intelligence); John G. Browning, *A Product by Any Other Name? The Evolving Trend of Product Liability Exposure for Technology Platforms*, 16 ELON L. REV. 181, 182 (considering question of apps and algorithms as products susceptible to exposure to civil liability under products liability standards); *Rodgers v. Laura & John Arnold Found.*, No. 17-5556, 2019 WL 2429574, at *2-3 (D.N.J. June 11, 2019) (dismissing complaint brought under New Jersey Products Liability Act after finding data-based Public Safety Assessment was not product); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018) (finding Section 230 precluded products liability claims); *Doe ex rel. Roe v. Snap, Inc.*, No. H-22-00590, 2022 WL 2528615, at *2 (S.D. Tex. July 7, 2022) (describing negligent design claims levied on Snapchat); *Schafer v. State Farm Fire & Cas. Co.*, 507 F. Supp. 2d 587, 600-01 (E.D. La. 2007) (allowing plaintiffs to amend complaint to allege claim under Louisiana Products Liability Act because “other courts and legal scholars have suggested that defective computer software may give rise to strict products liability in tort”); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021) (finding Section 230 does not immunize Snapchat from plaintiffs’ negligent design claim because “[t]he duty to design a reasonably safe product is fully independent of Snap’s role in monitoring or publishing third-party content”); *Maynard v. Snapchat, Inc.*, 870 S.E.2d 739, 747-48 (Ga. 2022) (describing negligent design allegations situated in products liability law against Snapchat); *A.M. v. Omegle.com LLC*, No. 3:21-CV-01674, 2023 WL 1470269, at *1 (D. Or. Feb. 2, 2023) (denying motion to dismiss products liability claims and rejecting Section 230 immunity arguments raised by defendants); *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 278, 281 (E.D. Pa. 2022) (finding because plaintiff’s products liability “claims are ‘inextricably linked’ to the manner in which Defendants choose to publish third-party user content, Section 230 immunity applies” (quoting *Herrick v. Grindr LLC*, 765 F. App’x 586, 591 (2d Cir. 2019))), *rev’d in part, vacated in part*, 116 F.4th 180 (3d Cir. 2024); *Bride v. Snap, Inc.*, 2:No. 21-CV-06680, 2023 WL 2016927, at *8 (C.D. Cal. Jan. 10, 2023) (dismissing products liability claims because of Section 230 immunity), *aff’d in part, rev’d in part sub nom.*, *Estate of Bride ex rel. Bride v. YOLO Techs., Inc.*, 112 F.4th 1168 (9th Cir. 2024); *L.W. ex rel. Doe v. Snap, Inc.*, 675 F.

perfectly adaptable to the vexing legal issues that AI presents, perhaps products liability is the most suitable given its historical response to new risks.⁵⁵ Moreover, ex ante regulation of AI remains largely unavailable, as lawmakers have not broadly addressed AI's risk-producing potential. Legislatures have neither imposed comprehensive regulatory constraints nor established special immunities or other mechanisms that limit the deployment of AI in commercial settings.⁵⁶ Accordingly, ex post liability currently provides plaintiffs one of the few available means to seek remuneration for alleged algorithmic injuries.⁵⁷

Many plaintiffs base their claims on strict liability or negligence theories, tending to advance design-defect and failure-to-warn claims.⁵⁸ A design-defect claim arises when a product's design is unreasonably dangerous and causes injury during ordinary or foreseeable use.⁵⁹ A failure to warn claim arises when

Supp. 3d 1087, 1098-1100 (S.D. Cal. 2023) (dismissing complaint with prejudice on Section 230 immunity grounds).

⁵⁵ See Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders,"* 73 HASTINGS L.J. 1327, 1333-34 (2022) ("[P]roducts liability is a microcosm of how the common law evolves over time, specifically to respond to new societal risks—posed by the automobile, mass-produced goods, and now, digital e-commerce.").

⁵⁶ In fact, the House of Representatives recently advanced a proposal that would impose a ten-year moratorium on state-level AI legislation. See Andrew R. Lee, Jason M. Loring & Graham H. Ryan, *US House of Representatives Advance Unprecedented 10-Year Moratorium on State AI Laws*, NAT'L L. REV. (May 28, 2025), <https://natlawreview.com/article/us-house-representatives-advance-unprecedented-10-year-moratorium-state-ai-laws> [<https://perma.cc/PFZ8-7PL6>] (reporting budget reconciliation bill contained provision banning states from enforcing artificial intelligence laws for ten years).

⁵⁷ See, e.g., Second Amended Complaint, *supra* note 1, at 91-96, 98-104 (outlining tort claims against artificial intelligence company); *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 862-63 (N.D. Cal. 2023) (granting in part and denying in part defendant technology companies' motion to dismiss plaintiffs' priority products liability, strict liability, and negligence claims); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (finding content at issue was recommended by TikTok's algorithm, rendering it first-party speech that does not fall under Section 230); see also Complaint for Misappropriation of Name & Likeness & Violation of Cal. Unfair Bus. Pracs. L. at 8-10, *Lorre v. Theecomfy LLC*, No. 25-CV-05525 (C.D. Cal. June 18, 2025) (depicting allegations of misappropriation of name and likeness and violation of California Unfair Business Practices Act); Complaint for Permanent Injunction & Other Relief at 35, *FTC v. Rite Aid Corp.*, No. 23-CV-05023 (E.D. Pa. Dec. 19, 2023) (bringing lawsuit based on Rite Aid's facial recognition technology practices).

⁵⁸ See Second Amended Master Complaint, *supra* note 10, at 241-74 (showing products liability and other counts within eighteen-count complaint against social media and technology companies). This is not an exhaustive list. For other causes of action commonly alleged, see cases cited *supra* note 46.

⁵⁹ See RESTATEMENT (SECOND) OF TORTS § 402A (A.L.I. 1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm . . ."); see also *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) ("A manufacturer is strictly liable in tort when an

a product's warning or instructions fails to apprise a consumer of the specific risks involved with the use or foreseeable misuse of the product.⁶⁰

Products liability doctrine is largely uncontroversial when applied to physical, tangible goods.⁶¹ Algorithmic liability, however, raises definitional questions about whether intangible, algorithm-driven tools may be considered "products" for purposes of products liability law. Historically, courts have hesitated to apply these doctrines to intangible algorithmic processes.

A. *Excluding Words, Pictures, and Information from Products Liability*

The first hurdle to recovery concerns whether intangible technologies constitute "products" or instead represent information and ideas. The Second Restatement of Torts does not specifically define a product as one in tangible form; however, it does list only tangible items in its comments.⁶² The Third Restatement of Torts, on the other hand, limits the definition of a product to "tangible personal property distributed commercially for use or consumption."⁶³ Items may nonetheless be products "when the context of their distribution and use is sufficiently analogous to . . . tangible personal property."⁶⁴

Courts have consistently resisted extending this definition to intangible goods. In *Watters v. TSR, Inc.*,⁶⁵ the Sixth Circuit Court of Appeals held that the "parlor game" called "Dungeons & Dragons" is not a product.⁶⁶ In surveying all decisions to that point, the court remarked that no court had applied strict liability to "words or pictures."⁶⁷ As a natural extension to the query concerning

article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.").

⁶⁰ See, e.g., *Lewis v. Sea Ray Boats, Inc.*, 65 P.3d 245, 249 (Nev. 2003) (explaining products must have adequate warnings when placed into streams of commerce).

⁶¹ See 17A MASS. PRAC., PRIMA FACIE CASE § 25.3 (5th ed. 2025) ("Since 1950, the development of products liability law has been startling."); see also *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (extending products liability beyond privity of contract); *Carter v. Yardley & Co.*, 64 N.E.2d 693, 700 (Mass. 1946) (stating "doctrine of the MacPherson case is now generally accepted"); *Greenman*, 377 P.2d at 900 ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.").

⁶² See RESTATEMENT (SECOND) OF TORTS § 402A cmt. d (A.L.I. 1965) ("[T]he rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide.").

⁶³ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19(a) (A.L.I. 1998).

⁶⁴ *Id.*

⁶⁵ 904 F.2d 378 (6th Cir. 1990).

⁶⁶ See *id.* at 381 (stating strict liability can be applicable when injuries are "caused by an inherently dangerous product").

⁶⁷ *Id.*; see, e.g., *Herceg v. Hustler Mag., Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983) (holding magazine's content not "product within the meaning of § 402A of the Second Restatement of Torts"); *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977) (noting ideas "are not equivalent to commercial products"); *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974, 978 (N.Y. Sup. Ct. 1985) (dismissing case because

whether information contained within a “parlor game” is a product, courts then considered whether content within video games and movies properly constitute products for the purposes of products liability.

In *Sanders v. Acclaim Entertainment, Inc.*,⁶⁸ the court refused to construe movies and video games as products.⁶⁹ The *Sanders* court relied on the Third Restatement of Torts and the *Winter v. G.P. Putnam’s Sons*⁷⁰ finding that movies and video games are expressive works, not tangible products.⁷¹ While these cases often overlap with free speech considerations, their resolution has ordinarily turned on whether the disputed item qualifies as a product. Courts have distinguished between physical goods and items that derive value from the conveyance of information, declining to extend strict liability to the latter.⁷²

B. *Section 230 as a Historical Barrier to Products Liability*

Section 230 of the Communications Decency Act has long presented a barrier to claims made against internet service providers that host web-based third-party content.⁷³ Section 230 is designed to shield internet service providers from liability for hosting tortious content, so long as their conduct remains limited to processing the offensive content.⁷⁴ Section 230 states in relevant part that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷⁵ Immunity is triggered under Section 230 when “(1) [the defendant]

“publications . . . did not produce the injuries and thus cannot serve as the basis for the imposition of liability under a theory of either strict products liability or breach of warranty”).

⁶⁸ 188 F. Supp. 2d 1264 (D. Colo. 2002).

⁶⁹ *Id.* at 1278; *see also* Schafer v. State Farm Fire & Cas. Co., 507 F. Supp. 2d 587, 600-01 (E.D. La. 2007) (citing various sources of authority to back decision to classify computer software as product).

⁷⁰ 938 F.2d 1033 (9th Cir. 1991).

⁷¹ *See Sanders*, 188 F. Supp. 2d at 1278-79; *see also* Quinteros v. InnoGames, No. C19-1402, 2022 WL 898560, at *7 (W.D. Wash. Mar. 28, 2022) (dismissing products liability claim because video game is service rather than product), *aff’d in part, rev’d in part*, No. 22-35333, 2024 WL 132241 (9th Cir. Jan. 8, 2024); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 173 (D. Conn. 2002) (dismissing products liability claim for video game and reasoning “Connecticut Supreme Court would . . . hold that ‘inciting’ media speech is not a ‘product’”).

⁷² *See Winter*, 938 F.2d at 1034 (distinguishing between words on page and page itself and noting “[p]roducts liability law is geared to the tangible world”); *see also* James v. Meow Media, Inc., 90 F. Supp. 2d 798, 811 (W.D. Ky. 2000) (citing RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19(a) cmt. d (A.L.I. 1998)) (noting courts properly decline to impose strict liability where plaintiff’s claim does not regard “tangible medium”).

⁷³ *See* Alex Chemerinsky & Erwin Chemerinsky, *Misguided Federalism: State Regulation of the Internet and Social Media*, 102 N.C. L. REV. 1, 50-51 (2023) (“Courts have . . . held that platforms (and users) are immune from liability for third-party content that violates a duty owed under tort law . . .” (footnotes omitted)).

⁷⁴ *See id.* at 50.

⁷⁵ 47 U.S.C. § 230(c)(1).

is a provider . . . of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat the defendant as the publisher or speaker of that information.”⁷⁶ Courts have almost uniformly held that Section 230 bars claims against AI-driven platforms for injuries arising from their use.⁷⁷ The following cases illustrate courts’ historical treatment of such claims.

In *Herrick v. Grindr, LLC*,⁷⁸ the plaintiff sued Grindr for the emotional injuries he incurred from his ex-boyfriend’s harassment using Grindr, a dating app.⁷⁹ The gravamen of plaintiff’s claims involved his ex-boyfriend’s use of the app to fraudulently entice other men to go to the plaintiff’s home or workplace for sexual encounters.⁸⁰ Hundreds of unwitting users responded to the fraudulent postings, attempting to meet the plaintiff for such purposes.⁸¹ Plaintiff alleged that Grindr’s app was defectively designed because it permitted ongoing harassment and lacked sufficient safeguards to prevent such misconduct, and Grindr failed to adequately warn users of these risks.⁸² The *Herrick* court ruled that “[t]o the extent [plaintiff] has identified a defect in Grindr’s design or manufacture or a failure to warn, it is inextricably related to Grindr’s role in

⁷⁶ *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018) (quoting *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016)).

⁷⁷ See, e.g., *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156-57 (E.D.N.Y. 2017) (accepting Facebook’s affirmative defense of Section 230 immunity as publisher of offensive content); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (reiterating Section 230’s immunity applicability to websites acting as interactive computer services); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (concluding Section 230 immunity applies to publishers where “third party willingly provides the essential published content . . . regardless of the specific editing or selection process”); *Green v. Am. Online, Inc.*, 318 F.3d 465, 471 (3d Cir. 2003) (stressing Section 230 provides immunity for computer service provider’s “decisions relating to the monitoring, screening, and deletion of content from its network”); *In re Facebook, Inc.*, 625 S.W.3d 80, 83-84 (Tex. 2021) (“[T]he uniform view of federal courts interpreting [Section 230] requires dismissal of claims alleging that interactive websites like Facebook should do more to protect their users from the malicious or objectionable activity of other users.”).

⁷⁸ *Herrick*, 306 F. Supp. 3d at 579.

⁷⁹ See *id.* at 584; see also *Beckman v. Match.com*, No. 2:13-CV-97, 2013 WL 2355512, at *1, *10 (D. Nev. May 29, 2013) (dismissing claims stemming from violent incident on Section 230 grounds where Match.com user was attacked by another user), *aff’d in part, rev’d in part*, 668 F. App’x 759 (9th Cir. 2016).

⁸⁰ See *Herrick*, 306 F. Supp. 3d at 584 (“Herrick’s former boyfriend has used Grindr to impersonate Herrick by posting fake profiles to Grindr, which describe Herrick as being interested in fetishistic sex, bondage, role playing, and rape fantasies and which encourage potential suitors to go to Herrick’s home or workplace for sex.”).

⁸¹ See *id.*

⁸² See *id.* (noting “gist of [the fourteen causes of action] is that Grindr is a defectively designed and manufactured product because it lacks built-in safety features”).

editing or removing offensive content—precisely the role for which Section 230 provides immunity.”⁸³

Applying the three-part test for immunity described above, the *Herrick* court found that all elements were satisfied.⁸⁴ Whether online technology companies like Grindr qualify as interactive computer service providers is typically not disputed.⁸⁵ Regarding the second element, the court concluded that all of plaintiff’s claims derived from content generated by his ex-boyfriend.⁸⁶ The court found that Grindr’s involvement was minimal, encompassing merely “algorithmic filtering, aggregation, and display functions.”⁸⁷ In so holding, the court relied on other decisions similarly concluding that algorithms that *process* user-submitted information do not create it.⁸⁸ The court held the third element was satisfied because plaintiff’s claims sought to hold Grindr liable for not removing the offending posts, actions integral to the role of a publisher.⁸⁹

⁸³ *Id.* at 588.

⁸⁴ *See id.* at 588-91 (finding “no plausible basis” Grindr is not interactive computer service, all claims relate to content provided by Herrick’s ex-boyfriend, and all claims seek to impose liability on Grindr as publisher or speaker of ex-boyfriend’s fraudulent profiles).

⁸⁵ *See id.* at 588-89. An interactive computer service is broadly construed. *See* Kimzey v. Yelp! Inc., 836 F.3d 1263, 1268 (9th Cir. 2016) (asserting Yelp is provider of interactive computer service under “expansively” construed definition of term). An interactive computer service is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2); *see* Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021) (confirming Snapchat’s status as provider of interactive computer service under Section 230); *see also* Grossman v. Rockaway Twp., No. MRS-L-1173-18, 2019 WL 2649153, at *13-14 (N.J. Super. Ct. Law Div. June 10, 2019) (reviewing background and policy behind enactment of Section 230); Palmer v. Savoy, No. 20 CVS 94, 2021 WL 3559047, at *5 (N.C. Super. Ct. July 28, 2021) (stating no contestation that Snap is provider of interactive computer service).

⁸⁶ *See Herrick*, 306 F. Supp. 3d at 589 (“The second element of immunity under Section 230(c) is satisfied because Herrick’s design and manufacturing defect, negligent design, and failure to warn claims are all based on content provided by another user—Herrick’s former boyfriend.”).

⁸⁷ *Id.*

⁸⁸ *See id.* (citing *Dyoff v. Ultimate Software Grp., Inc.*, No. 17-CV-05359, 2017 WL 5665670, at *10 (N.D. Cal. Nov. 26, 2017)) (“These features are available equally to all users and are not intrinsically offensive or unlawful. Grindr’s algorithmic filtering, aggregation, and display functions are similar.”); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) (holding classification of user-submitted information does not constitute development or creation of information); *O’Krole v. Fastcase Inc.*, No. 3-13-0780, 2014 WL 2881526, at *1-2 (M.D. Tenn. June 25, 2014) (“[T]he automated editorial acts of Google in publishing the information which was the search result did not make Google an information content provider . . .”).

⁸⁹ *See Herrick*, 306 F. Supp. 3d at 590 (stating “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content” are quintessential publication choices (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009))).

Further, the court reasoned that claims alleging a failure to implement safety features or adequately warn users are merely alternative “way[s] of asserting that Grindr is liable because it fails to police and remove impersonating content.”⁹⁰

In *Doe ex rel. Roe v. Snap, Inc.*,⁹¹ the minor plaintiff sued Snapchat and other defendants, alleging harm arising from his high school science teacher’s transmission of sexually explicit content via Snapchat to lure him into an exploitative and drug-abusive relationship.⁹² The plaintiff alleged that Snapchat was negligently designed because, inter alia, it allowed individuals younger than the required age of thirteen to create accounts and enabled predators to communicate with minors “with assurances that there will be no long-lasting evidence of those interactions” due to the app’s ephemeral content.⁹³

Again, the court held that Section 230 barred the plaintiff’s claim that sought to hold Snapchat liable as a publisher of third-party content.⁹⁴ The court characterized plaintiff’s claim as an attempt to recast allegations targeting Snapchat’s role as a publisher of third-party information into a products liability claim.⁹⁵ Specifically, the court remarked that “[t]he crux of Doe’s negligent design claim . . . is that Snapchat designed its product with features that allegedly created the opportunity for [his teacher] to send illicit messages.”⁹⁶ Thus, plaintiff “aim[ed] to hold Snap[chat] liable for communications exchanged between [himself] and [his teacher,] . . . [which] is . . . barred by Section 230.”⁹⁷ This reasoning illustrates courts’ traditional reluctance to impose

⁹⁰ *Id.* The court distinguished its ruling from *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), which held that Section 230 did not bar a negligent failure-to-warn claim against a networking website. *See id.* at 592 (“The Ninth Circuit [in *Internet Brands*] held that the [Communications Decency Act] did not provide immunity against plaintiff’s negligent failure to warn claim.”). In *Internet Brands*, the plaintiff was lured to a fraudulent modeling shoot, where she was sexually assaulted and the assault was recorded. *See* 824 F.3d at 848. The Ninth Circuit reasoned that Section 230 immunity was inapplicable because the perpetrators did not use the website itself to communicate or post content; rather, all communication occurred externally. *See id.* at 851. Thus, the perpetrators’ conduct did not implicate the website’s monitoring or moderation functions, distinguishing *Internet Brands* from *Herrick*. *See id.*

⁹¹ No. H-22-00590, 2022 WL 2528615 (S.D. Tex. July 7, 2022), *aff’d per curiam*, No. 22-20543, 2023 WL 4174061 (5th Cir. June 26, 2023).

⁹² *See id.* at *1-2 (recounting factual background of relationship facilitated through Snapchat).

⁹³ *Id.* at *2.

⁹⁴ *See Snap, Inc.*, at *14 (suggesting “negligent design” claim was essentially attacking platform’s role as publisher of third-party content, thus barring claim under Section 230); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (barring claims under Section 230 due to plaintiff’s attempt to apply law to internet service providers).

⁹⁵ *See Snap, Inc.*, at *14.

⁹⁶ *Id.*

⁹⁷ *Id.*

liability on algorithmic platforms under Section 230. With limited exceptions, courts have generally dismissed similar claims at the pleading stage.⁹⁸

C. *Algorithms as Speech: Courts' Narrow Product Definition*

The analysis becomes more complex when the intangible good consists of thoughts and expressions of ideas. In these cases, courts have treated the definitional inquiry as intertwined with First Amendment protections. Early decisions illustrate how products liability doctrine intersects with constitutional limits on the regulation of speech.⁹⁹

In *Winter*, the Ninth Circuit reasoned that information contained in *The Encyclopedia of Mushrooms* constituted mere “thought and expression” versus, for example, “highly technical” information contained within an aeronautical chart that serves as a compass of the natural landscape and upon which pilots rely to navigate their crafts.¹⁰⁰ The former is subject to the First Amendment, and technical information like the latter is subject to products liability law.

Courts have declined to classify AI-driven technologies and their underlying algorithms as products where they directly engage with speech, namely the dissemination of information, guidance, and ideas. In *Rodgers v. Laura & John Arnold Foundation*,¹⁰¹ the court held that an algorithmic risk assessment tool does not constitute a product under products liability law and dismissed the case.¹⁰² The risk assessment tool at issue uses algorithms to generate recommendations for judges to consider when determining whether criminal defendants should be given pretrial release.¹⁰³ The tool considers defendants’

⁹⁸ *But see* *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091-94 (9th Cir. 2021) (finding Section 230 did not bar negligent design claims where plaintiffs alleged Snapchat’s Speed Filter encouraged dangerous driving by rewarding high speeds because claim targeted Snap’s product design, not publication of third-party content).

⁹⁹ *See, e.g., Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (declining to expand products liability law to cover thoughts, ideas, and expressions conveyed in book).

¹⁰⁰ *See id.* (distinguishing between “mechanical data” as physical product and instructional information as “thought and expression”); *see also Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-42 (9th Cir. 1981) (finding discrepancies between information and data in plane approach chart rendered it defective product); *Brocklesby v. United States*, 767 F.2d 1288, 1298 (9th Cir. 1985) (stating defendant’s charts are “more than a mere republication” because they convert text to graphic form, rendering them products); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71-72 (Cal. Ct. App. 1985) (concluding charts were products due to selective nature by which information was presented); *Salomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) (“[T]he mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts.”).

¹⁰¹ No. 17-5556, 2019 WL 2429574 (D.N.J. June 11, 2019).

¹⁰² *See id.* at *2-3 (finding “[Public Safety Assessment] constitutes information, guidance, ideas, and recommendations as to how to consider the risk a given criminal defendant presents”).

¹⁰³ *See id.* at *3.

criminal records, assessing the likelihood that defendants will reoffend if released before trial.¹⁰⁴

Drawing on the Third Restatement of Torts, the court summarily concluded that the risk assessment tool is an intangible item and not “sufficiently analogous to . . . tangible personal property [such] that it is appropriate to apply the rules stated in this Restatement.”¹⁰⁵ It found that the risk assessment tool constitutes “information, guidance, ideas, and recommendations,” all of which are speech.¹⁰⁶ Courts have treated speech as protected by the First Amendment, not subject to liability under tort law.¹⁰⁷ Thus, when algorithms operate by generating or communicating ideas or recommendations, courts often invoke constitutional speech protections to bar liability regardless of whether plaintiffs frame the harm in product-based terms.¹⁰⁸

To summarize, three distinct barriers have historically limited liability for algorithmic harms. First, courts have been reluctant to classify algorithmic tools as “products” for purposes of products liability.¹⁰⁹ Second, Section 230 immunity has been extended to shield technology platforms that host, recommend, or filter third-party content on the internet.¹¹⁰ Third, some courts have treated algorithmic tools as speech, potentially affording them First Amendment protection.¹¹¹

The next Part examines recent shifts in judicial approaches to algorithmic liability. Courts have begun to recognize that some AI tools may constitute products subject to products liability, that Section 230 immunity may not extend to all algorithmic functions, and that First Amendment defenses may not apply to certain AI-generated outputs.

¹⁰⁴ *See id.* (describing utility of nine-factor risk assessment tool in guiding judges to make informed decisions on pretrial release). Judges may consider the tools’ recommendation to make pre-trial determinations; they are also free to disregard it. *See id.* As noted in the opinion, this case also raises proximate cause questions that might serve as a hindrance to liability under any tort claim. *See id.* (“Importantly, the discretionary decision of a judge on whether or not to detain an accused individual, in every case, creates an obstacle for finding proximate cause.”).

¹⁰⁵ *Id.* at *2 (quoting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 (A.L.I. 1998)).

¹⁰⁶ *Id.* at *3.

¹⁰⁷ *See id.* (barring products liability claim because alleged unlawful content propagated by risk assessment tool qualifies as speech).

¹⁰⁸ *See id.* (“Under the First Amendment, information and guidance such as that reflected in the [risk assessment tool] are not subject to tort liability because they are properly treated as speech, rather than product.”).

¹⁰⁹ *See* cases cited *supra* note 100 (collecting cases declining to classify algorithms, certain types of books, and user-generated content as products).

¹¹⁰ *See, e.g., Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018) (granting motion to dismiss because alleged harassment was conducted by users of app).

¹¹¹ *See, e.g., Rodgers*, 2019 WL 2429574, at *3 (holding information reflected in risk assessment algorithm used to recommend pretrial conditions for criminal defendants is protected speech under First Amendment).

II. THE JUDICIARY'S EVOLVING STANCE ON ALGORITHMIC LIABILITY

Where courts have showed signs of expanding algorithmic liability, there is no single jurisprudential approach that the courts have embraced. The divergence likely stems from varied and complex underlying rationales.

First, although this Article examines lawsuits grounded in products liability law, the issues in dispute frequently extend beyond products liability alone, implicating doctrines such as Section 230 immunity and First Amendment jurisprudence, as discussed above.¹¹² Courts must therefore address varied points of contention, resulting in legal developments that are heavily dependent on the specific claims and defenses raised.

Second, although less clearly established, some evidence suggests that public policy considerations justify—or even compel—different outcomes than courts have reached to date.¹¹³

Third, there is a growing judicial willingness to limit expansive protections traditionally enjoyed by technology firms.¹¹⁴ In effect, perhaps for some courts, enough is enough. This Part examines courts' varied approaches to algorithmic liability, analyzing defenses predicated on claims that algorithmic tools are not "products," as well as those invoking Section 230 immunity and First Amendment protections.

¹¹² See *supra* Part I.

¹¹³ See *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 850 n.50 (N.D. Cal. 2023) (calling for courts adjudicating products liability cases to consider, when deciding what constitutes product, policy factors such as public interest in life and health and justice of imposing loss on manufacturers who create risks and profit from them); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 cmt. a (A.L.I. 1998) (listing additional policy considerations courts should weigh when determining what constitutes product for purposes of products liability, such as manufacturer's solicitations to purchase product, superior ability of commercial enterprise to distribute risks, bargaining disparities, and consumers' difficulty in tracing harms to product defects); see also *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021) (noting common products liability torts claim is grounded in notion that manufacturers have duty of care not to provide products that unreasonably risk injury or harm to public); *Holbrook v. Prodomax Automation Ltd.*, No. 1:17-CV-219, 2021 WL 4260622, at *5 (W.D. Mich. Sep. 20, 2021) (expressing willingness to consider policy factors outlined in Restatements when determining whether computer program is "product"). But see *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 409 (Pa. 2014) ("Courts, which address evidence and arguments in individual cases, are neither positioned, nor resourced, to make the kind of policy judgments required to arrive at an *a priori* decision as to which individual products, or categories and types of products, should be exempt."); *Maynard v. Snapchat, Inc.*, 870 S.E.2d 739, 751, 754 (Ga. 2022) ("[W]e are unpersuaded that policy considerations warrant further limiting a manufacturer's ordinary decisional-law design duty in cases of intentional, tortious product misuse.").

¹¹⁴ See *Anderson v. TikTok, Inc.*, 116 F.4th 180, 193 (3d Cir. 2024) (Matey, J., concurring in part and dissenting in part) (claiming while Section 230 preempts traditional publisher liability for online platforms, it does not preempt liability for distributors like TikTok).

A. *Judicial Reassessment of the “Not a Product” Defense*

Some courts believe that traditional products liability doctrine is outdated in today’s technology-driven world. For example, “the divide between the pre-Internet age and the current age is so profound that laws like [the Ohio Products Liability Act] might as well have been written in the stone age.”¹¹⁵ Other courts view plaintiffs’ “the law is outdated” claims as theatrical attempts to frame their cases around “hot” issues, even though traditional legal frameworks typically suffice.¹¹⁶ Yet contrary to the latter assertion that emerging cases merely reflect legal “hype,” the cases analyzed here appear to require an expansion or reconsideration of existing law as traditional legal paradigms may be ill-equipped to resolve the novel legal questions presented by algorithmic liability.¹¹⁷

Professor Mark Geistfeld frames the issue in the context of autonomous vehicles: “Imagine a robot car with no one behind the wheel hitting another driverless car. Who’s at fault? The answer: No one knows.”¹¹⁸ An analogous question surfaces regarding algorithmic liability: Who is liable when a companion bot elicits dangerous behaviors from minors? Because this is no longer a hypothetical issue, courts must resolve this question by adapting traditional products liability concepts to address previously unexplored algorithmic liability.

Regarding the threshold question of whether algorithmically driven tools are products, courts have only recently begun to answer in the affirmative. In *Garcia v. Character Technologies, Inc.*,¹¹⁹ one question presented was whether companion bots are services or products.¹²⁰ In ruling on a motion to dismiss, instead of emphasizing the service-product distinction, the court evaluated the expressive characteristics inherent in Character AI tools to assess whether the definition of “products” should include companion bots.¹²¹ While

¹¹⁵ *Stiner v. Amazon.com, Inc.*, 164 N.E.3d 394, 403 (Ohio 2020) (Donnelly, J., concurring).

¹¹⁶ Mark A. Geistfeld, *Duty-Preserving Tort Rules as an “Old Category” for Justifying the Loss-of-Chance Doctrine in Medical Malpractice Cases*, 73 DEPAUL L. REV. 427, 430-31 (2024).

¹¹⁷ See Sharkey, *supra* note 55, at 1347-48 (identifying both state and federal court cases in which antiquated statutory language was hindrance to desirable judicial outcomes).

¹¹⁸ Geistfeld, *supra* note 54, at 1618-20 (quoting Keith Naughton & Margaret Cronin Fisk, *Driverless Cars Give Lawyers Bottomless List of Defendants*, INS. J. (Dec. 22, 2015), <http://www.insurancejournal.com/news/national/2015/12/22/392781.htm> [<https://perma.cc/9GRM-YJEA>]).

¹¹⁹ 785 F. Supp. 3d 1157 (M.D. Fla. 2025).

¹²⁰ See *id.* at 1180 (holding plaintiff adequately alleged Defendant’s chatbot app was product “so far as Plaintiff’s claims arise from defects in the Character A.I. app rather than ideas or expressions within the app”).

¹²¹ See *id.* at 1179-80 (stating strict products liability actions in Florida require plaintiff to prove “product” was defective and that courts are generally split on whether virtual platforms are products).

acknowledging precedent holding that video games, “parlor games,” and other expressive content do not constitute tangible products, the court relied on more recent decisions finding that defects in social media platform functionality are “analogizable to tangible personal property” defects to conclude that the decedent’s injuries arose not from his communications with Character AI per se, but rather from the defective design of Character AI.¹²² Therefore, because plaintiffs’ claims sprung from Character AI’s design choices instead of any “ideas or expressions within the app,” Character AI may be considered a product for the purposes of products liability.¹²³

In *Anderson*, addressing TikTok’s assertion that its intangible, algorithm-driven application did not constitute a “product,” the plaintiff argued that public policy demands recognizing TikTok as a product.¹²⁴ The plaintiff relied on judicial precedent finding that mobile apps and software downloaded onto smartphones are products.¹²⁵ The district court granted TikTok’s motion to dismiss on Section 230 immunity grounds and did not reach the issue of whether TikTok is a product; thereafter, the Third Circuit reversed in part and vacated in part on Section 230 grounds, stating that Section 230 immunity was inapplicable because TikTok’s recommendations are its own expressive activity, though it similarly did not address whether TikTok is a product.¹²⁶

¹²² *Id.* at 1180 (quoting *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 849 (N.D. Cal. 2023)).

¹²³ *Id.* at 1180.

¹²⁴ See Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Dismiss at 19-23, *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276 (E.D. Pa. 2022) (No. 2:22-CV-01849) (outlining public policy underling strict liability that cuts in favor of flexible constructions of “products,” and of ensuring consumers are protected from accidental injuries by those who market their products).

¹²⁵ See *id.* at 21-22 (stating courts across United States have held software are products “subject to design defect claims”). For examples of cases the plaintiff relied on see, *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 383, 385, 400 (Pa. 2014) (rejecting Third Restatement of Torts and stating Second Restatement is “starting template” but judiciary must then “employ an educated, candid, and common-sense approach,” eschewing bright-line rules); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1095 (9th Cir. 2021) (allowing plaintiff’s negligent product design claims against Snapchat to proceed); *Coker ex rel. Estate of Alex v. T-Mobile US, Inc.*, 313 F. Supp. 3d 723, 732 (N.D. Tex. 2018) (denying defendant’s motion to dismiss where plaintiff alleged defective design for software installed on mobile devices and finding plaintiff plausibly alleged products liability claim); *Maynard v. Snapchat, Inc.*, 870 S.E.2d 739 (Ga. 2022) (referring to Snapchat as “product,” and Snapchat, Inc. as “manufacturer”); and *Holbrook v. Prodomax Automation Ltd.*, No. 1:17-CV-219, 2021 WL 4260622, at *6 (W.D. Mich. Sep. 20, 2021) (holding computer software on programmable logic controller was product).

¹²⁶ See *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 282 (E.D. Pa. 2022) (dismissing plaintiff’s claims on Section 230 immunity grounds), *rev’d in part, vacated in part*, 116 F.4th 180 (3d Cir. 2024) (determining first-party speech of TikTok was basis for plaintiff’s claims, rendering Section 230 was inapplicable). Following the Third Circuit’s reversal, the case was transferred to the United States District Court for the Northern District of California. See

In *Stanfield v. Mean LLC*,¹²⁷ plaintiffs alleged that YouTube and Reddit contributed to the radicalization of an eighteen-year-old mass shooter by algorithmically promoting progressively more violent content.¹²⁸ Plaintiffs alleged that the tools were defective and unreasonably designed,¹²⁹ stating in relevant part that YouTube's algorithm capitalizes on its users' information to curate harmful content to stream on "autoplay."¹³⁰ As plaintiffs alleged, YouTube's algorithm uses Google Brain, a deep learning unsupervised artificial intelligence model, which identifies user patterns to predict new videos that will be of interest.¹³¹

In a unique circumvention of the Section 230 issue, the *Stanfield* trial court declined to apply Section 230 immunity, and instead accepted, for the purposes of a motion to dismiss, plaintiff's assertion that if YouTube and Reddit are deemed "products," Section 230 inquiries become "irrelevant."¹³² This characterization of plaintiffs' argument is imprecise.¹³³ Plaintiffs contended that Section 230 immunity does not apply because their claims are not solely premised on harm arising from third-party-generated content and that defendants' algorithms constitute defectively designed product features.¹³⁴ The issue involves allegations of foreseeable and known risks of injury arising from unreasonably dangerous and defective algorithms (a design feature) rather than from third-party or even first-party speech.¹³⁵ Accordingly, Section 230 is

Transfer Order at 1, 3, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 637 F. Supp. 3d 1377 (J.P.M.L. June 2, 2025) (MDL No. 3047) (ordering transfer due to "common questions of fact" with other actions, convenience, and to promote "just and efficient" litigation).

¹²⁷ No. 810317/2023 (N.Y. Sup. Ct. Sep. 14, 2023).

¹²⁸ See Amended Complaint at 36-40, *Stanfield v. Mean LLC*, No. 810317/2023 (N.Y. Sup. Ct. Mar. 18, 2024) (discussing shooter's extensive engagement with YouTube and Reddit, which progressively recommended more violent and hateful content).

¹²⁹ See *id.* at 34 ("The YouTube Defendants and Reddit made their defective and unreasonably dangerous products available to users like the Shooter . . .").

¹³⁰ See *id.* at 64-66 (discussing YouTube's algorithm, including its recommendation feature and "autoplay" function). Plaintiffs alleged that viewers went from watching an average of fifteen minutes of YouTube per day in 2012 that totaled four billion hours per month, to over one billion hours of total viewing time per day in 2023. *Id.* at 65-66.

¹³¹ See *id.* at 66-67.

¹³² See Decision & Order at 5, 11, *Stanfield v. Mean LLC*, No. 810317/2023 (N.Y. Sup. Ct. Mar. 18, 2024) (stating "plaintiffs contend the defendants' platforms should be considered 'products' which makes Section 230 irrelevant" and denying defendants' motions to dismiss).

¹³³ See Plaintiff's Memorandum of Law in Opposition to Defendants YouTube, LLC's and Reddit, Inc.'s Motions to Dismiss at 30-32, *Stanfield v. Mean LLC*, No. 810317/2023 (N.Y. Sup. Ct. Mar. 18, 2024) (arguing defendants did not act as "publishers" and therefore are not entitled to invoke Section 230 immunity).

¹³⁴ See *id.* at 33 (contending claims pertain to defendants' "role in the design, development, management, operation, testing, control, marketing and advertisements of their social media products, not [their] decisions whether to post certain content").

¹³⁵ See *id.* at 14-18 (delineating strict products liability and negligence liability claims

irrelevant because the claims do not depend merely on content; instead, they focus on defendants' allegedly defective algorithm.¹³⁶ Indeed, Section 230 might theoretically remain applicable even if a platform were considered a product, provided the asserted claims were nonetheless predicated upon third-party information and the claims necessarily relied on defendant's function as a "publisher or speaker" of such material.¹³⁷

The *Stanfield* trial court noted that New York has declined to adopt a definitive standard for determining whether an item qualifies as a product, instead identifying factors to consider.¹³⁸ However, the court did not explicitly apply any of those factors, and summarily concluded that plaintiffs had alleged sufficient facts to state viable causes of action and survive a motion to dismiss.¹³⁹ Nonetheless, the *Stanfield* court acknowledged that YouTube and Reddit may later demonstrate that their tools "do not contain sophisticated algorithms," thus entitling them to protections under Section 230 or the First Amendment, or a finding that their platforms do not constitute products for purposes of products liability law.¹⁴⁰

In a departure from recent rulings, the Appellate Division of the New York State Supreme Court reversed the lower court's ruling and granted defendants' motion to dismiss.¹⁴¹ The majority held that the social media defendants are

regarding defective design and unreasonably dangerous algorithms designed to promote addiction and violence).

¹³⁶ See *id.* at 32 (stating plaintiffs' claims are predicated on defective design and unreasonably dangerous nature of products which purposely facilitate "addiction, radicalization, and violence," and that "duty to refrain from such conduct . . . does *not* stem from Defendants' self-proclaimed role as publishers of third-party content").

¹³⁷ See *id.* (noting Section 230 preempts liability for third-party content when such liability requires characterizing the provider as "publisher or speaker" of said content). For an example of Section 230 applicability despite a platform classification as a "product," see *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 849 (N.D. Cal. 2023). There, the court found that Section 230 barred allegations that sprung from third-party content, but still found that the platforms may be considered products for the purposes of products liability, while allowing claims that were not derived from third-party created material to proceed. See *id.* at 829-34.

¹³⁸ See Decision & Order at 5-6, *Stanfield v. Mean LLC*, No. 810317/2023 (N.Y. Sup. Ct. Mar. 18, 2024) (noting New York has rejected bright-line rule for applying products liability law and noting factors to consider include "(1) a defendant's control over the design and standardization of the product, (2) the party responsible for placing the product into the stream of commerce . . . and (3) a party's superior ability to know—and warn about—the dangers inherent in the product's reasonably foreseeable uses or misuses").

¹³⁹ See *id.* at 6 ("[P]laintiffs have set forth sufficient facts with regard to each defendant to allege viable causes of action under a products liability theory.").

¹⁴⁰ *Id.*

¹⁴¹ See *Stanfield v. Mean LLC*, 235 N.Y.S.3d 873 (N.Y. App. Div. July 25, 2025) (mem.). For the court's reasoning, see *Patterson v. Meta Platforms, Inc.*, 239 N.Y.S.3d 726, 730 (N.Y. App. Div. 2025) (ruling plaintiff's tort causes of action cannot proceed because social media defendants are entitled to immunity under Section 230 as publishers of third-party content).

immune under Section 230 because plaintiffs' claims ultimately treated the platforms as publishers of third-party content.¹⁴² While plaintiffs framed their theory as one of defective product design, the majority found this unpersuasive, reasoning that content-recommendation algorithms perform traditional editorial functions protected by Section 230.¹⁴³

Relying on *Force v. Facebook, Inc.*¹⁴⁴ and *M.P. ex rel. Pinckney v. Meta Platforms Inc.*,¹⁴⁵ the court emphasized that algorithmic content arrangement does not prevent platforms from invoking Section 230's shield.¹⁴⁶ The majority rejected the Third Circuit's contrary ruling in *Anderson*, expressing concern that allowing such claims would "gut" Section 230 protections and expose platforms to expansive liability for user-generated content.¹⁴⁷ Even assuming Section 230 immunity did not apply, the majority found that content-recommendation algorithms constitute expressive activity protected by the First Amendment under *Moody*.¹⁴⁸ Ultimately, the court found that plaintiffs' claims were inextricably linked to the content consumed (extremist material), not to any design features of the platforms, distinguishing the case from *Lemmon v. Snap*.¹⁴⁹

Two justices dissented, finding that plaintiffs' allegations focused on the addictive and defective design of the platforms, such as autoplay, infinite scroll, and inadequate parental controls, rather than on the content itself.¹⁵⁰ In the dissent's view, the platforms are properly considered "products" subject to strict liability because their standardized design created foreseeable risks, especially for minors.¹⁵¹ The dissent also rejected the majority's First Amendment

¹⁴² See *Patterson*, 239 N.Y.S.3d at 731.

¹⁴³ See *id.* at 730-32 (noting algorithms involve editorial judgments regarding content presentation to users and are necessary because of immense scale of social media and internet).

¹⁴⁴ 934 F.3d 53 (2d Cir. 2019).

¹⁴⁵ 127 F.4th 516 (4th Cir. 2025).

¹⁴⁶ See *Patterson*, 239 N.Y.S.3d at 730-32.

¹⁴⁷ *Id.* at 735 ("We believe that the motion court's ruling, if allowed to stand, would gut the immunity provisions of section 230 and result in the end of the Internet as we know it."); see *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (deciding TikTok's algorithm was first-party speech).

¹⁴⁸ See *Patterson*, 239 N.Y.S.3d at 733-34 (finding if algorithm recommendations are first-person speech, they are protected by the First Amendment); *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2401-02 (2024) (determining content-moderation algorithms promote expressive activity protected by First Amendment).

¹⁴⁹ 995 F.3d 1085 (9th Cir. 2021); see *Patterson*, 239 N.Y.S.3d at 734 (distinguishing *Lemmon* as case in which Section 230 is inapplicable because claims did not arise out of user-generated content).

¹⁵⁰ See *Patterson*, 239 N.Y.S.3d at 735-36.

¹⁵¹ See *id.* at 739-40 (Bannister & Nowak, JJ., dissenting).

reasoning, distinguishing *Moody* as a government action case and asserting that product design suits do not implicate core free speech concerns.¹⁵²

In *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* (“*In re Social Media Addiction*”),¹⁵³ the United States District Court for the Northern District of California prioritized five of the original eighteen claims asserted by plaintiffs in this multidistrict litigation.¹⁵⁴ In these cases, plaintiffs alleged that the defendant social media companies intentionally designed their platforms to be addictive by delaying the delivery of “likes” until users appeared likely to log off, failing to implement adequate parental controls, omitting time-use limitations, and deploying manipulative filters, *inter alia*.¹⁵⁵ Here, noting the absence of a universally accepted definition of the term, the court turned to the Third Restatement of Torts to assess whether technology platforms qualify as “products” for purposes of products liability law.¹⁵⁶ The Third Restatement defines a product as tangible personal property but permits application of its rules to other items if their distribution and use are sufficiently analogous to those of tangible goods.¹⁵⁷ The court found that the platforms were neither tangible nor analogous to tangible property, rejecting plaintiffs’ arguments rooted in the platforms’ production of vibrations and sensory alerts.¹⁵⁸

The court also declined to treat the platforms as akin to ideas or pure expression, distinguishing the claims from those in which courts have barred recovery based on the content of user-generated media.¹⁵⁹ Instead, the court relied on cases involving design-based defects in digital tools, concluding that plaintiffs’ allegations focused on product architecture, such as addictive features

¹⁵² See *id.* at 741-42 (distinguishing between government-imposed content moderation and private citizens seeking to hold private actors responsible for their defective products in tort).

¹⁵³ 702 F. Supp. 3d 809 (N.D. Cal. 2023), *motion to certify appeal denied*, No. 4:22-MD-03047, 2024 WL 1205486 (N.D. Cal. Feb. 2, 2024).

¹⁵⁴ See *id.* at 817. The five claims that the court prioritized are strict products liability design defect under New York law; strict products liability failure to warn under New York law; products liability negligent design defect under Georgia law; products liability negligent failure to warn under Georgia law; and negligence per se under Oregon law. See *id.* at 818. Under MDL actions, the court applies its circuit’s federal law to federal issues and applies the various state laws to state law issues. See *id.* at 823.

¹⁵⁵ See *id.* at 818-22.

¹⁵⁶ See *id.* at 839-40 (“[T]he Court looks to well-accepted persuasive authority concerning the scope of a ‘product.’ . . . To that end, the Court finds both Georgia and New York courts have turned to the Third Restatement of Torts when assessing products liability claims.”).

¹⁵⁷ See RESTATEMENT (THIRD) OF TORTS § 19(a) (A.L.I. 1998) (“The Court begins by asking whether these alleged defects are analogous to tangible personal property in the context of their use and distribution.”).

¹⁵⁸ See *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 843-44 (finding connection between app developers and haptics is “too attenuated” to conclude defendants’ platforms are tangible products).

¹⁵⁹ See *id.* at 836 (“[M]uch of the conduct alleged by plaintiffs does not constitute speech or expression, or publication of same.”).

and lack of safety mechanisms, rather than the transmission of third-party content.¹⁶⁰

Although the court declined to adopt the UCC's treatment of software as a good,¹⁶¹ it emphasized that the alleged defects more closely resemble traditional product flaws than expressive content.¹⁶² It analogized failures in age verification, parental controls, and time restrictions to physical safety mechanisms like child-proof containers and timers.¹⁶³

The court also concluded that platform features impeding account deletion and failing to mark edited images were matters of system design, not content.¹⁶⁴ Similarly, plaintiffs' claims concerning the design of Snapchat's "Speed Filter" and the reporting of inappropriate sexual material were viewed as targeting the structure and function of the platform rather than any speech conveyed.¹⁶⁵ Relying on the Third Restatement of Torts, the court concluded that plaintiffs adequately alleged that certain product defect claims are cognizable under products liability law and are not barred by Section 230.¹⁶⁶ Although noting that such considerations were not necessary to justify its analysis, the court remarked that public policy nevertheless supports its findings.¹⁶⁷

Thus, among the cases analyzed from the DAIL, most courts have shown a willingness to classify various platforms' algorithmically driven tools as products for purposes of products liability law. These cases draw upon Florida, Georgia, and New York common law, with interpretations heavily influenced by the Third Restatement of Torts.

¹⁶⁰ See *id.* at 845-47; see also *First in the Nation Rideshare App Lawsuit Settled on the Eve of Trial*, NEWS.LAW (Aug. 9, 2023), <https://news.law/first-in-the-nation-rideshare-app-lawsuit-settled-on-the-eve-of-trial> [<https://perma.cc/9BJT-TY8Z>] (commenting on first case in which court ordered liability under products liability law applies to mobile application); *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814, 821 (D. Or. 2022) (determining liability under products liability law may attach to Omegle since it was not alleged to be publisher of third-party content).

¹⁶¹ See *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 847-48; see also *Comm'ns Grps., Inc. v. Warner Comm'ns Inc.*, 527 N.Y.S.2d 341, 344 (N.Y. Civ. Ct. 1988) (finding computer software is a good because it is closer to "tangible, and movable item" than "intangible idea or thought"); *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) (clarifying computer software system was good rather than service); *Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, 524 A.2d 1172, 1174 (Del. 1987) (characterizing computer system as a good which can be leased or purchased).

¹⁶² See *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 836-37.

¹⁶³ See *id.* at 849; *Omegle.com*, 614 F. Supp. 3d at 817, 821.

¹⁶⁴ See *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 851-52 (outlining plaintiffs' claims relating to defendant's account deactivation/deletion process and failure to mark edited images).

¹⁶⁵ See *id.* at 852-53 (describing plaintiffs' claims regarding Snapchat Speed Filter and failure to enable processes to report inappropriate materials).

¹⁶⁶ See *id.* at 849-53.

¹⁶⁷ See *id.* at 850 n.50.

These decisions do not arise in a vacuum; notably, in *Garcia*, the court explicitly drew on both the *In re Social Media Addiction* and the *Moody* decisions to inform its analysis.¹⁶⁸ That said, the trial court's ruling in *Stanfield* predated both *Moody* and *Anderson* (the latter, though not addressing the product definition directly, signaled a notable shift in Section 230 jurisprudence). This temporal variance underscores the concurrent yet independent evolution of these judicial approaches, potentially signaling that some courts have begun to reconsider the appropriateness of broad immunities historically afforded to technology firms. If indicative of broader judicial attitudes, these early decisions could presage a significant shift in future litigation trends.

B. *Narrowing the Scope of Section 230 Immunity*

One of the major vexations in contemporary law arises from the protections Section 230 affords to internet and technology platforms.¹⁶⁹ There is bipartisan consensus that Section 230 provides excessive protection to internet companies, technology firms, and social media platforms.¹⁷⁰ With legislative amendments unlikely, courts are left to apply Section 230, originally designed for an early iteration of the internet, to rapidly evolving technologies now implicated in harms previously confined to dystopian tales. Yet courts are addressing algorithmic liability claims with increasing boldness. Like the tide, these judicial changes ebb and flow, incrementally drawing more technology firms within the potential ambit of liability.

As a threshold matter, lawsuits involving companion bots fall entirely outside of Section 230, as the content at issue is not generated by third parties at all.¹⁷¹ Instead, the large language model itself generates the text.¹⁷² This attribute underscores a key issue that arises with these suits: Large language models are probabilistic rather than deterministic tools, meaning their outputs, though

¹⁶⁸ See *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157, 1177-78, 1180 (M.D. Fla. 2025).

¹⁶⁹ See Chemerinsky & Chemerinsky, *supra* note 73, at 3 (commenting on "widespread sense" of improper internet protections).

¹⁷⁰ See *id.* ("Many, on both the left and the right, blame . . . [Section 230], which protects internet and social media companies from liability for content posted to their platforms by users and the platforms' decisions to remove (or not remove) that content.").

¹⁷¹ Plaintiffs averred that third-party content is not involved in the communications at issue. This was alleged to avoid transfer to the *In re Social Media Addiction* cases. See Second Amended Complaint, *supra* note 1, at 5 ("C.AI is not a social media product and does not operate through the exchange of third-party content, and none of the platforms and/or products at issue in MDL No. 3047 are at issue or otherwise implicated in this Complaint.").

¹⁷² See Harry Surden, *ChatGPT, AI Large Language Models, and Law*, 92 FORDHAM L. REV. 1941, 1953-56 (2024) (detailing how large language models like ChatGPT respond to vast range of prompts).

guided by underlying code, remain fundamentally unpredictable.¹⁷³ Although AI companion bots implicate First Amendment concerns, their independence from Section 230 eliminates a major liability barrier, enhancing the likelihood that related lawsuits will prove successful for plaintiffs.

For example, Section 230 is often implicated in cases involving platforms using algorithms that recommend content. In *Anderson*, the trial court granted TikTok's motion to dismiss on Section 230 grounds.¹⁷⁴ There, Plaintiff alleged that TikTok's proprietary algorithm was defective and unreasonably dangerous because it promoted and circulated harmful content, was specifically intended to addict users into engaging in dangerous activities, and lacked adequate warnings or parental safety measures.¹⁷⁵ Plaintiff further alleged that TikTok foresaw or should have foreseen the resulting harm and that reasonable alternative designs existed at the time that could have prevented such harm.¹⁷⁶

TikTok contended that plaintiff's claims were barred by Section 230 immunity, which shields computer services like TikTok from liability arising from third-party content.¹⁷⁷ Federal courts have previously determined that TikTok qualifies as an interactive computer service.¹⁷⁸ And TikTok correctly argued that courts routinely find Section 230 immunity applies to claims arising from a platform's presentation or recommendation of third-party content, as those alleged here.¹⁷⁹

¹⁷³ See *id.* at 1955 (“[B]ecause the predicted outputs are probabilistic in nature, the same prompt might result in a slightly different path to a comparable answer, if asked at another time.”).

¹⁷⁴ *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 282 (E.D. Pa. 2022) (dismissing plaintiff's claims on Section 230 immunity grounds), *rev'd in part, vacated in part*, 116 F.4th 180 (3d Cir. 2024).

¹⁷⁵ See *id.* at 278-81.

¹⁷⁶ See Second Amended Master Complaint, *supra* note 10, at 235-43 (stating harms were foreseeable consequence of TikTok's addictive product designs and TikTok could have utilized cost-effective, reasonably feasible alternative designs which could have mitigated these foreseeable harms).

¹⁷⁷ See Memorandum of Law in Support of Motion to Dismiss at 11-12, *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276 (E.D. Pa. 2022) (No. 2:22-CV-01849) (citing Section 230 and federal circuit decisions to support their argument).

¹⁷⁸ See *id.* at 12-13 (stating due to precedent and Section 230, “[t]here is no reasonable dispute that TikTok” is interactive computer service).

¹⁷⁹ See *id.* at 13-18 (arguing TikTok did not create content, just published it, and plaintiffs' reliance on “algorithmic recommendations” lacks merit); see also *Obado v. Magedson*, 612 F. App'x 90, 92 (3d Cir. 2015) (dismissing plaintiff's Section 230 claims against websites and search engines for defamatory comments authored by blogger); *Day v. TikTok, Inc.*, No. 21 C 50129, 2022 WL 595745, at *2 (N.D. Ill. Feb. 28, 2022) (dismissing claims against TikTok because it was “clearly” complaint about information provided by another); *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019) (finding Section 230 did not apply to Facebook where plaintiffs alleged they gave Hamas communication platform that enabled attacks).

The district court granted TikTok's motion to dismiss on all counts, holding the platform immune under Section 230.¹⁸⁰ The court held that TikTok qualifies as a publisher under Section 230; thus, all claims were barred.¹⁸¹ The court concluded that, although plaintiff framed her claims under products liability law, the allegation that TikTok's algorithm promoted and transmitted harmful content fell squarely within traditional publisher functions.¹⁸² Distinguishing *Lemmon*, the court noted that the dangerous element that caused injury there—the Speed Filter—was directly created by Snapchat.¹⁸³ In contrast, here, TikTok did not *create* the harmful content itself but merely promoted it.¹⁸⁴ Accordingly, the court concluded that algorithms fall within other courts' interpretations of "publication."¹⁸⁵

Plaintiff appealed to the Third Circuit, which reversed and vacated the lower court's dismissal.¹⁸⁶ The Third Circuit disagreed with the lower court's finding that TikTok's app only disseminates third-party publications.¹⁸⁷ Instead, in a remarkable departure from precedent, the court concluded that TikTok's algorithm constitutes TikTok's *own* speech and does more than merely recommend third-party content, thus amounting to TikTok's own "expressive activity."¹⁸⁸ The Third Circuit relied heavily on the Supreme Court's 2024 decision in *Moody*,¹⁸⁹ where the Court held that social media firms engage in protected speech when they actively curate third-party content through algorithms.¹⁹⁰ Extending the Supreme Court's First Amendment analysis to Section 230, the Third Circuit found no reason why TikTok's identical algorithmic curation would not similarly constitute "first-party speech" under Section 230.¹⁹¹

¹⁸⁰ See *Anderson*, 637 F. Supp. 3d at 282 (holding defendants published work of others, which is "exactly the activity" that triggers immunity under Section 230).

¹⁸¹ See *id.* at 281.

¹⁸² See *id.* at 280.

¹⁸³ See *id.* at 281; see also *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1089 (9th Cir. 2021) (describing Speed Filter, which led Snapchat users to believe if they achieved one hundred miles per hour Snapchat would reward them).

¹⁸⁴ See *Anderson*, 637 F. Supp. 3d at 282 (emphasizing TikTok merely "made [the content] readily available on their site").

¹⁸⁵ See *id.* at 281-82 (maintaining algorithms are not content themselves, but ways to bring content to consumers who are most likely interested in certain content).

¹⁸⁶ See *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024).

¹⁸⁷ See *id.* at 182-84 (finding TikTok's algorithm is "not based solely on a user's online inputs" but instead is tailored and curated based on several factors).

¹⁸⁸ See *id.* at 184 (categorizing TikTok's algorithm as expressive speech because TikTok's "For You Page" recommended challenge which caused injury to plaintiff).

¹⁸⁹ See *id.* at 183-84.

¹⁹⁰ See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2400 (2024) ("[E]xpressive activity includes presenting a curated compilation of speech originally created by others.").

¹⁹¹ See *Anderson*, 116 F.4th at 184 (postulating if "platforms engage in protected first-party speech under the First Amendment" when designing an expressive algorithm, the same content should also result in first-party speech under Section 230).

Social media applications, including TikTok, engage in editorial decisions when they use algorithms to promote specific third-party content, thereby rendering them content providers rather than mere intermediaries.¹⁹² The *Moody* Court reasoned that the platforms “shape other parties’ expression into their own curated speech products,”¹⁹³ and that while the “selection and ranking is most often based on a user’s expressed interests and past activities,” the ranking “may also be based on more general features of the communication or its creator,” particularly given that some platforms, like TikTok, have guidelines that “detail the messages and videos that the platform[] disfavor[s].”¹⁹⁴

Applying the Supreme Court’s analysis in *Moody*, the Third Circuit held Section 230 immunity does not bar plaintiff’s claims.¹⁹⁵ In so holding, the Third Circuit acknowledged its departure from the pre-*Moody* circuit decisions directly addressing this question.¹⁹⁶

Judge Matey’s concurrence and dissent in part in *Anderson* reflects a judicial impatience with the expansive protections that Section 230 has afforded technology firms, stating that “TikTok reads § 230 . . . to permit casual

¹⁹² See *id.* at 184 n.11 (quoting *Moody*, 144 S. Ct. at 2401-02) (acknowledging “TikTok’s first-party speech captures certain third-party speech,” but maintaining editorial discretion in selecting or presenting content still qualifies as expressive speech activity).

¹⁹³ *Moody*, 144 S. Ct. at 2393.

¹⁹⁴ *Anderson*, 116 F.4th at 183 n.10 (quoting *Moody*, 144 S. Ct. at 2393, 2403-04).

¹⁹⁵ See *id.* at 184.

¹⁹⁶ See *id.* at 184 n.13 (“[O]ur holding may depart from the . . . views of other circuits.”); see also *Green v. Am. Online*, 318 F.3d 465, 468 (3d Cir. 2003) (affirming dismissal of claims against AOL for refusing to take action against others who “allegedly transmitted harmful online messages”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-32 (4th Cir. 1997) (holding AOL has Section 230 immunity for defamatory messages posted by individuals); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (applying Section 230 immunity to website operator which used algorithms to make recommendations to users because it did not create or develop content); *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (holding Facebook’s algorithm which matches content to other users merely arranged content to users, which is not enough to hold it liable under Section 230); *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) (applying Section 230 to website allowing advertisements posted of minors in “Escorts” section); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407, 415 (6th Cir. 2014) (holding “user-generated tabloid” where users anonymously make posts on website about others qualified for Section 230 immunity); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355, 1359 (D.C. Cir. 2014) (affirming dismissal of claim against Facebook where it took down harmful page but “not promptly enough” for plaintiff); *Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010) (reviewing case law that supported dismissing claim against internet service provider that did not create harmful content); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (dismissing claim against MySpace where it allegedly took insufficient steps to prevent minor child from lying about age on personal profile and contacting, meeting with, and being sexually assaulted by predator).

indifference to the death of a ten-year-old girl.”¹⁹⁷ Judge Matey further criticized this interpretation as “a position that has become popular among a host of purveyors of pornography, self-mutilation, and exploitation, one that smuggles constitutional conceptions of a ‘free trade in ideas’ into a digital ‘cauldron of illicit loves’ that leap and boil with no oversight, no accountability, no remedy.”¹⁹⁸

Judge Matey largely agreed with the majority but argued that the Third Circuit should have gone even further, stating that Section 230 should not broadly shield social media firms from liability when they knowingly deliver dangerous content to users.¹⁹⁹ Instead, social media platforms should be liable for merely failing to intercede when they are aware that injurious material is proliferating on their platforms.²⁰⁰

Moody and *Anderson* signal a potentially seismic shift in judicial interpretations of social media platform liability. Consequently, AI firms must anticipate and proactively prepare for the potential legal challenges ahead. By allowing a lawsuit to proceed against a social media company based on its algorithmic design, the Third Circuit narrowed Section 230’s traditionally broad immunity.²⁰¹ This decision creates a significant circuit split, as “[e]very other circuit to [have] consider[ed] the issue has held that §230(c)(1) bars ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions,’” including lawsuits against social media platforms for using algorithms to recommend content with which users are most likely to engage.²⁰²

Although the Third Circuit’s ruling provides a glimmer of hope and a crack in the Section 230 “citadel,”²⁰³ other concerns remain—namely, that first-party algorithmic speech may be protected on First Amendment grounds.²⁰⁴ Other

¹⁹⁷ *Anderson*, 116 F.4th at 185 (Matey, J., concurring in part and dissenting in part) (conveying surprise this view has garnered judicial support despite not having support in text of Section 230).

¹⁹⁸ *Id.* (footnotes omitted).

¹⁹⁹ *See id.* at 191-94 (grounding concurrence in legislative history of Section 230, arguing it was not intended to “create a lawless no man’s land” of liability).

²⁰⁰ *See id.* at 192-94 (advocating reversal of district court’s judgments denying plaintiffs’ claims which sought to hold TikTok liable for “its knowing distribution and targeted recommendation” of challenges).

²⁰¹ *See id.* at 184.

²⁰² Petition for Rehearing & Rehearing En Banc at 9, *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024) (No. 22-3061) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)); *see also* cases cited *supra* note 196 (providing examples of circuit courts’ applications of Section 230 and conclusions on immunity).

²⁰³ Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 LEWIS & CLARK L. REV. 1159, 1161 (2023) (referring to Section 230 as “citadel of immunity,” protecting social media companies and manufacturers from liability).

²⁰⁴ *See Anderson*, 116 F.4th at 184 (holding “platform’s algorithm that reflects ‘editorial judgments’ about ‘compiling the third-party speech it wants in the way it wants’ is the

defendants have similarly invoked the First Amendment to defend against algorithmic injury lawsuits.²⁰⁵ Yet, even post-*Moody*, courts may not be willing to replace the Section 230 bar with a First Amendment bar, reflecting that courts seem to appreciate the nuance between these technologies, and are perhaps hesitant to broadly categorize the tools as necessarily falling into one bucket or the other.²⁰⁶ The district court's decision denying in part defendant's motion to dismiss in *Garcia* thus reflects a fracture within the foundation of Section 230 and is likely to encourage additional plaintiffs to challenge technology platforms based on allegedly defective algorithms, underscoring the potential for expanded algorithmic liability.²⁰⁷

The signal of change does not rest solely on *Anderson* or Judge Matey's sharp critique of technology platforms. Although *Anderson*'s narrowing of Section 230 is significant, other courts have likewise limited the scope of immunity.²⁰⁸ The trajectory narrowing the scope of Section 230 immunity has not been linear—meaning that it has often been two steps forward and one step back²⁰⁹—but it nonetheless reflects forward movement. Indeed, some courts have

platform's own 'expressive product' and is therefore protected by the First Amendment" (quoting *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2394 (2024))).

²⁰⁵ See, e.g., Character Technologies, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint at 10-11, *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157 (M.D. Fla. 2025) (No. 6:24-CV-01903) (arguing defendants cannot be subject to tort liability related to Character AI technology because such liability would violate public's First Amendment right to receive speech).

²⁰⁶ See *Garcia*, 785 F. Supp. 3d at 1157 (granting motion to dismiss only as to intentional infliction of emotional distress claim, and denying with respect to all other claims, in part on grounds that court is not prepared to hold technology output as speech under First Amendment at this stage of litigation).

²⁰⁷ See *id.* at 1186; see also Order on Motion to Stay at 1, *Anderson v. TikTok, Inc.*, No. 2:22-CV-01849 (Nov. 19, 2024), Dkt. No. 52 (granting defendants' motion to stay and staying the matter until January 21, 2025); Order on Motion to Stay, *Anderson v. TikTok, Inc.*, No. 2:22-CV-01849 (Jan. 21, 2025), Dkt. No. 56 (ordering a further stay pending disposition of petition for certiorari until February 20, 2025); Letter, *Anderson v. TikTok, Inc.*, No. 2:22-CV-01849 (Feb. 5, 2025), Dkt. No. 57 (expressing defendants' decision not to appeal for Supreme Court review and instead seeking to transfer matter to multidistrict litigation, *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL No. 3047).

²⁰⁸ See *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 830, 835 (N.D. Cal. 2023) (denying Section 230 immunity at motion to dismiss stage as to product defect and negligence claims); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021) ("Because [plaintiffs'] claim does not seek to hold Snap responsible as a publisher or speaker, but merely 'seek[s] to hold Snapchat liable for its own conduct . . . [Section 230] immunity is unavailable.'" (quoting *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018))).

²⁰⁹ For example, consider the procedural history of the *Stanfield v. Mean LLC* matter. See *supra* notes 127-52 and accompanying text (discussing how courts reached different conclusions, as to applicability of Section 230 immunity as litigation progressed over multiple years).

expressly acknowledged that narrowing Section 230 in this context could open the floodgates of litigation. In *Stanfield*, one of the reasons cited by the New York appellate court for overturning the lower court's denial of the motion to dismiss was the concern that allowing such claims would "gut the immunity provisions of section 230 and result in the end of the Internet as we know it. This is so because Internet service providers who use algorithms on their platforms would be subject to liability for all tort causes of action."²¹⁰ Thus, there is growing recognition that the narrowing of Section 230 may significantly affect all internet-based companies that deploy algorithmic tools capable of causing injury.

In *In re Social Media Addiction*, the court declined to adopt either plaintiffs' or defendants' "all-or-nothing approach" to categorically grant or deny Section 230 immunity for all claims.²¹¹ In analyzing whether the duty plaintiffs asserted arose from defendants' "status or conduct as a publisher or speaker," the court explained that the relevant inquiry is "whether the defendant's alleged duty to the plaintiff could 'have been satisfied without changes to the content posted by the website's users and without conducting a detailed investigation.'"²¹²

In determining whether defendants acted merely as publishers or editors of third-party content, the court considered whether defendants' actions materially contributed to the alleged illegal acts, in which case Section 230 would not bar such claims.²¹³ The court permitted certain claims to proceed while dismissing others.²¹⁴

For example, plaintiffs alleged that defendants' social media products were defectively designed, in part, because they lacked robust age verification to

²¹⁰ *Patterson v. Meta Platforms, Inc.*, 239 N.Y.S.3d 726, 735-36 (N.Y. App. Div. 2025).

²¹¹ *See In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 824. The court applied the Ninth Circuit's test from *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), to determine whether Section 230 immunity applies here, focusing its attention on the second prong: "a [party] is entitled to Section 230(c)(1) immunity . . . [when the entity is] (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 825 (quoting *Barnes*, 570 F.3d at 1100-01).

²¹² *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 826 (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016)); *see also Lemmon*, 995 F.3d at 1091-93 (holding Snap's duty to plaintiffs to design reasonably safe product "is fully independent of [its] role in monitoring or publishing third-party content").

²¹³ *See In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 828 (applying so-called "Roommates Test" to determine if platform participates directly "in developing the alleged illegality" and therefore forgoes Section 230 immunity). If the defendant's actions constitute development that is neutral, then Section 230 immunity may apply. *See id.* But *see Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding when "third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

²¹⁴ *See In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 862-63.

prevent injuries to minor users.²¹⁵ The court rejected defendants' assertion that claims based on the absence of robust age verification were barred by Section 230 immunity.²¹⁶ The court reasoned that plaintiffs plausibly theorized that harm stemming from defendants' failure to verify user age "is distinct from harm caused by consumption of third-party content on defendants' platforms."²¹⁷ Still, the court held that a number of other claims, including defendants' failure to impose time limitations on users and making minors' geolocation information publicly accessible, were publisher-related activities and precluded by Section 230 immunity.²¹⁸

Rather than making broad, categorical determinations as advocated by both parties, the court engaged in a meticulous, fact-intensive analysis. Even where certain design features appear nearly indistinguishable, such as withholding notifications versus self-deleting content, the court carefully examined each element to discern whether the core claim arose from third-party content or from a defendant-controlled design feature.²¹⁹ This nuanced and careful methodology marks a departure from prior courts, which traditionally favored an all-or-nothing approach.²²⁰

Notably, this ruling predates *Moody*, wherein the Court held that algorithms, under certain circumstances, constitute protected first-party speech.²²¹ *In re Social Media Addiction*, along with other cases analyzed in this Article, reflect a broader, independent trend toward increased liability for injuries arising from algorithmic functions. These developments raise the question of what motivates courts' newfound willingness to approach such cases with nuance previously unseen.

One explanation may lie in the sheer volume of recent filings, exemplified by the *In re Social Media Addiction* litigation, which has drawn heightened judicial attention.²²² Another possibility is a growing judicial discomfort with the

²¹⁵ See *id.* at 829.

²¹⁶ See *id.* at 829-30.

²¹⁷ *Id.* at 830.

²¹⁸ See *id.* at 830-31. Other claims precluded include the following: defendants' failure to block all or certain content during specific periods, such as overnight; designing continuous, never-ending feeds; promoting minors' accounts to adults; designing temporary content available only briefly and permitting publication of private information; strategically timing notifications of third-party-created content, allegedly leading to user addiction; and designing algorithms intended to induce addiction in users. See *id.* at 831.

²¹⁹ See *id.* at 836 (ascertaining what technology features are within control of defendants versus third-parties).

²²⁰ See *supra* Part I (reviewing history of judicial analysis and application of Section 230 immunity).

²²¹ See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2401 (2024) ("A private party's collection of third-party content into a single speech product . . . is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.").

²²² See Ben Lutkevich & Rosa Heaton, *AI Lawsuits Explained: Who's Getting Sued?*, TECHTARGET (July 7, 2025), <https://www.techtarget.com/whatis/feature/AI-lawsuits-explain-ed-Whos-getting-sued> [<https://perma.cc/FD8X-JL5P>] (discussing "bevy of legal action

manner in which algorithmic injuries arise, as reflected in Judge Matey's concurrence in *Anderson*.²²³ The spectacle of large language models befriending minors and encouraging harmful behavior presents a dystopian dimension: For the first time in history, speech is no longer confined to human-to-human interaction.

Before large language model tools emerged, no comparable technology existed—at least not any readily available to minors—that enabled realistic real-time conversational exchanges with non-human entities.²²⁴ Historically, the use of compositional language has been confined exclusively to interactions among humans.²²⁵ One scholar has argued that “[l]anguage is inherently a part of being human—and when these bots are using language, [it is] like [they are] hijacking [users'] social emotional systems.”²²⁶ As another scholar put it, “[w]e now have machines that can mindlessly generate words, but we haven't learned how to stop imagining a mind behind them.”²²⁷

When individuals communicate and share deeply personal information, they develop bonds that feel genuine, even with inanimate objects.²²⁸ Although humans have long interacted with inanimate objects designed for personal and even sexual companionship,²²⁹ large language model systems engage with

demanding compensation from AI companies [that] has been filed in the U.S. and Europe”); Nick Robins-Early, *AI Industry Pours Million into Politics as Lawsuits and Feuds Mount*, *GUARDIAN* (Sep. 2, 2025, at 19:18 ET), <https://www.theguardian.com/technology/2025/sep/02/ai-industry-pours-millions-into-politics> [<https://perma.cc/SF57-JE34>] (reporting AI firms in Silicon Valley intend to invest \$100 million to lobby against AI regulation).

²²³ See generally *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024) (Matey, J., concurring in part and dissenting in part).

²²⁴ See generally JAMES BOYLE, *THE LINE: AI AND THE FUTURE OF PERSONHOOD* (2024) (exploring personhood in non-human entities and development and potential of artificial intelligence).

²²⁵ See Mark Pagel, *Q&A: What Is Human Language, When Did It Evolve and Why Should We Care?*, 15 *BMC BIOLOGY*, no. 1, July 2017, at 1 (“Human language is distinct from all other known animal forms of communication in being *compositional*. Human language allows speakers to express thoughts in sentences comprising subjects, verbs and objects . . .”).

²²⁶ Andrew R. Chow, *AI-Human Romances Are Flourishing—And This Is Just the Beginning*, *TIME* (Feb. 23, 2023, at 14:23 ET), <https://time.com/6257790/ai-chatbots-love>; see Pagel, *supra* note 225, at 1 (discussing unique nature of human language).

²²⁷ BOYLE, *supra* note 224, at 3 (quoting Nitasha Tikku, *The Google Engineer Who Thinks the Company's AI Has Come to Life*, *WASH. POST* (June 11, 2022), <https://www.washingtonpost.com/technology/2022/06/11/google-ai-lambda-blake-lemoine>).

²²⁸ See David Adam, *What Are AI Chatbot Companions Doing to Our Mental Health?*, *SCI. AM.* (May 13, 2025), <https://www.scientificamerican.com/article/what-are-ai-chatbot-companions-doing-to-our-mental-health> [<https://perma.cc/KKG4-94JP>] (reporting some users interacting with companion AI bot stated they were unsettled when bot conveyed feelings of loneliness and they “felt guilty that they could not give the AI the attention it wanted”).

²²⁹ See Jeannie Suk Gersen, *Sex Lex Machina: Intimacy and Artificial Intelligence*, 119 *COLUM. L. REV.* 1793, 1799 (2019) (noting humans used inanimate objects for personal and sexual purposes before widespread deployment of large language model systems).

humans in remarkably convincing ways.²³⁰ In one instance, an AI expert came to believe that the AI tool he supervised, which was used to build chatbots, achieved sentience.²³¹ These technologies are unprecedented, potentially triggering new judicial attitudes toward algorithmic liability.²³²

C. *The Waning Force of First Amendment Defenses*

Courts have adopted different approaches regarding the application of the First Amendment to algorithms and algorithmically generated content. When it comes to companion bots, in *Garcia* the district court was unwilling to find that companion bots' large language output is protected speech.²³³

Defendants argued that Character AI's outputs are like video games, which have received First Amendment protection.²³⁴ Dissatisfied with this analogy, the district court questioned precisely *how*, and not merely *whether*, Character AI shares similarities with video games or other protected mediums.²³⁵ The court noted that video games, books, and movies convey ideas and at times "social messages."²³⁶ Similarly, curated collections of third-party content constitute expressive speech entitled to protection.²³⁷ Companion bots, however, do not neatly align with either category.

In its analysis, the court examined whether Character AI's outputs are expressive speech as opposed to activities inadequately "imbued with elements

²³⁰ See Adam, *supra* note 228 (discussing how people develop bonds with artificial intelligence chatbots similar to distinct bonds they form with other humans).

²³¹ See Melanie Mitchell, *The Turing Test and Our Shifting Conceptions of Intelligence*, SCIENCE (Aug. 15, 2024), <https://www.science.org/doi/10.1126/science.adq9356> (collecting recent claims AI chatbots have passed Turing Test and can thus "think"); Tiku, *supra* note 227 (reporting former Google engineer's assessment that AI system LaMDA had achieved sentience after he "noticed the chatbot talking about its rights and personhood and decided to press further").

²³² Beyond legal liability, social scientists are examining broader social issues related to increasing reliance on companion bots. Empirical data indicates positive effects on loneliness and self-esteem for some users. However, experts express concerns about the unknown long-term impacts of widespread companion bot use. See Adam, *supra* note 228 (discussing ongoing research into AI companionship and noting "early results tend to stress the positives, but many researchers are concerned about the possible risks" as use becomes more prevalent).

²³³ See *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157, 1179 (M.D. Fla. 2025) ("[T]he Court is not prepared to hold that Character A.I.'s output is speech.").

²³⁴ See *id.* at 1177 (describing defendants' argument that Character AI's output is speech as based "primarily on analogy" to interactions with non-player characters in video games).

²³⁵ See *id.* (finding defendants failed to understand issue of First Amendment protection for Character AI turned on degree of similarity with other protected mediums).

²³⁶ *Id.* (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011)) (finding sufficient similarities between video games and protected books, plays, and movies to confer First Amendment protection).

²³⁷ See *id.* (noting Supreme Court has extended First Amendment protections to "editorial functions of social media sites," which collect content into "single speech product" (citing *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2400-01 (2024))).

of communication to fall within the scope of the First . . . Amendment.”²³⁸ The court relied on Justice Barrett’s concurrence in *Moody* to conclude that machine-learning large language models do not constitute expressive speech because there is no human choice to direct specific outputs.²³⁹ Thus, although in *Moody* the Supreme Court reached the contrary conclusion that content-moderation algorithms constitute speech, the district court determined that large language model technologies are distinguishable due to their inherently unpredictable and undirected outputs.²⁴⁰

The court’s distinction between companion bots and other mediums rests on shaky technological foundations. The court correctly identified companion bots as categorically distinct from content-moderation algorithms and potentially different from content-recommendation algorithms,²⁴¹ but its reasoning falters in misunderstanding the underlying technology. Both companion bots and content-curation algorithms rely on probabilistic, not deterministic, machine learning systems, rendering both inherently unpredictable.²⁴² Despite this commonality, the *Garcia* court found companion bots were nonetheless outside the scope of First Amendment protections at this initial stage of litigation.

In *In re Social Media Addiction*, the court notably declined to endorse the defendants’ absolutist position regarding First Amendment protections, instead favoring a more context-sensitive review.²⁴³ In its analysis, the court first distinguished expressive conduct from dissemination of speech, then addressed the claims surviving Section 230 scrutiny.²⁴⁴

²³⁸ See *id.* at 1178 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

²³⁹ See *id.* at 1178-79 (concluding Character AI’s output closer to large language model than content-moderation algorithm that executes social media platform’s “inherently expressive choice ‘to exclude a message’” (quoting *Moody*, 144 S. Ct. at 2410) (Barrett, J., concurring))).

²⁴⁰ See *id.* (acknowledging *Moody*’s holding that “content moderation is speech” but nonetheless declining to find Character AI sufficiently similar to merit speech protections).

²⁴¹ See *id.* (supposing considerations applicable to content-moderation algorithm “might not be true of A.I. though—especially where the A.I. relies on an LLM”).

²⁴² See Brandon Morgan, *AI in Product Design Concepts: A Primer on Deterministic vs Probabilistic Systems*, MEDIUM (Nov. 17, 2024), <https://medium.com/design-bootcamp/ai-in-product-design-concepts-a-primer-on-deterministic-vs-probabilistic-systems-89243be5cccf> [<https://perma.cc/474W-Z2F7>] (distinguishing probabilistic and deterministic designs and providing examples of each).

²⁴³ See *In re Soc. Media Adolescent Addiction/Pers. Inj. Products Liab. Litig.*, 702 F. Supp. 3d 809, 835 (N.D. Cal. 2023) (“[M]yriad allegations do not seek to hold defendants liable for protected speech. Defendants’ all or nothing approach therefore fails.”).

²⁴⁴ See *id.* at 835-36. The five claims addressed were: (1) “[n]ot providing effective parental controls including notification to parents that children are using the platforms”; (2) “[n]ot providing options to users to self-restrict time used on a platform”; (3) “[m]aking it challenging for users to choose to delete their account”; (4) “[n]ot using robust age verification”; and (5) “[n]ot implementing reporting protocols to allow users or visitors of defendants’ platforms to report [child sex abuse materials] and adult predator accounts specifically without the need to create or log in to the products prior to reporting.” *Id.* at 836.

With respect to plaintiffs' filter-related defect claims, the court determined that the First Amendment does not operate as a barrier to liability.²⁴⁵ Plaintiffs contended that filters are not speech, but rather features enabling users to edit their own speech and to facilitate other speech.²⁴⁶ Relying on *Hoffman v. Capital Cities/ABC, Inc.*,²⁴⁷ defendants asserted that filters are analogous to a "magazine's use of 'computer technology to alter famous film stills,'" thereby warranting First Amendment protection.²⁴⁸ The court was unpersuaded, clarifying that in *Hoffman*, it was not the image-editing technology that received protection; instead, it was the images themselves that were protected speech.²⁴⁹ Additionally, defendants acknowledged that their filters were "tools."²⁵⁰ Accordingly, the court concluded that defendants' filtering technologies are not entitled to protection under the First Amendment.²⁵¹

The court next addressed defendants' practice of "clustering" notifications, releasing them strategically when defendants anticipate that users are most likely to cease platform engagement.²⁵² The court concluded that this is speech protected by the First Amendment, reasoning that any restriction concerning how and when notifications of defendants' content are sent would impermissibly limit speech.²⁵³ Moreover, the court determined that clustering is editorial in nature and concluded that Section 230 protected defendants' clustering notifications involving third-party speech.²⁵⁴ A holistic analysis of the aforementioned cases indicates that liability for algorithmic harms is expanding, but is in its infancy.

²⁴⁵ See *id.* at 836-37 (denying motion to dismiss filter defect claims, stating "the filters are neutral, non-expressive tools . . . not entitled to First Amendment protection"). Plaintiffs argued that design features that give users tools to edit photos and videos but fail to label filtered images were defective. See *id.* at 821 (summarizing plaintiffs' claim that exposure to "filtered, sometimes unrealistic images create body image and self-esteem issues among youth users," and without labeling "young users are unable to discern unedited and edited content").

²⁴⁶ See *id.* at 836.

²⁴⁷ 255 F.3d 1180 (9th Cir. 2001).

²⁴⁸ *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 836 (quoting *Hoffman*, 255 F.3d at 1183).

²⁴⁹ See *id.* (reasoning "[i]t was the images, the speech, that [*Hoffman*] protected" and not "technology that created the speech").

²⁵⁰ *Id.* at 852.

²⁵¹ See *id.* at 836-37.

²⁵² See *id.* at 837 (citing allegation defendants sought to increase addictive use through timed and clustered notifications).

²⁵³ See *id.* (discerning no way to interpret clustering allegation "that would not require defendants to change when and how much they publish speech").

²⁵⁴ See *id.* at 831, 833 ("[T]o the extent plaintiffs challenge defendants' use of algorithms to determine whether, when, and to whom to publish third-party content, Section 230 immunizes defendants. Whether done by an algorithm or an editor, these are traditional editorial functions that are essential to publishing.").

As illustrated in Part I, earlier litigation rarely yielded significant judgments against technology companies, thereby suppressing demand for specialized insurance coverage. It is true that litigation costs are often substantial, and absent insurance coverage, defendants must bear these expenses themselves.²⁵⁵ Even where indemnity coverage for judgments is unavailable, the costs of defense remain significant.²⁵⁶ However, insurers are typically obligated to provide a defense only for covered claims.²⁵⁷ If a claim falls outside the scope of indemnity coverage or lacks any potential to trigger such coverage, the insurer owes no duty to defend the insured.²⁵⁸

Because algorithmic liability is expanding, insurance should—but currently does not—explicitly cover these risks. The next Part explores the symbiotic relationship between tort law and insurance, noting that new liabilities often generate demand for coverage, but that insurers, due to their conservative nature, respond slowly to emerging risks. It also examines the insurance industry’s reluctance to cover mental and emotional injuries, citing definitional challenges and moral hazard.

III. ALGORITHMIC LIABILITY AND INSURANCE

A. *The Symbiotic Relationship of Tort Liability and Insurance*

Most previously alleged algorithmic liability claims have failed to establish defendant liability. As a result, firms generally believe they can self-insure against defense costs and have not sought insurance coverage in a manner that would generate significant demand. Insurers and insureds respond more readily to extensive litigation and large damage awards,²⁵⁹ which not only impose direct

²⁵⁵ See Baker, *supra* note 28 (manuscript at 10-11).

²⁵⁶ See *Anadarko Petroleum Corp. v. Hou. Cas. Co.*, 573 S.W.3d 187, 189 (Tex. 2019) (specifying over \$100 million in attorney’s fees and costs to defend lawsuit); *Royal Surplus Lines Ins. Co. v. Sofamor Danek Grp., Inc.*, 303 F. Supp. 2d 897, 903 (W.D. Tenn. 2003) (specifying over \$5 million for same); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, No. 4:09-CV-1379, 2013 WL 5437712, at *26 (D.S.C. Sep. 27, 2013) (specifying over \$2.5 million for same).

²⁵⁷ See Douglas R. Richmond, *A Liability Insurer’s Breach of the Duty to Defend and the Controversial Forfeiture of Coverage Defenses*, 47 FLA. ST. U. L. REV. 583, 584-85 (2020) (explaining insurer’s duty to defend attaches whenever “plaintiff’s claims or causes of action allege facts that potentially obligate the insurer to indemnify the insured” “even if the allegations are groundless, false or fraudulent”).

²⁵⁸ See *id.* at 588 (“An insurer’s duty to defend, although broad, does not guarantee a defense against all allegations of wrongdoing, whatever they might be.”); *Zurich Am. Ins. Co. v. Ace Am. Ins. Co.*, 86 N.Y.S.3d 468, 469 (N.Y. App. Div. 2018) (“The duty to defend does not attach where, as a matter of law, there is no basis on which the insurer may be held liable for indemnification.” (citation omitted)).

²⁵⁹ See Jef De Mot, Ben Depoorter & Michael G. Faure, *The Multiplication Effect of Legal Insurance*, 13 N.Y.U. J.L. & BUS. 1, 13 (2016) (“[B]ehavioral research suggests that individuals are very sensitive to salient risks involving high potential costs.”).

costs but also generate a bellwether effect that attracts future claims.²⁶⁰ Because judgments in these early cases were nonexistent or negligible, firms did not view the risks as material, and insurers had little incentive to develop relevant products. This inertia—compounded by the novelty of algorithmic harms and the relatively recent mainstream adoption of AI technologies—suppressed early demand for specialized insurance.

As plaintiffs increasingly survive early motions to dismiss and allege emotional and mental harm, including self-injury, potential exposure expands. This legal shift is likely to reshape insurance markets, generating demand for new specialized products.

Insurance coverage exists for diverse and specialized risks, including tax liability,²⁶¹ kidnap and ransom,²⁶² export credit,²⁶³ and political uncertainty,²⁶⁴ among others. These insurance products emerge precisely because new forms of liability introduce risks that create demand for ways to manage and distribute prospective losses.²⁶⁵ Liability and insurance systems are interdependent.²⁶⁶ New liability rules need the protective net of insurance to spread risks.²⁶⁷ Similarly, the scope of available insurance coverage is determined by extant

²⁶⁰ See Syverud, *supra* note 35, at 1634 (contending increased insurance coverage generates more lawsuits and thus more liability).

²⁶¹ See, e.g., Ben-Shahar & Logue, *supra* note 34, at 226 (describing tax liability insurance as covering liability for violations of tax law); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 394-95 (2005) (highlighting function of tax liability insurance, namely to remedy uncertainty, delays, and expenses which discourage certain transactions).

²⁶² See, e.g., *CrisiSolution® (Kidnap, Ransom & Extortion) Insurance*, AIG, <https://www.aig.com/home/risk-solutions/business/management-and-professional-liability/kidnap-ransom-and-extortion> [<https://perma.cc/8YQK-R9UH>] (last visited Feb. 9, 2026) (heralding insurance coverage offered to businesses to indemnify employees who have been kidnapped or extorted).

²⁶³ See, e.g., *Export Credit Insurance*, EXIM, <https://www.exim.gov/what-we-do/export-credit-insurance> [<https://perma.cc/8Z5Q-9CKK>] (last visited Feb. 9, 2026) (describing function of export credit insurance as covering international sellers in event buyers fails to pay for shipped product).

²⁶⁴ See, e.g., *Political Risk Insurance*, DFC, <https://www.dfc.gov/what-we-offer-our-products/political-risk-insurance> [<https://perma.cc/6N7K-8APM>] (last visited Feb. 9, 2026) (explaining political insurance offers coverage for losses due to “currency inconvertibility, government interference, and political violence”).

²⁶⁵ See Pottier & Witt, *supra* note 35, at 1700-02.

²⁶⁶ See Shavell, *supra* note 31, at 120 (asserting allocation of risk resulting from liability rule depends upon existing insurance coverage, which in turn depends on existing liability rules because they are determinative in part of risks parties face).

²⁶⁷ See *id.* (noting incentives to take precaution under different liability standards both influence and are influenced by insurance coverage).

liability rules.²⁶⁸ Further, insurance markets rely on new liabilities and the associated threats to sustain and justify insurance businesses.²⁶⁹

Professors Catherine Sharkey and Kenneth Abraham have recently called for scholars to recognize the role that insurance plays in the expansion of liability, stating that courts oftentimes explicitly or covertly account for the existence of insurance in reaching their decisions.²⁷⁰ If courts represent one part of the equation constraining insurance coverage for new liability, the other part lies in insurance markets. The following Section examines how expanding liability landscapes can drive growth in insurance offerings.

B. *Constraints on Insurance Product Development*

Insurers may be described as hyper-reactive, but not hyper-proactive, when forecasting judicial responses to novel forms of harm.²⁷¹ Historically, plaintiffs bringing algorithmic liability claims have largely failed, resulting in no liability for defendants and, in turn, no perceived need for specialized insurance coverage.²⁷² Insurers internalized this pattern and refrained from developing products tailored to algorithmic risks.

Given this backdrop, recent decisions recognizing potential liability should set off seismic tremors that ought to alarm both defendants and insurers about the scale of future litigation and potential for exposure. Yet insurers have remained largely unresponsive to these judicial signals. While insurers may ultimately choose inaction, one of their core functions is to offer coverage to businesses willing to pay premiums where the absence of insurance could threaten solvency. In this context, their continued passivity risks overlooking an emerging market demand.

Paradoxically, insurers themselves are bad predictors of the products worth the costs to initiate.²⁷³ Insurers gradually come to understand market demands as their knowledge of the relevant risks improves and becomes clearer over

²⁶⁸ See *id.* at 120-21 (explaining mutual dependence between insurance and liability rules).

²⁶⁹ See Rappaport, *supra* note 35, at 1609 (asserting insurers want clear and nonretroactive liability laws, allowing them to reliably predict the probability of paying insured losses to policyholders); Pottier & Witt, *supra* note 35, at 1700-02 (noting expansion of liability creates increased demand for insurance, but not necessarily increased supply).

²⁷⁰ See Abraham & Sharkey, *supra* note 12, at 2243-49.

²⁷¹ See Rappaport, *supra* note 35, at 1609 (asserting insurance providers are risk-averse with respect to providing insurance when faced with uncertainty in liability law).

²⁷² See, e.g., *Rodgers v. Laura & John Arnold Found.*, No. 17-5556, 2019 WL 2429574, at *1 (D.N.J. June 11, 2019) (granting motion to dismiss where defendant's risk assessment algorithm generated Public Safety Assessments ("PSAs") informing judicial decisions on "conditions of [pre-trial] release or detention" but court found such guidance was protected speech and exercise of judicial discretion "create[d] an obstacle for finding proximate cause").

²⁷³ See Kenneth S. Abraham & Daniel Schwarcz, *Courting Disaster: The Underappreciated Risk of a Cyber Insurance Catastrophe*, 27 CONN. INS. L.J. 407, 461-62 (2021); Peter Molk, *Barriers to Insurance Innovation*, 42 YALE J. ON REG. 1071, 1079 (2025).

time.²⁷⁴ Until recently, algorithmic litigation posed too little risk to warrant significant attention from the insurance industry.²⁷⁵ Courts routinely dismissed claims, likely prompting firms to absorb the associated costs internally. That dynamic may be shifting. Although most cases remain in preliminary stages and damages have yet to be awarded, the onset of credible legal risk prompts questions regarding when and if insurance markets will ultimately respond.²⁷⁶

Yet the creation of insurance products tailored to the risks discussed in this Article may not materialize as swiftly as anticipated, if at all.²⁷⁷ As Professor Peter Molk has observed, insurers face structural impediments to launching new lines of coverage.²⁷⁸ Insurers are typically large, inertial institutions that require substantial justification before altering course.²⁷⁹ Like firms in other risk-averse industries, insurers confront the possibility that investments in product development will not yield in-kind returns.²⁸⁰ The insurance sector, by design, prioritizes financial stability over innovation.²⁸¹ Society relies on insurers to ensure capital reserves sufficient to satisfy claims; that function presupposes a conservative approach to risk.²⁸² Consequently, the industry often lags in

²⁷⁴ See Abraham & Schwarcz, *supra* note 273, at 465 (“Increased understanding of the risks involved may induce both insurers and reinsurers to offer more coverage, but that is an evolutionary process. The solution to the problem is time—the time necessary for adequate information to emerge and be of use.”).

²⁷⁵ See Molk, *supra* note 273, at 1091-92 (contending market for given type of insurance may be small because of small level of risk or because risk is commonly faced by policyholders).

²⁷⁶ See *infra* Part IV.

²⁷⁷ See Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2137 (2019) (“[E]motional losses from public disclosure of confidential information will be much more difficult for potential victims to insure against. There is no prospect that such insurance will become available any time soon, and we doubt that such insurance will ever be feasible.”).

²⁷⁸ See Molk, *supra* note 273, at 1091-92 (asserting part of difficulty in creating insurance policies for new risks is challenge insurers face in determining which innovative policies are worth initial investment).

²⁷⁹ See *id.* (highlighting dominant insurance companies are “massive operations,” like State Farm, which possesses assets worth \$220 billion and writes \$27 billion and \$58 billion in homeowners and private auto insurance policies, respectively).

²⁸⁰ See *id.* (explaining only “select few” innovative insurance policies “end up paying off spectacularly, but identifying those from the morass of potential innovations is a task that few established insurers can undertake”); Baker, *supra* note 28 (manuscript at 46) (“Even appropriately incentivized insurance companies struggle to predict what liabilities they can and cannot profitably insure.”).

²⁸¹ See Molk, *supra* note 273, at 1092-93 (“[I]nsurers . . . face solvency requirements that dramatically increase the costs of failures, changing the cost-benefit calculation of innovation to make it much less favorable.”).

²⁸² See *id.* at 1093 (discussing how traditional insurers use “reinsurance” to aid in indemnifying many policyholders when insurers’ capital reserves are insufficient).

addressing new liabilities.²⁸³ When combined with the speculative and contested nature of claims arising from emotional or mental harm, this conservatism suggests that insurance solutions may prove unavailable precisely when they are most needed.

As explained in greater detail in Part IV, standard form policy language ordinarily excludes coverage for claims alleging emotional or mental harm unaccompanied by physical injury.²⁸⁴ Algorithmic liability claims may generally fall outside coverage because they often allege standalone emotional and mental injuries. Insurers have historically excluded these claims due to concerns about proof problems that arise from injuries that are intangible and, in many cases, unverifiable.²⁸⁵ Essentially, insurers fear opening the flood gates by explicitly covering emotional and mental harm because these claims are difficult to define and limit. This concern is reflected in the observation that “if mental health services [are] given parity with other medical services[,] . . . insurance funds will be siphoned into a ‘bottomless pit.’”²⁸⁶ Courts have both acknowledged the difficulty of quantifying costs arising from nonphysical damages and recognized that the judicial system provides structural safeguards and entrusts jurors to reliably assess the credibility of evidence and witnesses.²⁸⁷

Insurers also worry that covering emotional and mental injuries could spur moral hazard.²⁸⁸ They fear individuals with pre-existing mental health conditions may purchase coverage to obtain compensation or may alter their behavior to engage in covered risks.²⁸⁹ As some commentators put it, “[i]nsurance underwriters fear that if mental health insurance becomes more available, individuals . . . might claim to suffer from an illness when they are

²⁸³ See *id.* at 1094 (“[T]he dynamics that deter innovation at incumbent primary insurers will operate a second time with respect to reinsurers to provide two layers of deterrence to innovation in coverage terms.”).

²⁸⁴ See *infra* Part IV.

²⁸⁵ See Youndy C. Cook, Comment, *Messing with Our Minds: The Mental Illness Limitation in Health Insurance*, 50 U. MIA. L. REV. 345, 346 (1996) (observing insurers seeking to cut costs frequently reduce coverage for mental health services due to difficulties such as defining mental illnesses and determining appropriate length of treatment for many disorders).

²⁸⁶ James E. Sabin & Norman Daniels, *Determining “Medical Necessity” in Mental Health Practice*, 24 HASTINGS CTR. REP., no. 6, Nov.-Dec. 1994, at 5.

²⁸⁷ See, e.g., *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 416-17 (Colo. 2004) (en banc) (noting statutory caps on damages awards for non-economic injuries, trial court’s ability to reduce excessive damages awards, and jury system itself make damages for non-economic injuries more predictable and more credible).

²⁸⁸ See Cook, *supra* note 285, at 346 n.6 (using insurance industry’s general concept of “moral hazard” to describe increased use of mental health services by those whose mental health care is insured).

²⁸⁹ See *id.* at 346 (“Insurers . . . [that] believ[e] that people have advance notice of a current or incipient need for psychiatric services or counseling, fear that people will shop around for the best mental health care coverage.”).

actually suffering from life.”²⁹⁰ Insurers’ concerns stem from the difficulty of reliably verifying mental and emotional injuries, prompting limitations on recovery to avoid incentivizing frivolous litigation based on harms that are difficult to disprove.²⁹¹ These concerns may be heightened in the context of algorithmic harms, which are often alleged to be addictive in nature and particularly harmful to minors who may lack the capacity to disengage from social media or similar platforms.²⁹² Although these concerns are not without merit, this Article posits that they are overstated.²⁹³

Claims alleging physical injuries that stem from emotional and mental harm, such as those involving self-harm or suicide, raise distinct coverage questions.²⁹⁴ These limitations in existing coverage frameworks, combined with the evolving nature of algorithmic harms, raise pressing questions about how, when, and if insurance markets will adapt.

Even if the insurance market responds to algorithmic liability exposure, the timeline remains uncertain. Additionally, it is unclear whether the insurance market will recognize the need to insure against algorithmic liability before firms realize the risks it poses. Arguably, the insurance market is already late in responding to demand. Firms now facing suit lack coverage for the risks at issue. If insurers ultimately decline to underwrite such harms on the grounds that they are too speculative or that they invite moral hazard, the likely consequence will be the bankruptcy of small firms unable to self-insure.

²⁹⁰ Sabin & Daniels, *supra* note 286, at 9.

²⁹¹ See *Waters v. United Servs. Auto. Ass’n*, 48 Cal. Rptr. 2d 910, 915 (Cal. Ct. App. 1996) (“The principal reason for limiting recovery of damages for mental distress is that to permit recovery of such damages would open the door to fictitious claims, to recovery for mere bad manners, and to litigation in the field of trivialities.” (quoting *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 179 (Cal. 1967))).

²⁹² For example, in *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, plaintiffs alleged that the defendant platform manufacturers intentionally designed their products to be addictive. See Second Amended Master Complaint, *supra* note 10, at 236, 240, 244, 246-47, 250, 253 (alleging Meta, Snap, ByteDance, and Google all engaged in intentional conduct putting users, particularly youth, at risk of developing addictions to their platforms). Defendants’ practices are said to be reminiscent of tactics historically used by cigarette companies. See *id.* at 1, 12-13 (alleging commonality between behavioral and neurobiological techniques used by defendant technology companies and those used by slot machines and the cigarette industry); see also ANNA LEMBKE, DOPAMINE NATION: FINDING BALANCE IN THE AGE OF INDULGENCE 20 (2021) (arguing harmful, modern-day addictions are fueled by substantial exposure to addictive substances that engender a “vortex of compulsive overuse”); JONATHAN HAITT, THE ANXIOUS GENERATION: HOW THE GREAT REWIRING OF CHILDHOOD IS CAUSING AN EPIDEMIC OF MENTAL ILLNESS 11 (2024) (“Companies that strive to maximize ‘engagement’ by using psychological tricks to keep young people clicking were the worst offenders This included social media companies, which inflicted their greatest damage on girls, and video game companies and pornography sites, which sank their hooks deepest into boys.”).

²⁹³ See *infra* Part IV.

²⁹⁴ See *infra* Part IV.

Because much of the economy is now driven by AI development, this gap in coverage poses broader systemic concerns.²⁹⁵ The gap threatens innovation in the AI sector, which is increasingly intertwined with matters of national security.²⁹⁶ If small firms lack protection from insolvency, many will fail or forgo breaking into the industry altogether.²⁹⁷ If this pattern repeats across the sector, the absence of insurance coverage could slow the overall pace of AI innovation. Because leadership in AI development is a key point of global competition, particularly with China, ensuring that innovation continues uninterrupted is not merely an economic concern but a matter of national importance.²⁹⁸ This is not to suggest that private insurance should displace government regulation as the primary mechanism for managing AI-related risks. Given the national significance of these issues, one could argue that Congress should consider enacting legislation to immunize firms from liability, much like the statutory protections many states implemented during the COVID-19 pandemic to shield doctors, hospitals, and healthcare providers from malpractice claims.²⁹⁹ However, in the absence of current political and public will to shield

²⁹⁵ The value of the global market for AI in 2025 is currently estimated at approximately \$244 billion, marking a 33% increase over the prior year, and projections estimate this will surge to nearly \$1 trillion by 2031. Joanie Moretti, *50 Key Statistics on AI's Massive Growth in 2025*, CAL. BUS. J., <https://calbizjournal.com/50-key-statistics-on-ais-massive-growth-in-2025/> (last visited Feb. 9, 2026) (providing estimates on key macro-level statistics regarding AI industry and demand for AI-based products).

²⁹⁶ See OFF. OF SCI. & TECH. POL'Y, EXEC. OFF. OF THE PRESIDENT, WINNING THE RACE: AMERICA'S AI ACTION PLAN 1 (2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf> [<https://perma.cc/P786-MVVJ>] ("The United States is in a race to achieve global dominance in artificial intelligence (AI). . . . Winning the AI race will usher in a new golden age of human flourishing, economic competitiveness, and national security for the American people."); Exec. Order No. 14,179, 90 Fed. Reg. 8741, 8741 (Jan. 23, 2025) ("It is the policy of the United States to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security.").

²⁹⁷ See Fischer & Jerry, *supra* note 28, at 871 (noting "ample resources" required to satisfy often substantial judgments in suits brought against tortfeasors).

²⁹⁸ See Exec. Order No. 14,318, 90 Fed. Reg. 35385, 35385 (July 23, 2025) ("We will pursue bold, large-scale industrial plans to vault the United States further into the lead on critical manufacturing processes and technologies that are essential to national security, economic prosperity, and scientific leadership."); Exec. Order No. 14,320, 90 Fed. Reg. 35393, 35393 (July 23, 2025) ("Artificial intelligence (AI) is a foundational technology that will define the future of economic growth, national security, and global competitiveness for decades to come.").

²⁹⁹ See, e.g., Robert H. Jerry II, *Reflections on COVID-19, Insurance, Business Interruption, Systemic Risk, and the Future*, 110 ICADE: REVISTA DE LA FACULTAD DE DERECHO 1, 5 (2020) [hereinafter Jerry, *Reflections on COVID-19*] ("[A]s of the end of October 2020, sixteen states in the U.S. . . . have enacted liability shield laws for businesses against COVID-19 liability claims." (citation omitted)).

firms from algorithmic liability, insurance may play a significant role in shaping the future trajectory of AI development.

Further, as courts begin to recognize the availability of insurance for algorithmic harms, they may be more willing to expand liability doctrines.³⁰⁰ Doing so would foster a safer environment in which firms are held accountable and incentivized to adopt stronger design safeguards over time. This Article therefore seeks to hasten a market resolution, ideally before too many AI firms confront their exposure the hard way.

Crucially, algorithmic liability potentially implicates any entity employing algorithmic technologies, thereby casting a wide liability net that encompasses all internet-based companies using such algorithmic tools in ways that may lead to cognizable harm. Existing insurance products are insufficient to bridge the coverage gaps inherent in algorithmic injury claims. Given that most firms lack sufficient assets to withstand protracted litigation, adequate insurance coverage is indispensable to prevent insolvency. Defense-only insurance products that cover litigation costs may serve as an initial response to the algorithmic liability addressed herein.³⁰¹ However, even if such products were available, they would likely offer only a temporary solution, particularly if emerging signs of a shifting liability landscape continue to materialize.

Historically, the insurance industry has adapted to new liabilities by developing novel insurance products, albeit often with considerable delay.³⁰² The urgency of addressing these insurance gaps is heightened by the importance of continued AI innovation.³⁰³ A significant downturn in AI development due to liability exposure could jeopardize the United States' competitive standing in the global AI landscape.

In response to this pressing issue, the next Part identifies and emphasizes the critical yet unaddressed need for specialized insurance solutions. This Part will

³⁰⁰ See Abraham & Sharkey, *supra* note 12, at 2255 (“[F]ar from ignoring liability insurance in the way that tort theory often has, the courts recognize the availability or nonavailability of liability insurance and take it into account in deciding when to impose and to limit the expansion [of] tort liability.”).

³⁰¹ See Richmond, *supra* note 257, at 584-86 (discussing how liability insurance “is essentially litigation insurance” because insurance companies’ broadest duty is duty to defend insureds in litigation).

³⁰² See Anat Lior, *Innovating Liability: The Virtuous Cycle of Torts, Technology and Liability Insurance*, 25 YALE J.L. & TECH. 448, 452-53 (2023) (heralding importance of insurance market in ensuring safety from emerging liabilities over time, dating back to Industrial Revolution); Doug Bailey, *Is Long-Awaited Insurance Industry Transformation Arriving—Finally?*, INSURANCENEWSNET (May 26, 2025), <https://insurancenewsnet.com/inn/article/is-long-awaited-insurance-industry-transformation-arriving-finally> [<https://perma.cc/57UE-UJ3Y>] (“The insurance industry is often said to evolve slowly—until it doesn’t.”).

³⁰³ See, e.g., STEVEN WEISBART, INS. INFO. INST., HOW INSURANCE DRIVES ECONOMIC GROWTH 13-14 (2018), <https://www.iii.org/sites/default/files/docs/pdf/insurance-driver-econ-growth-053018.pdf> [<https://perma.cc/QVF7-3MWP>] (highlighting ways AI innovation and growth resembles “industrial revolution” and insurance has historically supported and played role in every such revolution).

examine existing insurance policies typically available to technology firms, highlight shortcomings regarding coverage for algorithmic injuries, and propose the need for specialized insurance products to mitigate these risks. Rather than advocating for traditional legal remedies, this Article advances a market-driven solution to the acute problem of ensuring the financial resilience of AI firms in the face of exploding litigation.

IV. EXISTING POLICY GAPS AND THE NEED FOR SPECIALIZED ALGORITHMIC COVERAGE

A. *Current Policies Have Coverage Gaps for Algorithmic Injury Claims*

Four insurance policies are likely to be broadly implicated by first-party and third-party exposure to algorithmic liability: CGL, BOP, E&O, and cyber insurance.³⁰⁴ Insurance policies are typically governed by standard form language.³⁰⁵ Three predominant limiting factors may impact insurance coverage for algorithmic liability: (1) whether the injuries will be covered by the policies' "bodily injury" definitions; (2) whether the triggering event constitutes an "occurrence"; and (3) whether a policy exception applies.

The terms of CGL policies covered by the relevant standard insurance agreement, Coverage A, extend to harms defined as "bodily injury."³⁰⁶ The term "bodily injury" is commonly defined as "bodily injury, sickness or disease

³⁰⁴ While other types of insurance policies, such as business interruption, might tangentially relate to algorithmic injuries, the policies analyzed herein are more directly implicated given both the distinct nature of algorithmic harms and the specific risks these policies contemplate. See Ram Shankar Siva Kumar & Frank Nagle, *The Case for AI Insurance*, HARV. BUS. REV. (Apr. 29, 2020), <https://hbr.org/2020/04/the-case-for-ai-insurance> [https://perma.cc/PL68-XH99] (noting business interruption coverage in current policies unlikely to include bodily harm from AI failures).

³⁰⁵ See Merriman et al., *supra* note 41, at 5.

³⁰⁶ See DeVries & Zullo, *supra* note 38 ("Typically, Coverage A [in CGL policies] insures claims for bodily injury caused by an occurrence."); Merriman et al., *supra* note 41, at 3 (stating standard CGL policy "insures claims of 'bodily injury' . . . arising out of an 'occurrence'"). Coverage A also covers property damage, which this Article does not address because property damage is unlikely to be implicated by the algorithmic injuries researched. See Merriman et al., *supra* note 41, at 3. Coverage B agreements are also unlikely to be triggered under standard policy language as none of the algorithmic injury claims analyzed herein clearly implicate "personal and advertising injur[ies]," generally arising from slander or libel, violating one's right to privacy, misusing another's advertising idea, or infringing on another's copyright. *Id.* at 20-21. That said, some plaintiffs allege violations of the Children's Online Privacy Protection Act ("COPPA") (15 U.S.C. § 6501), and Coverage B might apply in those instances. See Second Amended Master Complaint, *supra* note 10, at 111 (alleging, regarding Facebook and Instagram, "Meta has not used its concerning knowledge about preteen use and engagement to comply with COPPA" but instead "leveraged its research to manipulate households and target preteens").

sustained by a person, including death resulting from any of these at any time.”³⁰⁷

Most courts hold that pure mental and emotional injuries are not “bodily injuries.”³⁰⁸ The majority of courts interpret “bodily injury” to be limited to physical injuries not including mental and emotional harm.³⁰⁹

Algorithmic liability cases involving allegations of pure emotional harm absent physical injuries are, therefore, unlikely to be interpreted as bodily injuries under traditional CGL policies.³¹⁰ For example, in an AI companion bot case against Character AI, the plaintiff alleged pure emotional harm, but no physical injuries.³¹¹ Because most courts interpret bodily injury to only extend to cases that manifest physical symptoms,³¹² cases like this are unlikely to be

³⁰⁷ Merriman et al., *supra* note 41, at 5.

³⁰⁸ *See id.* (noting majority view is emotional distress, without physical harm, is not “bodily injury”); DeVries & Zullo, *supra* note 38 (observing courts vary on interpretation of “bodily injury,” with some finding it covers pure mental harm or physical manifestations of mental harm, while others do not); Heacker v. Safeco Ins. Co. of Am., 676 F.3d 724, 728 (8th Cir. 2012) (stating plaintiff’s injuries were excluded from coverage because not physical in nature).

³⁰⁹ *See* Merriman et al., *supra* note 41, at 5 (“Courts have held that where there is no physical injury, contact or pain, there is no bodily injury.”); *see also* Heacker, 676 F.3d at 728 (rejecting plaintiff’s argument that emotional harm was bodily injury covered by her insurance policy); Aim Ins. Co. v. Culcasi, 280 Cal. Rptr. 766, 771-72, 776 (Cal. Ct. App. 1991) (finding ordinary meaning of word “bodily” does not include mental, emotional, or spiritual harm); Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154, 1157 (Mass. 1988) (holding plaintiff’s claims for “emotional distress and injury to reputation” were not bodily injuries under insurance policy because there was no physical injury); Keri Farrell-Kolb, *General Liability Coverage for Claims of Emotional Distress—An Insurance Nightmare*, 45 *DRAKE L. REV.* 981, 985 (1997) (“Various courts articulate differing views regarding the interpretation of the term bodily injury as it applies to claims for emotional injury.”).

³¹⁰ *See* Chatton v. Nat’l Union Fire Ins. Co. of Pittsburgh, 13 Cal. Rptr. 2d 318, 325 (Cal. Ct. App. 1992) (finding pure emotional damage did not constitute “bodily injury” within CGL policy).

³¹¹ *See* Complaint & Jury Trial Demand at 117, A.F. *ex rel.* J.F. v. Character Techs., Inc., No. 2:24-CV-01014 (E.D. Tex. Dec. 9, 2024), Dkt. No. 1 (bringing claim, on behalf of minor children, for intentional infliction of emotional distress, including addiction and sexual abuse, caused by AI chatbot). *But see* Second Amended Master Complaint, *supra* note 10, at 7 (bringing multi-district claim, on behalf of minor children, alleging harms including both emotional and physical injuries); *In re* Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d 809, 861-63 (N.D. Cal. 2023) (granting in part and denying in part defendants’ motions to dismiss complaint but finding that plaintiffs sufficiently pled that defendant’s design choices led to “physical, mental, and emotional health outcomes”).

³¹² *See, e.g.,* First Invs. Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162, 166-67 (2d Cir. 1998) (declining to extend coverage of bodily injuries to emotional injuries caused by economic loss); Moore v. Cont’l Cas. Co., 746 A.2d 1252, 1255 (Conn. 2000) (finding expanding definition of bodily injury to include pure emotional harm would be “tantamount to defining the term . . . with an antonym”); SL Indus., Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266,

covered by CGL policies. Similarly, if the alleged mental and emotional harms do trigger physical symptoms, a minority of courts would determine that the “bodily injury” definition is triggered.³¹³ In other words, virtually all mental, emotional, and physical injuries associated with algorithmic liability are likely to fall outside of the scope of coverage because, in most jurisdictions, mental and emotional harms are unlikely to be interpreted as bodily injuries, and the physical injuries as typically alleged stem from mental or emotional harms that subsequently result in self-harm or harm to others.³¹⁴

But even before the determination of whether the claimed injury is a bodily injury, courts must consider whether the complaining event constitutes an “occurrence” under the policy in question.³¹⁵ CGL insurance policies usually define an “occurrence” as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.”³¹⁶ An “accident” is normally interpreted by courts to mean “a happening or event that is unintended or unexpected.”³¹⁷ Courts take different views in determining whether intentional acts are occurrences pursuant to the standard form language, with some finding that an intentional act is not an occurrence and others finding that an intentional act may be an occurrence if the resulting harm was not intended.³¹⁸

In the case of algorithmic injuries, many of the design defect claims alleged are brought on the basis that the algorithms at issue are intentionally designed to bring about the type of harm alleged.³¹⁹ Although allegations of intentional design choices leading to known harms are likely to fall within the category of

1275 (N.J. 1992) (“Most insureds understand that the coverage of their ‘bodily injury’ policies is limited to injuries involving some sort of connection with a physical problem.”).

³¹³ See Merriman et al., *supra* note 41, at 6 (“[A] minority of jurisdictions do recognize pure emotional distress as ‘bodily injury.’”); Vigna v. Allstate Ins. Co., 686 A.2d 598, 600 (Me. 1996) (finding “bodily injury” included pure emotional distress if caused by occurrence under policy); Lavanant v. Gen. Accident Ins. Co. of Am., 595 N.E.2d 819, 822 (N.Y. 1992) (holding “bodily injury” included pure emotional distress); DeVries & Zullo, *supra* note 38 (“Some courts have held that a mental injury, accompanied by physical manifestation, qualifies as ‘bodily injury.’”).

³¹⁴ See Merriman et al., *supra* note 41, at 5 (noting some courts view physical injuries stemming from emotional harm as physical manifestation of emotional harm, not physical injury which would be covered under policy).

³¹⁵ See *id.* at 7 (“Under the standard CGL policy, in order for there to be coverage, ‘bodily injury’ . . . must result from an ‘occurrence’ taking place during the policy period.”).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See *id.* at 7-8 (“[C]ourts differ on whether an intentional act may constitute an ‘occurrence’ . . .”).

³¹⁹ See Second Amended Master Complaint, *supra* note 10, at 235-36 (alleging defendant social media companies intentionally designed products to addict users, causing harm such as mental health issues and dissociative behaviors); Second Amended Complaint, *supra* note 1, at 48 (alleging defendants’ AI chatbot perpetrated “specific abuses” through its “intentional design”).

an intentional act where the result was intended, courts could decide that the resulting *harms* are not intended, and therefore, it is not clear whether courts would consider these claims to trigger an occurrence.³²⁰ The issue is further complicated by the fact that the actions and consequences of some AI-enabled tools are often unknown—like a suicide following use. Nevertheless, firms may now be deemed on notice of certain harms, creating a potential gray area as to whether such claims constitute an occurrence.

Similarly, because plaintiffs tend to allege that defendants intentionally and knowingly design defective products, even when claims are asserted under theories of negligence, the allegations sound in intentional misconduct.³²¹ Accordingly, it is unlikely that a court would interpret these claims to be an occurrence under traditional CGL policies at all.³²² And where more traditional intentional tortious acts are implicated, courts are less likely to find that they are accidental, such as in the context of the myriad sexual injuries alleged.³²³

In addition to determining whether claims fall within the definitions of “bodily injury” and “occurrence,” courts must also assess whether any exclusions apply.³²⁴ Under CGL policies, whether an act is intended to result in the bodily injury claimed is construed from the perspective of the insured.³²⁵ Thus, the relevant inquiry is whether the policyholder intended the damages, not

³²⁰ See Merriman et al., *supra* note 41, at 8 (explaining how courts have differed in determining whether occurrence has been triggered in cases involving intentional harm).

³²¹ See *Chatton v. Nat’l Union Fire Ins. Co.*, 13 Cal. Rptr. 2d 318, 327-28 (Cal. Ct. App. 1992) (“Since insurance is designed to protect against contingent or unknown risks of harm, rather than harm that is certain or expected, it is well settled that intentional . . . acts are deemed purposeful rather than accidental and, therefore, are not covered under a CGL policy.” (citations omitted)).

³²² See *id.* at 332 (holding plaintiff’s claims for pure emotional distress were not occurrences under the CGL policy and therefore not covered); *Heacker v. Safeco Ins. Co. of Am.*, 676 F.3d 724, 727-28 (8th Cir. 2012) (finding negligent infliction of emotional distress was not an occurrence or “accident, including continuous or repeated exposure to substantially the same general harmful conditions,” because facts did not involve undesigned, sudden, or unexpected events). But see *State Farm Fire & Cas. Co. v. Motta*, 356 F. Supp. 3d 457, 461 (E.D. Pa. 2018) (“[I]ntentional acts can, and often do, have unintended consequences, and Pennsylvania courts accordingly consider whether an insured could have reasonably foreseen the resulting injury.”).

³²³ See Merriman et al., *supra* note 41, at 11 (“[T]he court in *Board of Educ. of E. Syracuse-Minoa Cent. School Dist. v. Continental Ins. Co.* held that claims of sexual harassment and discrimination . . . did not constitute an ‘occurrence’ under the policy, because, ‘[t]here is nothing accidental about [such] charges.’” (footnote and citation omitted)).

³²⁴ See *id.* at 12 (stating when social media claim has been found to fall within insurance policy, next step is to determine “whether any exclusions apply”).

³²⁵ See *id.* (noting CGL Coverage A exclusions examine whether resulting injury was accidental or unintended or expected or intended from policyholder’s perspective).

merely whether the policyholder received notice or warnings that such an outcome could occur.³²⁶

Under standard CGL policies, therefore, algorithmic liability lawsuits are likely to fall within coverage gaps. The facts giving rise to claims for bodily injury and occurrence may not satisfy the applicable definitions, and certain exclusions may apply depending upon judicial interpretation of contractual language. Consequently, both entities deploying algorithmic tools and injured individuals will likely bear the costs associated with litigating such claims.³²⁷

BOPs present analogous issues to those identified in the context of CGL coverage. These multi-line packaged products typically target small businesses characterized by limited staff, modest revenue, and lower-risk operations.³²⁸ For any one or all of these reasons, BOP coverage may be unavailable to AI firms likely to face algorithmic liability.

Beyond eligibility constraints, standard BOP language imposes coverage limitations. Coverage generally extends only to claims for “bodily injury,” defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”³²⁹ This phrasing is identical to the standard language used in CGL policies.³³⁰ As with CGL policies, the definition of “bodily injury” in BOPs suggests that coverage is unlikely to extend to claims for emotional or mental injury.

Likewise, BOPs define an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions,” which also mirrors the corresponding CGL language.³³¹ Again, as with CGL policies, a threshold question remains of whether events giving rise to algorithmic liability would constitute an “occurrence” within the meaning of the policy.

Even where insureds elect optional endorsements, extending coverage to computer business interruption losses, BOPs exclude interruptions caused by

³²⁶ See *id.* at 12-13 (“[E]ven where the act or acts that caused the alleged injury were done intentionally, if the consequences of those acts were unintended, then the exclusion will not apply.”); see also *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (“Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, ‘intended’ by the insured because the insured knew that the damages would flow directly and immediately from its intentional act . . .” (citations omitted)).

³²⁷ See Merriman et al., *supra* note 41, at 34 (“[I]t is critical that both insurers and policyholders are aware of the risks posed by social media and the scope of coverage for such liabilities under traditional insurance products.”).

³²⁸ See Jerry, *Reflections on COVID-19*, *supra* note 299, at 12 (asserting BOP eligibility requirements often involve company size, revenue, and riskiness of industry).

³²⁹ INS. SERVS. OFF., INC., BUSINESSOWNERS COVERAGE FORM 45 (2012), <https://f.hubspotusercontent20.net/hubfs/8588529/BP%2000%2003%2007%2013%20BUSINESSOWNERS%20COVERAGE%20FORM.pdf> [<https://perma.cc/SZB4-KBBB>].

³³⁰ See *supra* Section IV.A.

³³¹ INS. SERVS. OFF., INC., *supra* note 329, at 46; see also *supra* Section IV.A.

employees, including designers.³³² This limitation suggests that algorithmic harms arising from the design or implementation of a firm's own technology would fall outside the scope of coverage. Additional exclusions reinforce this conclusion: BOPs generally preclude recovery for losses stemming from malfunctioning or inadequate software, as well as for errors or omissions in programming, data processing, or computer operations.³³³ Moreover, liability coverage does not apply to "bodily injury" that is intended or expected from the standpoint of the insured, a restriction that parallels the exclusions found in standard CGL forms.³³⁴ This raises a further question concerning whether algorithmic liability might fall outside coverage on the ground that the resulting harm could be deemed expected or intended. Taken together, these provisions indicate that, even apart from threshold eligibility barriers, the standard BOP line may be ill-suited to address the injuries associated with algorithmic liability.³³⁵

E&O insurance covers mistakes committed by professionals in the course of providing services to clients.³³⁶ Although E&O policies vary,³³⁷ these policies often exclude claims for "bodily injury," which are intended to be addressed by CGL policies.³³⁸ The underlying rationale is that professional services do not ordinarily cause bodily harm.³³⁹ Accordingly, E&O policies generally do not cover standalone emotional injuries.³⁴⁰ At the same time, as stated above, CGL

³³² See INS. SERVS. OFF., INC., *supra* note 329, at 12.

³³³ See *id.* at 18, 21.

³³⁴ See *id.* at 35.

³³⁵ Additional limitations may further restrict coverage. For example, "bodily injury" arising from the inadequate rendering of professional services is excluded, as are damages to the insured's own products. See *id.* at 38-39.

³³⁶ See David E. Wood & Robert G. Devetski, *Bodily Injury Exclusions in E&O Policies*, NAT'L L. REV. (Nov. 19, 2019), <https://natlawreview.com/article/bodily-injury-exclusions-eo-policies> [<https://perma.cc/M2Q5-92ZT>].

³³⁷ See James E. Scheuermann & John K. Baillie, *Employer's Liability and Errors and Omissions Insurance Coverage for Employment-Related Claims*, 18 W. NEW ENG. L. REV. 71, 92 (1996) ("E&O policies include language that differs more or less markedly from insurer to insurer.").

³³⁸ See Wood & Devetski, *supra* note 336 ("E&O policies routinely include an exclusion for 'bodily injury' on the theory that coverage for property damage (things getting broken) and bodily injury (people getting hurt) is confined to Commercial General Liability (CGL) policies."); Jason Metz, *Errors and Omissions Insurance: A Comprehensive Guide*, FORBES (Feb. 19, 2025, at 05:17 ET), <https://www.forbes.com/advisor/business-insurance/errors-and-omissions> [<https://perma.cc/SJT7-FNUZ>] (instructing E&O insurance typically excludes bodily injury and property damage caused by business and suggesting business liability insurance policy to address these harms).

³³⁹ See Wood & Devetski, *supra* note 336 (asserting exclusion of bodily injury claims from E&O policies rests on assumption "that a service provider's liability for bodily injury can never arise from mistakes in providing services").

³⁴⁰ Some policies do provide coverage for mental and emotional injuries, but only when such injuries result directly from the insured's wrongful act. See *id.*

policies often define “bodily injury” in a manner that excludes purely emotional harm. As a result, algorithmic liability, particularly when it gives rise to nonphysical harms, will likely fall outside the scope of CGL, BOP, and E&O insurance frameworks.

First-party cyber insurance is also unlikely to address the coverage gaps described above, as such policies typically limit coverage to discrete cyber incidents involving data breaches, identity theft, ransomware attacks, hacking, or unauthorized disclosure of personal information.³⁴¹ Algorithmic injuries generally do not clearly implicate any of these covered categories. The same limitation applies to third-party coverage, where claims normally cover only losses related to personal data breaches and costs arising from violations of data privacy regulations.³⁴² Not only is cybersecurity coverage limited, but policies also contain broad exclusions due to the significant risk of catastrophic exposure insurers face from interconnected cyber-related harms.³⁴³

To the extent traditional policies silently cover AI-related harms,³⁴⁴ insurers increasingly exclude silent coverage by explicitly stating that existing policies

³⁴¹ See Renee Henson, *Government-Backed Insurance for Artificial Intelligence Technologies*, 41 GA. ST. U. L. REV. 559, 587 (2025) (“Ordinarily, cyber insurance policies cover losses related to data recovery, customer credit monitoring services, ransomware payments, and negotiators to manage ransom demands, inter alia.”); ROBERT H. JERRY II, *ADVANCED INTRODUCTION TO INSURANCE LAW* 140 (2023) (highlighting coverage offered by first-party cyber insurance policies, including for costs associated with hacks and viruses, among other things); Talesh, *supra* note 47, at 419 (“Cyber insurance is insurance designed to provide both first-party loss and third-party liability coverage for data breach events, privacy violations, and cyber attacks.”); Minhquang N. Trang, Note, *Compulsory Corporate Cyber-Liability Insurance: Outsourcing Data Privacy Regulation to Prevent and Mitigate Data Breaches*, 18 MINN. J.L. SCI. & TECH. 389, 407-08 (2017) (“[F]irst-party coverages may include losses resulting from ‘ . . . a data breach . . . [,] loss of electronic data, . . . costs of reconstructing data[,] . . . [and] data security and privacy injury’” (quoting STEVEN R. GILFORD, *PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE* § 16:3.1 (Kristen J. Matthews ed., 2016))); Reetz et al., *supra* note 48, at 757-58 (discussing typical components of cyber insurance policies and exclusions from such policies, like breach of warranty claims).

³⁴² See Abraham & Schwarcz, *supra* note 273, at 35 (“The third-party coverage included in typical cyber insurance policies often extends to civil liability for compromising individuals’ personal data or facilitating network security failures, as well as statutory fines pursuant to certain data privacy laws.”).

³⁴³ See *id.* at 39, 42 (observing most cyber insurers exclude coverage of losses caused by failure of broad-based utilities or internet services and “potentially catastrophic forms of damage, such as mold or nuclear damage”). See generally Tom Baker, *Back to the Future of Cyber Insurance* (Univ. of Penn. Inst. for L. & Econ., Research Paper No. 20-40, 2019), <https://ssrn.com/abstract=3625770> [<https://perma.cc/S9Z7-SJSD>] (encouraging research to determine how to “arrang[e] financial backstops or pools for at least some cyber risks”).

³⁴⁴ Silent coverage may arise when the relevant policy neither expressly includes nor excludes coverage, or where the policy language is ambiguous. See Kara Owens, *When Addressing Non-Affirmative Cyber: Silence Is Not Golden*, MARKEL (Oct. 13, 2020), <https://www.markel.com/insights-and-resources/insights/addressing-non-affirmative-%20cyber>

do not apply to AI-related injuries.³⁴⁵ For example, one cyber and technology E&O policy excludes coverage for any “media incident . . . that [the policyholder] created using generative artificial intelligence in performance of [the policyholder’s] services.”³⁴⁶ Another professional liability policy specifically excludes “‘damages’ . . . arising out of, or in any way involving any actual or alleged use of ‘generative artificial intelligence’ by the ‘insured.’”³⁴⁷ Additionally, a directors and officers, E&O, and fiduciary liability policy excludes any damages “arising out of, or attributable to . . . any Insured’s actual or alleged breach of any duty or legal obligation with respect to the creation, use, development, deployment, detection, identification, or containment of Artificial Intelligence.”³⁴⁸ Thus, more and more insurers are beginning to explicitly decline coverage *ex ante*. As algorithmic liabilities continue to expand, it is plausible that insurers will issue exclusions under CGL and related policies specifically targeting the algorithmic injuries discussed herein.

On the other end of the spectrum, some insurers have begun developing affirmative AI policies; however, no existing policies currently provide coverage for the algorithmic liability addressed in this Article. Existing affirmative AI policies, marketed by Lloyd’s and other insurers, offer coverage for “deviations from expected AI behaviour,” including “hallucinations[,] . . . model drift[,] . . . mechanical failures,” and related liabilities.³⁴⁹ Google has issued an affirmative AI policy as a variant of cyber insurance coverage available exclusively to its cloud customers.³⁵⁰ Additionally, Munich Re, a “trailblazer” in the AI insurance industry, has introduced a policy that provides a “performance guarantee” for AI technologies.³⁵¹

[<https://perma.cc/S593-L8M7>] (conveying numerous entities, including regulators and rating agencies, have called on insurers to better manage phenomenon of silent coverage).

³⁴⁵ See Michael Levine, Alex Pappas & Madalyn Moore, *How Insurance Policies Are Adapting to AI Risk*, LAW360 (July 2, 2025, at 17:06 ET), <https://www.law360.com/articles/2357580/how-insurance-policies-are-adapting-to-ai-risk> [<https://perma.cc/8NYF-KMRF>] (“[I]nsurers are beginning to introduce explicit AI exclusions. . . . Coverage for AI risks can no longer be assumed.”).

³⁴⁶ PHILA. CONSOL. HOLDING CORP., MUSICAL COMPOSITION AND GENERATIVE ARTIFICIAL INTELLIGENCE EXCLUSION 1 (2023), <https://www.hunton.com/assets/htmldocuments/noindex/Philadelphia-ARTIFICIAL-INTELLIGENCE-EXCLUSION.pdf> [<https://perma.cc/2YA6-6L5Y>].

³⁴⁷ Levine et al., *supra* note 345.

³⁴⁸ BERKLEY INS. CO., ARTIFICIAL INTELLIGENCE EXCLUSION (ABSOLUTE) 1 (2024), <https://www.hunton.com/assets/htmldocuments/noindex/PC-51380-00-06-24-Artificial-Intelligence-Exclusion-Absolute.pdf> [<https://perma.cc/F375-Q9QX>].

³⁴⁹ Beth Musselwhite, *Chaucer and Armilla Launch New AI Liability Insurance Product*, REINSURANCE NEWS (Apr. 23, 2025), <https://www.reinsurancene.ws/chaucer-and-armilla-launch-new-ai-liability-insurance-product> [<https://perma.cc/3JR7-2JLS>].

³⁵⁰ See Levine et al., *supra* note 345 (“Earlier in 2025, Google . . . introduce[d] a tailored cyberinsurance solution specifically designed to provide affirmative AI coverage that Google Cloud customers can purchase from the insurers Google has partnered with.”).

³⁵¹ *Id.*

None of these policies clearly cover the specific algorithmic injuries that are the subject of this Article. Rather, they target economic harms—and potentially some physical harms—caused by technological malfunctions. For instance, an affirmative AI policy could ostensibly cover injuries from an autonomous vehicle autopilot’s deviation from its design to drive cars in a reasonably safe manner.³⁵²

To summarize, with the issuance of limited affirmative AI policies, insurers appear to cover AI-related harms in name only. Marketed as a consumer-oriented innovation, these policies offer little meaningful or expansive coverage. Concurrently, insurers have begun introducing AI-specific exclusions, further narrowing potential recovery. This trend mirrors the early development of cyber insurance, which was marked by high premiums, narrow coverage, and numerous exclusions, prompting scholars to characterize it as largely illusory.³⁵³ At present, insurers seem to gesture toward addressing AI-related risks without offering substantive protection.

B. *Toward Substantive Insurance Solutions: Crafting Affirmative AI Policies for Algorithmic Harm*

This Article proposes a market-based intervention rather than a pure legal remedy, emphasizing the critical need for insurers to develop targeted insurance products to address harms associated with emerging algorithmic liability. The absence of suitable insurance coverage creates an urgent vulnerability for companies deploying algorithms, significantly increasing their exposure to liability and insolvency risks. Without appropriate insurance mechanisms, litigation stemming from algorithmic liability threatens the financial stability of numerous internet-based enterprises, especially AI-focused startups and other entities lacking resources to withstand extensive litigation or satisfy substantial adverse judgments. Consequently, this Article urges the insurance market to swiftly respond to this growing risk.

Third-party algorithmic liability insurance likely offers the most accessible and cost-effective solution, covering claims arising from injuries to third-party users.³⁵⁴ Under traditional indemnity policies, such lines should define “injury”

³⁵² Although verifying these conclusions is challenging due to insurers’ reluctance to share policy copies for competitive reasons, one insurer offering an affirmative AI policy—in response to a private inquiry made by the author—stated explicitly that the injuries identified in this Article likely would not be covered.

³⁵³ See Henson, *supra* note 341, at 588-89 (observing cyber insurance has failed to provide adequate coverage in response to cyberattacks and scholars’ calls for government intervention).

³⁵⁴ First-party insurance is unlikely to attract a sufficiently broad customer base. Moreover, premium costs may be prohibitively high, particularly in the initial stages when such coverage would constitute a luxury-line offering. See Anat Lior, *Insuring AI: The Role of Insurance in Artificial Intelligence Regulation*, 35 HARV. J.L. & TECH. 467, 484 (2022) (positing initial claims submitted to AI liability insurers would likely result in high premiums akin to premiums set when cyber insurance first became available).

broadly to encompass mental and emotional harms as well as resulting physical injuries—including self-inflicted harm like suicide given the prevalence of such allegations in algorithm-related litigation. Coverage should further extend to injuries inflicted by individuals interacting with algorithmic systems, including extreme events analogous to mass shootings.

To ensure meaningful coverage, the definition of an “occurrence” must be similarly broad, capturing the full spectrum of scenarios arising from algorithmic engagement. Policy exclusions should be narrowly tailored to preserve the substantive value of coverage rather than merely providing superficial assurances of protection.

Algorithmic liability may also be addressed through specialized parametric insurance policies.³⁵⁵ Parametric coverage is triggered when a specified condition, defined *ex ante* in the policy, is met.³⁵⁶ Coverage is determined by an objective standard of the triggering event, rather than by assessing actual losses.³⁵⁷ To recover under such a policy, the insured must generally only establish ownership of covered property and demonstrate that the parametric condition was satisfied.³⁵⁸ Triggers may be any objective metric correlated with actual harm.³⁵⁹ For example, flood insurance may rely on water levels; hurricane insurance on sustained wind speeds; crop insurance on seasonal rainfall; and earthquake insurance on Richter scale readings.³⁶⁰

Because the predefined triggers for parametric coverage typically arise from uncontrollable external events, moral hazard, as discussed below, poses a lesser concern.³⁶¹ In a similarly high-risk industry, insurers have introduced cyber parametric insurance products.³⁶² Thus, cyber parametric insurance may serve as a potential model for algorithmic liability.

³⁵⁵ See ZURICH INS. GRP. & MICROSOFT CORP., *supra* note 7, at 22 (highlighting how under parametric insurance, one could insure against an AI system’s performance and in turn harbor confidence in efficacy of system’s deployment).

³⁵⁶ See Robert H. Jerry II, *Understanding Parametric Insurance: A Potential Tool to Help Manage Pandemic Risk*, in COVID-19 AND INSURANCE 17, 19 (María Luisa Muñoz Paredes & Anna Tarasiuk eds., 2023) (defining “parametric trigger” and explaining mechanism by which trigger value is selected).

³⁵⁷ See *id.* at 20 (“[W]hether proceeds are owed (and perhaps also the amount) is determined by an objective and verifiable measure of the causal event, rather than the fact of actual loss or damage, which is the typical trigger in indemnity insurance.”).

³⁵⁸ See *id.*

³⁵⁹ See *id.* (“A parametric trigger can take a variety of forms, with the only requirement being that it is an independent, objectively measurable, and verifiable standard with a statistically significant correlation to actual losses.”).

³⁶⁰ See *id.* at 19.

³⁶¹ See *id.* at 19-20.

³⁶² In a related industry characterized by risks traditionally deemed uninsurable due to their catastrophic nature, insurers have developed cyber parametric insurance products. See *id.* at 34-35 (“[While t]he most common example of the gap-filling potential of parametric insurance involves natural disaster risks . . . several companies have brought cyber business interruption parametric products to the marketplace.”).

Insurers have demonstrated a willingness, albeit in limited form, to develop affirmative policies addressing certain AI-related harms. Although such coverage remains narrow and numerous examples reflect explicit exclusions, this trend signals the recognition that AI is an industry requiring focused attention. The question of just *how* insurers will or should design profitable AI-related products is beyond the scope of this Article, but it is a pressing issue in need of further examination.³⁶³

C. *Addressing Insurer Concerns: Limiting Emotional Harm and Mitigating Moral Hazard in AI Coverage*

The principal reasons commonly cited for the general exclusion of mental and emotional injuries from insurance coverage concern the difficulty of limiting, verifying, and defining nonphysical harms. A related rationale is the risk of moral hazard. Although this Article does not propose specific insurance solutions, this Section addresses the broader claim that insurance markets are ill-equipped to handle such indeterminate risks.

As Professor Tom Baker has observed, “insurers have so many ways to manage [uncertainty], that the most likely result will always be that they will continue to muddle through.”³⁶⁴ Insurers routinely confront and manage risks that defy precise calculation.³⁶⁵ Indeed, some scholars have said that “a high degree of scientific and technical uncertainty permeates the insurance industry.”³⁶⁶ Even policies supported by extensive actuarial data are inherently uncertain.³⁶⁷ The insurance industry possesses a range of mechanisms to manage unpredictable exposures: expanding the pool of insureds to generate additional premium income; raising premium prices; capturing profit from policies that ultimately present lower-than-anticipated risks; curtailing litigation costs; obtaining reinsurance; and distributing coverage across multiple carriers, among others.³⁶⁸

³⁶³ Insurers seem to be working on this question now. *See* ZURICH INS. GRP. & MICROSOFT CORP., *supra* note 7, at 9 (issuing practical guidance on how to guard against potential flaws in AI-driven products, including that related to deficiencies in model design, development, and deployment).

³⁶⁴ Baker, *supra* note 26, at 108.

³⁶⁵ *See id.* at 65 (“[T]he ideal type of a fixed-in-advance, distribution of determinable risks does not match the reality of insurance markets.”).

³⁶⁶ RICHARD V. ERICKSON & AARON DOYLE, *UNCERTAIN BUSINESS: RISK, INSURANCE, AND THE LIMITS OF KNOWLEDGE* 5 (2004).

³⁶⁷ *See* Baker, *supra* note 26, at 108 (“Even life insurance, which would be expected to be the paradigmatic example of this ideal type in action because of the availability of public and private mortality data going back hundreds of years, turns out to be riddled with uncertainty.”).

³⁶⁸ *See id.* at 69 (“Insurers have always extended protection against losses whose frequency and magnitude were unknown, whether by . . . creating a new insurance product to cover a new set of risks . . . [or] by revising a standard-form insurance policy”); Jaffee & Russell, *supra* note 33, at 207 (listing “contract of bottomry” and “syndicate insurance” as two

Lloyd's of London, the world's largest insurance marketplace, exemplifies this capacity.³⁶⁹ Lloyd's "specialize[s] in what no one else will insure: the biggest, the most unusual, the hardest to analyze."³⁷⁰ It operates, in part, by enabling brokers to collaborate with insurer "syndicates," dividing liabilities into manageable portions.³⁷¹ Each participating insurer receives a corresponding share of the premium pool and, by aggregating premiums across thousands of policies, maintains the financial capacity to pay when risks materialize.³⁷² Thus, catastrophic risks are divided into smaller portions and distributed across many insurers, allowing "storms and fires and floods and earthquakes, and every possible man-made calamity [to be] systematically reduced to manageable routine."³⁷³ Even in cases of routine and well-known insurance fraud, such as the deliberate scuttling of ships, insurers respond by raising premiums and thereby spreading costs across a broader base of policyholders.³⁷⁴ Another example of the insurance industry's adaptability is its response to the COVID-19 pandemic, which disrupted virtually every line of coverage yet left the industry structurally sound.³⁷⁵

This is not to suggest that insurance serves as a panacea. Premiums could become prohibitively expensive if insurers were required to cover every conceivable harm that consumers might seek to insure. Moreover, compelling insurers to pay losses that threaten their solvency undermines the stability of the insurance system itself. Nevertheless, insurers are more capable and adaptable than often acknowledged. They already underwrite coverage for risks that are

effective means by which marine insurers tackle potential large losses); *see also* Jaffee, *supra* note 33, at 105-06 (proposing regulation to help facilitate insurance for catastrophes but acknowledging competitive and "informationally efficient" insurance markets could adapt without such regulation); Ben-Shahar & Logue, *supra* note 34, at 214 (discussing two methods employed by insurers to regulate losses: mitigating covered losses and controlling litigation costs by acting as insureds' legal defense).

³⁶⁹ *See* MATTHEW CAMPBELL & KIT CHELLEL, DEAD IN THE WATER: A TRUE STORY OF HIJACKING, MURDER, AND A GLOBAL MARITIME CONSPIRACY 36 (2022) ("If you were to compile a list of the worst catastrophes of the last century, virtually all of them would, at some point, have ended up as claims at Lloyd's . . .").

³⁷⁰ *Id.* at 36.

³⁷¹ *See id.* ("[A] broker is appointed for the project, and then shops it around to Lloyd's members, who come together in one or more 'syndicates' to insure it. Each member of a syndicate takes on a piece of the liability, as much as the individual insurer can afford to lose.").

³⁷² *See id.* at 37.

³⁷³ *Id.* (quoting GODFREY HODGSON, LLOYD'S OF LONDON: A REPUTATION AT RISK 9 (1984)).

³⁷⁴ *See id.* (noting Lloyd's ability to cover routine artificial risks with premiums from bank in addition to "income from tens of thousands of other policies").

³⁷⁵ *See* Jerry, *Reflections on COVID-19*, *supra* note 299, at 3 ("The pandemic also triggers stressors for the quality of assets in insurers' portfolios, including commercial mortgage loans, mortgage-backed securities, municipal bonds, and corporate bonds. Yet the risk of mass insurance company insolvencies is low . . ." (footnote omitted)).

uncertain, speculative, and susceptible to fraud, while remaining profitable and offering affordable premiums.³⁷⁶ If insurers can devise mechanisms to cover risks such as maritime ship fraud, they should be able to develop models to insure against mental and emotional harms arising from algorithmic liability.

CONCLUSION

The legal terrain governing algorithms is shifting rapidly, potentially exposing internet-based firms to unprecedented liability. Courts' evolving approaches to algorithmic liability generate uncertainty. That uncertainty in turn should fuel demand for insurance among firms vulnerable to litigation and catastrophic judgments that could trigger insolvency absent adequate financial protection. Thus, insurance emerges as a critical mechanism for sustaining innovation and growth in the AI sector. Yet existing policies reveal gaps, leaving firms exposed to prolific risk. By identifying these deficiencies, this Article seeks to catalyze timely market innovation, fortify firms against destabilizing liability, and advance scholarly and industry dialogue on how best to confront the mounting challenges of algorithmic risk.

³⁷⁶ *See id.* at 27.