



Barclay Damon Live Presents *Cyber Sip*[™] Season 5, Episode 9: “Warning: AI Exclusions Are Here”

Host: Kevin Szczepanski, Barclay Damon,
and Kelly Geary, EPIC Insurance Brokers & Consultants

[Kevin Szczepanski]: Welcome back to Kelly Geary, who is managing principal national practice leader for professional executive and cyber solutions at EPIC Insurance Brokers & Consultants. And we’re always happy to have her back. Welcome back to *Cyber Sip*, Kelly.

[Kelly Geary]: Thank you, Kevin. I’m very excited to be here.

[Kevin]: Oh, that’s so great to hear. By the way, I won’t say, but I finally learned today what EPIC stands for. I never noticed it.

[Kelly]: Oh, you did?

[Kevin]: So yes, it is an acronym or if you prefer, initialization. But anyway, we’re delighted to have our favorite friend from EPIC Insurance Brokers and Consultants join us. We’re going to talk about what we were predicting a year or two ago, and now they’re finally here, which is the rise—and the risk—associated with artificial intelligence exclusions. So first thing, Kelly, for those of us who aren’t familiar at the high level, what are AI exclusions and when did you first start seeing them in insurance policies?

[Kelly]: It’s a great question. I’d say actually the first time I saw an AI exclusion was maybe a little over a year ago, maybe a year and a half ago. And it was in a small lawyers professional liability policy, so small firm, lawyers professional. And it wasn’t an absolute AI exclusion. So “any claim arising out of or related to in any way, the use of artificial intelligence.” And I think there was a definition around that as well of artificial intelligence 18 months ago, which is now, if you looked at that same definition, is probably somewhat outdated already. So it’s interesting that that existed that long ago.

[Kevin]: Yeah, agreed. And of course, it’s evolved over time. And I want to talk a little bit about lawyers, maybe especially about lawyers in a bit. But from your standpoint, Kelly, what’s driving this push? What has driven the push to include AI exclusions? Is it a question of not having enough data points to properly underwrite, or is there something more fundamental about the nature of the AI risks that’s driving it?

[Kelly]: I mean, I think that’s certainly part of it. I think we know we don’t have enough data to be able to price accurately the insurance for it, or coverage for it. And we also don’t have enough information to be able to underwrite to the risk, right? To be able to say, if you do X, Y, and Z, you are a good risk. If you do A, B, and C, you are not.

[Kevin]: Mhm.

[Kelly]: And I think that that’s a struggle that carriers have for sure. I think the other push, honestly, is what we all went through with “silent cyber,” if you remember that, a number of years ago? You know, the market



responded to silent cyber post-loss, right? So the losses started to come and then they reacted to the fact that there was no mention of cyber risk in these policies. And then the losses came and the policies, and there are various different types, the commercial general liability, the professional liability policies, all of those policies that were sort of stress-tested at that point, didn't stand up. And so then the market shifted sort of reactively. And I think with AI, what you're seeing is you're seeing more of a proactive, "we're not going to get stuck in that same bucket as we did with this silent cyber. We're going to address silent AI head on."

[Kevin]: Yeah. And so I think you answered it, but I was thinking, is it just that desire to be proactive or there have there been certain types of AI losses and claims that have really started to focus the carriers on excluding this sort of risk?

[Kelly]: I think the most that we're seeing, at least that I've seen, is in the lawyer space, honestly, is the hallucinations. I think very shortly after ChatGPT launched, and that's where you really have the generative AI push. You saw a lot of law firms struggling with how to utilize this in a way that was ethical and, you know, where you had a human in the loop oversight. And they made a lot of mistakes. And so, and that was very well publicized. And I think that that certainly is something that I would, I would anticipate the carriers have been looking at and worried about.

[Kevin]: Yeah. So can we walk through, at least generally, what you're seeing a typical AI exclusion say, and what types of losses are in and what types are out? Because I've seen some writing and some get very granular. So I'm looking at one now "the generation or dissemination of any content or communications using AI." A claim arising out of that would be excluded. But then I'm seeing some very broad references, like "any product or service that incorporates AI." And I'm thinking, how does the insured even know with confidence whether that's happening until after the loss occurs? So I know this is a terribly long and convoluted question, but what are you seeing in the language of the exclusions and are there things that we should be looking out for?

[Kelly]: I mean, it's a great question. It's a really hard question to answer because I think they are still evolving very much, these exclusions. I, you know, honestly, we have not seen in my particular practice group, and I focus on large and complex risks, so we have not really seen any real exclusions to any any large extent, right? We are seeing some carriers ask a lot of questions around, you know, what is your use of AI? What are your governance practices? Things like that. We're not seeing a lot of exclusions. What we are starting to see is definitions, which as a coverage lawyer, Kevin, you will know that sometimes those are more powerful than the exclusions themselves.

[Kevin]: Yeah, we. Yeah, sure, sure.

[Kelly]: And I find those particularly interesting because, as I said before about that initial exclusion, AI exclusion I saw 18 months ago, the definition of AI very broadly, is now not capturing—like if you looked at that definition 18 months ago and you look at it today, it's different. And so it's very interesting to me to see carriers trying to define these things because the technology itself is evolving at such a rapid rate. I don't know how you define it in a policy period that is a year long.

[Kevin]: Agreed. And I remember at an old, I think it was an Advisen conference, there were all these people there and there's this really funny guy. I mean, he missed his calling. He should have been on SNL. And he was making the point about, you know, you're comparing policies like traditional CGL policies and it's like apples to apples, or maybe it's apples to oranges in a D&O policy. But in the cyber world, the AI world, it's going to be like comparing apples to hand grenades, because there's no standard definition. Everybody's making up their own. We all know the carriers are going to be like the underwriting team is going to be like, draft me the broadest possible AI exclusion. And then some are going to look at it and say, well, this is great, but we need to sell some insurance. So they'll try to pare it back. So it sounds like they're out there and I've seen it. Everybody's...every time something happens, it's always reported on LinkedIn. But where you...where the



rubber meets the road in your world, the underwriting and the policy purchasing world, you're sitting across the table from an underwriter or a carrier right now on behalf of one of your clients. Let's say it's a law firm. What is the discussion surrounding AI, because that firm is undoubtedly using it to some degree...there may be multiple platforms approved for use. How do you make sure that the use is covered and that there isn't some exclusion that's going to pop up later to take that coverage away?

[Kelly]: You know, it's hard. I'd say that, you know, what we try to do is really talk to the underwriters about trying to understand from their perspective, what is it that you are most afraid of? And let's see if we can narrow that down and work together to try to make sure that you're not precluding the coverage that really making the coverage illusory for the firm, or for the company...to your point, AI is used as a tool...let's step back for a second and say when we use the term AI, AI has been around since the 1950s, it's in everything we do, in our Outlook, autocorrect...So you have to be very careful about when you're looking at these exclusions and the wording, what are they saying? Are they saying AI broadly? Are they saying generative AI? I mean, we can step forward and say, are they saying agentic AI? And I actually saw the other day a policy involving or defining "quantum computing incident." So "AI incidents and quantum computing incident" in one policy. And, you know, I would argue that all of that would be covered in a cyber policy already without affirmatively saying it. But once you've defined those terms, then the incident must fall within those terms in order to trigger the policy which is the policyholder's burden to trigger the policy. The exclusion, I look at these exclusions and I think, well, this will be interesting to see if the carriers can actually effectively apply the exclusion because it's the carrier's burden to prove the exclusion actually fits the situation. Good luck.

[Kevin]: Yeah. That's an interesting scenario you bring up because I could imagine a creative claims or coverage lawyer saying, well, you know, this arose, this multi-million dollar loss arose out of an erroneous auto-correct, but that's AI, is that AI? And now all of a sudden you're going to have these definitions or exclusions sweeping...hoovering up all sorts of claims that you would have never imagined would be implicated. So...

[Kelly]: Right.

[Kevin]: Are there any are there any endorsements? We talked about exclusions, Kelly. I've seen one or two examples. Have you seen examples on the marketplace of sort of widespread affirmative AI coverage that would sort of be the mirror image of the exclusions? Because I'm wondering if as this goes forward in the next year or two or three, you're going to have carriers saying, well, we're going to take this away. And if you want to buy it back, even though you had it yesterday, we're going to charge you an additional premium.

[Kelly]: Right. Yeah, I mean, you're definitely starting to see the carriers try to figure out how to address it, right? And I think that as a general proposition, when I look back on my time on the carrier side as underwriting counsel, if there was a new emerging risk that we were unsure of, we could either exclude it, we could affirmatively provide coverage, or we could underwrite to it, right? And put the answers or put the questions in the application because the application becomes a part of the policy. Those are the main three ways that we would sort of address these new risks. So we are seeing some affirmative grants of coverage or, and/or I'll say some retreats from coverage that I think for the silent AI was sitting there and now they're trying to sublimit that coverage, right? Which is another way of containing the risk in some way and saying, look, you have the coverage, but here it is. It's \$100,000. That's all it is on your \$5 million policy. So one of the things that I think is really has evolved that's sort of interesting is business interruption coverage in a cyber policy, right? So if your network is impacted, right, the data restoration coverage, business interruption coverage, helps you sort of repair your systems, your network. If you have an AI model, and that AI model is poisoned or damaged or corrupted in some way, retraining that AI model can be very expensive, very expensive.

[Kevin]: Mhm. Sure, yeah.



And the carriers are starting to realize that that may be more than they really wanted to cover right? And so they're starting to work into these cyber policies...that's the first thing I'm starting to see in the cyber policies, is this containing of that coverage, the retraining the model. They're saying that's separate, that's different, that's not business interruption, even though you could argue that it should fit there now.

[Kevin]: Mhm. Mhm.

[Kelly]: Um, that's too much money, and...

[Kevin]: Is it so is it sub-limited or is it just not included?

[Kelly]: It depends. So on a brand new policy I saw, I will not name the market, but that I saw the other day, it was specifically excluded retraining the AI model from... in every definition I could find. It was there. They were so clearly focused on not accepting that risk. That financial risk is too much for them. And you're starting to see some other markets, some more traditional sort of markets doing that as well and subliming the coverage and saying, all right, if you want to retrain the model, almost similar to reputational harm coverage. If you remember, back like 15 years ago, that wasn't included. That was not a component of a cyber policy. The rep harm actually was a part of business interruption loss. And if you could prove that you lost a client because of the breach event, that would just become a part of your business income loss.

[Kevin]: Mhm, sure.

[Kelly]: Right? I lost this million-dollar client because of the breach event or whatever it was. And then all of a sudden, the carriers were like, wow, that's very expensive for us to carry to cover. So we're going to create affirmative coverage, and we're going to put a sublimit on it, and we're going to put all sorts of definitions around it. And right now, when I look at rep harm, and I don't know what your thoughts are, but most of the rep harm cover is like all the stars have to align in order for that coverage to trigger. I think it's very hard to trigger that coverage to begin with.

[Kevin]: Mhm.Mhm. Yeah.

[Kelly]: And so I think it's very, it's following a similar pattern, I think.

[Kevin]: So I have one question I'm going to save for the end, but let's focus on lawyers then. So you have so many lawyer clients, large and small, and everyone in between across the country. What should we law firms be thinking about in this era? So we have, we're increasingly using AI. Some are... they've bet the ranch on AI. Some are still afraid of it. I'm not sure that those are, those are the wrong ones. But then you have everything in between. And I think maybe we are everything in between. What are you telling lawyers in this? It's worse than emerging. It's increasingly maybe confusing risk landscape for policyholders. The law firms have got to be doing some things on their own to minimize this risk in order to, in turn minimize the risk that they're going to have to turn to insurance coverage that might be changing. So what do you say to your clients when they come to you and say, okay, Kelly, we've got to work around this. What's our best workaround?

[Kelly]: I mean, I think one of the things that I've been telling our firms as a general proposition is slow down. I feel like there is this rush to adopt and implement AI. And I think a lot of that is coming from pressure from clients perhaps. And also from pressure just from a competitive standpoint, right? We've got to do it because everybody, the fear of missing out, we've got to do it. And so I think there's a big rush, right? And I think that one of the things that I tell them is to sort of slow down and to recognize that the rate of change that we are experiencing today has no historical precedent. Everything is moving so fast. So the gap between risk liability and insurance is widening every day, which is very, very challenging for certainly... for us as insurance brokers, but for law firms and any other insurance buyer, right? Because insurance follows liability. So where liability is



uncertain, so is the insurance. And so you really have..

[Kevin]: Right.

[Kelly]: ...to think about risk management and AI governance as a part of this, because as this evolves, you know, just take, for example, the definition of AI. It's going to change. It's going to change... what is considered AI or generative AI will change in a very short period of time, not an annual policy period, right?

[Kevin]: Right.

[Kelly]: So you have to be prepared from the standpoint of making sure that your risk transfer is as resilient as it can be and as future proof as it can be. And I think you have to work with good coverage lawyers and risk advisors and insurance brokers, people that really understand the risk and look at your policy and make sure that you've got, you know, the best you've got, the best that you can get, but also recognize that that risk landscape is changing so quickly. We don't have a legal framework that contemplates a lot of the risks, right, from a liability standpoint.

[Kevin]: Right. It's not developed yet.

[Kelly]: No, it's not developed. And it's moving too fast for, it's like the tortoise and the hare, right? The, you know, the insurance world and the legislative world moves very, very slowly. And technology moves very, very fast. And there's... so it's hard to keep pace with it. So there's always going to be gaps. I don't think you're going to be able to avoid the gaps.

[Kevin]: No, and maybe some of us like the fact that there are gaps. It gives us something to do. But no, that's a terrible thing. It's half a joke. All right, let me end on this. As I'm thinking of my dear friend, Barry Rabkin, who is a very thoughtful guy, he's working on his second book. And he is, along with the, I don't know if he's still the CEO of Zurich Financial, but Barry is just banging the drum and in a good way. I respect his views, but sort of like, you know, this whole cyber risk thing is not wise. There should not be insurance. That is a fundamentally incalculable risk. And I can just, I'm channeling him and saying, you see, this business with AI is just underscoring...now the carriers are even conceding implicitly that they're having a hard time underwriting this risk. But I know you feel differently and candidly, so do I. So I wanted to put this through you, for people that will say, you know, this is just another reason why cyber risks are ultimately uninsurable. I'm not going to use AI and I'm not going to get cyber insurance. And we've certainly seen some law firms say that. We won't mention any names, but I'm sure you've seen it too.

[Kelly]: Yes.

[Kevin]: What do you say to a client that comes to you with that dim view of cyber insurance? How do you make the case that this is still an invaluable risk management tool, whatever the limitations are and whatever the coming AI exclusions might be?

[Kelly]: Well, I mean, I think there's certainly, if you look at the claim activity that we've seen, certainly in the last 15 years or so, carriers are paying out, they're paying out big numbers. So the policies are valuable, a valuable tool for risk transfer purposes. I mean, I do think that you will see a change in the insurance market and the way insurance is provided perhaps in the next five to 10 years. When you think about technology risk, I mean, I have maintained for a very long time to anybody that will listen to me, that part of the challenge, I think, is we're taking the model of the insurance, which is based on an annual policy period, and we're saying this is...we're trying to fit this very dynamic risk into this old model of one year. And I think that's part of the problem with this, ensuring this kind of risk is... in the span of a year, so many different things can change when you're thinking about whether it's artificial intelligence or any kind of cyber risk, really technology-based risk, that risk develops too quickly for us to keep pace with it and it from an insurance standpoint. And so



perhaps in the future, maybe one of the ways that the insurance carriers can continue to sort of make money on these products is to reevaluate the annual... the term of the insurance.

[Kevin]: Yeah. So it may be that it's not one year, it's less than one year. Or it could be that something, an event during the year triggers a supplemental underwriting process.

[Kelly]: Right.

[Kevin]: Very interesting. A lot of creative ways to address this. It is evolving every day. And here we are with AI exclusions that I think we're in the nascent phase. It's only going to get more developed. And that's why I wanted to have you on to talk about it, because I know you are always at the cutting edge. For those of you that don't know, Kelly...Kelly Geary was in the very early stages of cyber insurance. I think you drafted, did you not draft one of the earlier policies?

[Kelly]: I did. I, yes, very early on. I'm trying to remember when it was. It was over 15 years ago. So yeah, no, I was involved at the very beginning and trying to draft language and create vendor panels and do all those good things. So it's been interesting to see it evolve as a product.

[Kevin]: Right. And it's so nice to be able to talk to someone who has seen it from beginning to where we are today. And you'll be in it for the years to come. So it's always great to see you. Thank you so much for coming on. This is going to be an invaluable discussion for our listeners, our viewers. And I'm so glad that you could take some time out of your day today. We're on a Friday here, folks, and Fridays are busy in the insurance industry, so we thank Kelly for taking some time out to talk to us.

[Kelly]: Thank you so much, Kevin. I love chatting with you, so...

[Kevin]: Oh, my pleasure. Same here. All right, folks, thank you for joining us, and we'll be back soon with another episode.

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