

Speaking of AI:

What Can You Do to Avoid Trouble in Disclosures, Litigation, and Regulatory Scrutiny

April 3, 2025 Presentation by Katten and Gunderson Dettmer

We hope you were able to join, or have time to view the video recording of, the webinar presented by Katten and Gunderson Dettmer discussing the current landscape of AI-focused litigation.

For those of you who missed it, or are looking for a quick summary of the discussion, here are some key points and takeaways:

Key Points and Takeaways

- The boom in the use of AI by U.S. businesses has ushered in a new wave of litigation, with the plaintiff's bar and the SEC scrutinizing how companies deploy AI within their operations.
- Litigation can slightly lag new business trends, and few written decisions have yet been issued based on AI claims, but plaintiffs are growing more sophisticated about AI's strengths and limitations.
- Class action and state-law cases alleging contractual and equitable claims for improper use of AI can provide a testing ground for legal theories that could be used in other contexts, like securities lawsuits. More creative claims are likely to emerge in the next year or two as additional theories are evaluated in different legal actions.
- For public companies, plaintiffs can bring allegations that AI use is causing business harm (for example, by concealing or distorting business trends, or by cannibalizing core product revenue and development to support AI development) or Exchange Act claims alleging that companies have overstated their AI capabilities (so-called "AI washing" claims).
- The SEC has also indicated an interest in scrutinizing alleged "AI washing," as well as pursuing alleged fraud related to overstated claims with respect to AI. In late February 2025, the SEC established a Cyber and Emerging Technologies Enforcement Unit to focus on retail fraud concerning use of AI and machine learning.
- SEC enforcement actions and securities litigation to date have focused on factual claims such as:
 - Companies outsourcing to and relying on allegedly faulty predictive AI models to make impactful business decisions (for example, use of predictive AI by a health insurer to decide what coverage claims to deny, or when to override a physician's

determinations as to medically necessary care, even when the health insurer was allegedly aware of a high error rate in such model)

- Companies misrepresenting the amount of human intervention required for AI models to operate effectively or integrate into the business
 - Companies providing misleading information about whether the AI used in the business was internally developed or licensed from third parties
 - Companies overstating their AI tools' capabilities, ability to capitalize on AI-related opportunities, and the extent to which AI has driven sales
 - Pressure on margins from a company's shift to AI being greater than previously disclosed
 - Lack of disclosure that development of AI required diverting of needed resources from the company's core business and primary revenue driver
- In this environment, companies can take certain steps to prepare themselves for potential scrutiny and litigation:
 - Pay close attention to current AI disclosures, redrafting where necessary to maintain disclosures that are balanced (describing both risks and opportunities) and accurate (particularly as AI capabilities evolve and business uses change)
 - Assess D&O insurance policies to determine how AI-related claims may be handled
 - Board engagement is important, and while Board members may have significant awareness of and exposure to AI technology and use, the Board's role is ultimately one of oversight and policymaking while relying on management and experts for technical know-how and operational action
 - The Board should set corporate AI policy that's tailored to the individual company, transparent, flexible, and comprehensible, and then following up as appropriate
 - Management should help set realistic, clearly defined benchmarks and report progress to the Board as appropriate