

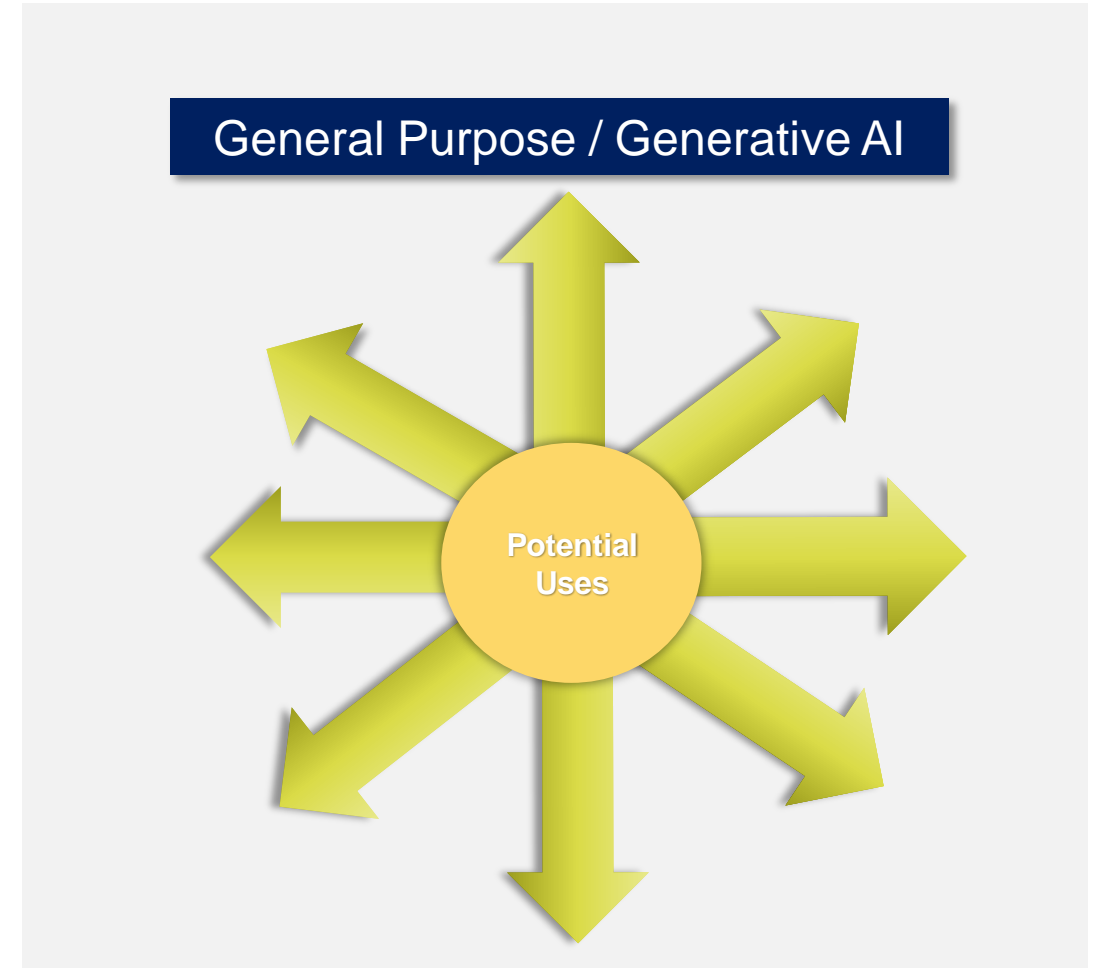


# DLA Piper's Product Liability Symposium

**Artificial Intelligence: Preparing Your Offense to  
Strengthen Your Defense**



# Narrow & General Purpose AI

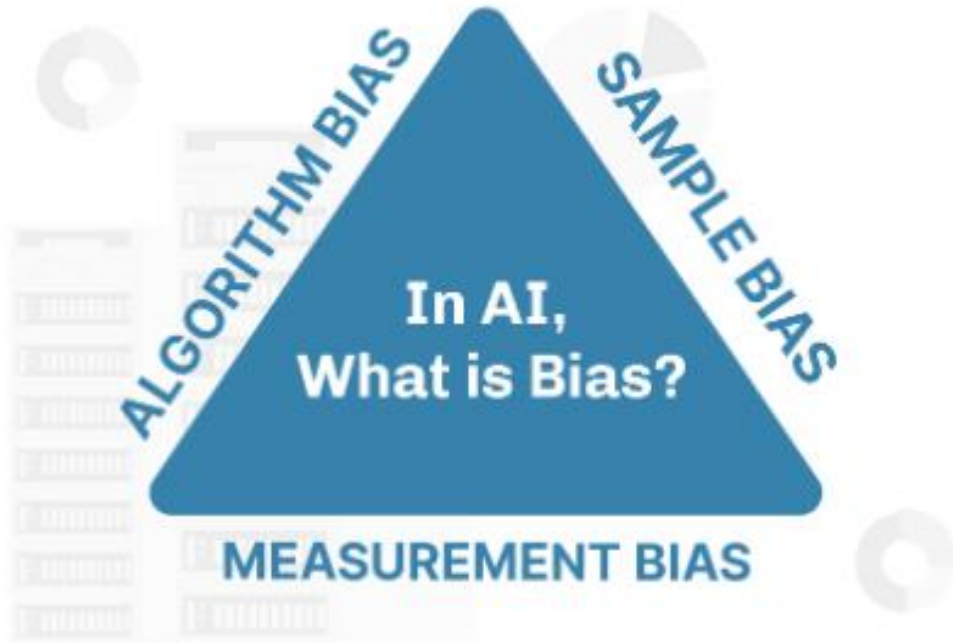


# Generative AI



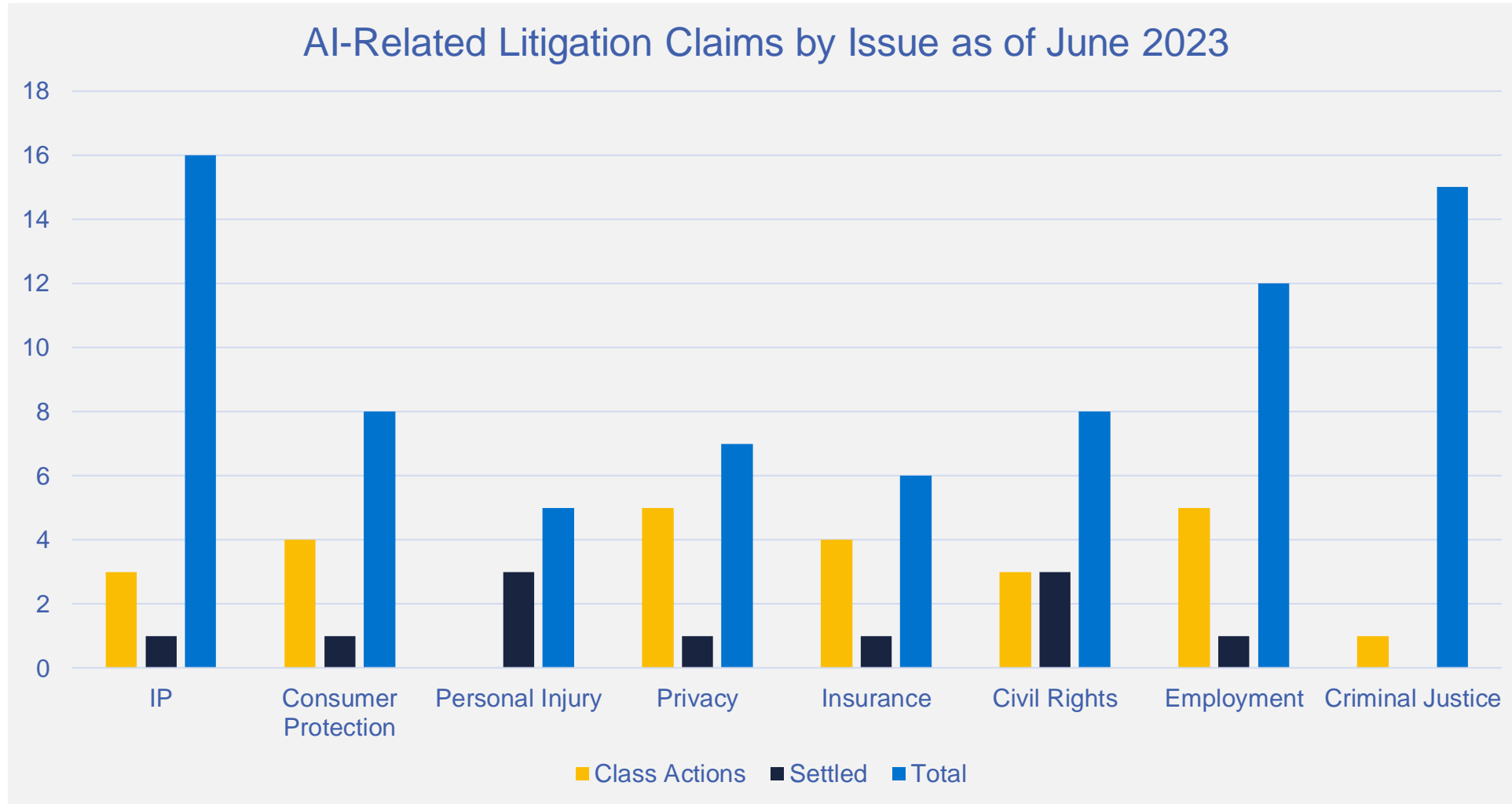
Generative AI is a different type of AI tool that uses inputs from various types of external sources to build a model of the world, from which it can create, or generate, new content based on user prompts.

# Algorithm Bias

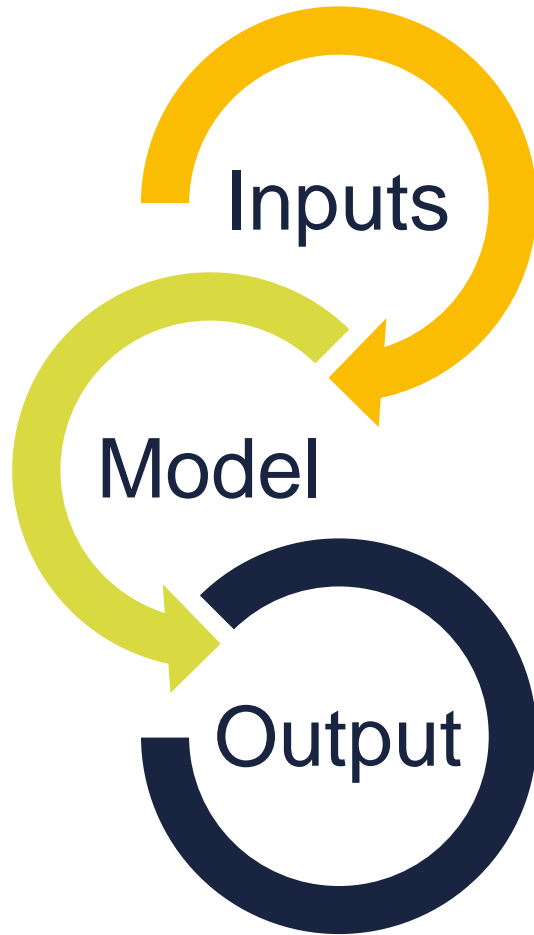


- Errors that create unfair outcomes
- Bias can be introduced through data sets
- Algorithm design can lead to unintended bias

# AI Litigation Has Begun, and Will Continue to Evolve



# Potential Liability by Inputs/Outputs



**Liability based on data integrity or misuse:**

**Liability based on the (mis)function of a model:**

**Liability based on the outcome of the GenAI:**

# Potential Litigation Risk Areas

## *Products Liability*

- Defect claims related to AI-technology
- Alleged injuries stemming from shared decision-making

## *Consumer Protection*

- Class actions or State AG actions based on deceptive business practices
- Violation of consumer protection laws



# AI Converts Individual Negligence to Product Liability

*Example: Human-Driven Vehicles to Autonomous Vehicles*





# Is AI Software A Product?



# Traditional View: Software is Protected



- *Restatements of Torts* describes “products” as “chattels” or “articles” (Second) and limits “products” to physical things (Third).
- *Quinteros v. Innogames*, (W.D. Wash. 2022) (psychologically addictive online games are not a product).
- *Facebook v. Doe*, (Tex. App. 2022) (Facebook is not a “tangible” product).
- *Rodgers v. Christie*, (3d Cir. 2020) (a public service announcement is not a product).

# Emerging View: Software Is Not Protected



- *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., and Prods. Liab. Litig.*, (C.D. Cal. 2013) (circumstantial defect evidence withstands summary judgment where software complexity precludes tangible evidence of specific design defect).
- *Lowe v. Cerner Corp.*, (4<sup>th</sup> Cir. 2022) (software's failure to meet EHR usability standards can be evidence in negligent design cases).
- *Brookes v. Lyft*, (Fla. State Ct. 2019) (Lyft app is a product).
- *Fain v. American Honda Motor Co*, (C.D. Cal. 2019) (self-braking software treated like a product).
- *Holbrook v. Prodomax Automation*, (W.D. Mich. 2021) (robotic programming is a product).

# Challenges to Products Liability Defenses



## *“Learned Intermediary” Doctrine*

- AI increasingly makes decisions that are adopted by professionals
- Alleged injuries stemming from shared decision-making

# How To Best Serve Clients



- Mitigate Risks
- Build Complaint AI Platforms
- Ethical AI
- Algorithm Bias Testing
- AI Governance Structures

# Questions?