Courts Redefining Software As Product Generates New Risks

By **Jamie Lanphear and Mildred Segura** (August 1, 2025, 4:51 PM EDT)

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For decades, product liability law has drawn a bright line between tangible products — think hip implants, pacemakers and insulin pumps — and intangible services like websites and video games.

This distinction has historically shielded software developers and digital platform providers from the strict liability claims that have long haunted traditional product manufacturers. But recent legal developments suggest that line is beginning to blur, with significant implications for companies in life sciences, digital health and consumer technology.

The legal landscape is shifting.

Courts have traditionally been reluctant to treat software as a product for purposes of strict liability. The prevailing rationale is that software is intangible, often licensed rather than sold, and its defects tend to resemble service failures or contract breaches rather than manufacturing or design flaws.

This view, reinforced by the Restatement (Third) of Torts definition of "product" as tangible personal property, has led many courts to dismiss product liability claims against software providers.

But as software and artificial intelligence have become embedded in everything from diagnostic tools to ride-hailing apps, courts are rethinking that approach. A recent wave of litigation against social media platforms, AI chatbot developers and ride-hailing companies has prompted courts to confront a new question: Can — and should — certain software features be treated as products under tort law?

A trio of approaches to software as a product are emerging.

A review of the recent case law reveals three emerging, nonexclusive approaches to determining when software should be deemed a product for product liability purposes.

Defect-Specific Approach

The U.S. District Court for the Northern District of California in the 2023 decision in In re: Social Media Adolescent Addiction-Personal Injury Products Liability Litigation **pioneered** a defect-specific approach.[1]

Rather than classifying software as a whole, the court examined, in the context of a motion to dismiss, specific functions alleged to be defective — such as parental controls, age verification and algorithmic content delivery — and evaluated whether each could be analogized to tangible personal property.

For every single function it analyzed, the court concluded that there was some tangible property analogous to it and allowed the plaintiffs' design defect claims to proceed.

This approach, which falls outside the Restatement (Third) of Torts and elevates "functionality" over "tangibility" in defining "product" for purposes of strict liability, has influenced other cases, such as in the July 8 decision in In re: Uber Technologies.

There, the Northern District of California applied the defect-specific framework to conclude that some, but not all, safety-related features alleged to be defective in a ride-hailing app were products subject to strict liability.[2]

In recent cases — such as the U.S. District Court for the Eastern District of Texas' Dec. 10, 2024, decision in A.F. v. Character Technologies,[3] the Superior Court of California's March 25 decision in Moore v. Meta[4] and the U.S. District Court for the Southern District of Texas' April 30 decision in Doe v. Roblox[5] — plaintiffs appear to be following this model, as the complaints ground their claims in the design and function of specific software features.

By emphasizing functionality over expression, they closely align with the Social Media multidistrict litigation court's logic and may be more likely to survive early-stage dismissal. We shall see.

Platform-as-a-Whole Approach

Some courts take a broader view, evaluating whether the app or platform as a whole is analogous to tangible personal property. These courts emphasize the policy rationale for strict liability and the need for the law to evolve with the times and technology.

For example, in the Aug. 12, 2024, decision in T.V. v. Grindr, the U.S. District Court for the Middle District of Florida took this approach to evaluate a motion to dismiss and conclude that a dating app was a product subject to product liability law.[6]

The court acknowledged that the Third Restatement defines "product" as "tangible personal property distributed commercially for use or consumption," but noted that it also includes intangible items "when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in th[e] Restatement."

Because the app at issue was designed, mass-marketed, placed into the global stream of commerce and generated a profit for the defendant, it satisfied the definition of product.

The court further emphasized that the goal behind strict liability is to place responsibility for injury caused by a product on the one who places it in the stream of commerce and emphasized that "common law must keep pace with changes in our society and may be altered ... when the change is demanded by public necessity or required to vindicate fundamental rights."

Other courts have reached similar conclusions.[7]

Content vs. Medium Distinction

A third approach, seen in the May 21 decision in Garcia v. Character Technologies, **distinguishes** between claims based on a platform's functionality and those based on its expressive content.[8]

There, the U.S. District Court for the Middle District of Florida reaffirmed that ideas, images, information and expressions are not products for strict liability purposes.

Product liability claims may proceed only when based on alleged defects in design or functionality — not the expressive content or output of the platform. In Garcia, claims based on the chatbot's expressive outputs were dismissed, but those alleging harm from alleged design flaws, such as inadequate age verification, were allowed to proceed.

Meanwhile, the June 27 decision in Nazario v. ByteDance Ltd. exemplifies and advances these judicial trends.[9]

There, the Supreme Court of the State of New York, County of New York, denied a motion to dismiss product liability and negligence claims against several social media platforms, where the plaintiff alleged that algorithmic recommendation systems actively targeted a minor with dangerous content.

The court distinguished between content-neutral algorithms, typically protected by Section 230, and those that target users with content based on demographic and behavioral data.

The court reasoned that, if proven, such targeted recommendations could constitute a design defect in a product, analogous to a physical product with a dangerous feature, rather than mere publication of third-party speech.

The court also held that Section 230 did not categorically bar these claims, as the plaintiff's theory focused on the defective design and operation of the algorithms, not editorial decisions.

By allowing these claims to proceed, Nazario reinforces the growing judicial willingness to scrutinize the design and functionality of digital platforms and expand product liability theories to encompass them.

A recent Ohio case takes a state-level look at the issue.

A July 14 decision froth U.S. District Court for the Northern District of Ohio has brought to the software-as-a-product question squarely into focus at the state level. In Deditch v. Uber Technologies Inc. the plaintiff sought damages for personal injuries allegedly caused by a motor vehicle accident involving a driver distracted by multiple ride-hailing apps.[10]

One of the ride-hailing companies moved to dismiss the negligence claim, arguing that the Ohio Product Liability Act, or OPLA, preempts all common-law product liability claims, and that the plaintiff's negligent design claim was therefore barred.

However, the OPLA defines "product" as tangible personal property, and both the court and the defendants agreed that a digital application does not fall within this definition.

With no controlling Ohio precedent on whether the OPLA precludes common-law claims for injuries allegedly caused by digital apps, the court certified the following question to the Ohio Supreme Court: Does the OPLA abrogate common-law claims alleging personal injuries resulting from the use of a digital app that does not constitute a product under the act?

The Ohio Supreme Court's forthcoming decision could have significant implications for how software is treated under state product liability law. For those monitoring the intersection of software and liability, this is a key case to follow.

State AI laws form a patchwork of new obligations.

While courts are rethinking the boundaries of product liability, state legislatures are imposing new AI-specific obligations. From California's broad AI bill package to Colorado's risk-based AI statute, states are enacting requirements around transparency, algorithmic fairness and safety, especially for systems affecting consumers, children or sensitive data.

California has introduced more than a dozen AI-related bills from 2024 to the present, including measures ranging from guardrails on generative AI to requirements for safety testing and disclosures in high-risk use cases.

Colorado's AI Act requires impact assessments and risk mitigation plans for high-risk AI systems. Other states — including Texas, Utah, New York, Vermont and Minnesota — have proposed or enacted laws targeting disclosure, discriminatory algorithms, disclosure obligations, safety, addictive online features and biometric data use.

This growing patchwork presents significant compliance challenges for companies operating across jurisdictions. It also increases litigation exposure, as products and platforms may be subject to varying — and sometimes conflicting — requirements.

Noncompliance can result in regulatory penalties and provide fodder for plaintiffs in product liability litigation, who may argue that violations constitute evidence of unreasonable conduct or defective design.

Efforts to impose a federal moratorium on state AI regulation were recently defeated in the U.S. Senate, where lawmakers voted 99-1 to strip a 10-year moratorium from the tax-and-spending bill. For now, while federal legislation is off the table, companies must navigate a fragmented and rapidly evolving state-by-state landscape.

The EU's new product liability directive sends a signal.

Meanwhile, the EU recently adopted a new product liability directive that explicitly defines software and AI as "products" for purposes of strict liability — even when delivered as a service.

This not only clarifies the law for EU member states but also signals a broader international shift in how software and AI are treated under product liability regimes. While U.S. courts have not yet followed suit wholesale, this development reinforces the global momentum toward holding software and AI developers liable under traditional tort frameworks.

And for multinational companies, this is a shift that should not be ignored.

Companies should consider several practical guidance tips.

The legal treatment of software and AI is undergoing a period of transformation. Courts are becoming more receptive to treating digital features as products, states are layering on AI-specific regulatory obligations, and the EU has moved decisively to classify software and AI as products for strict liability purposes.

For companies that develop, license, or integrate these technologies — especially in regulated sectors like life sciences, digital health and automotive — the risk environment is growing more complex. To navigate this evolving landscape, companies should consider several approaches.

Strengthen compliance and documentation.

Build safety, transparency, and traceability into software and AI systems. Maintain detailed records of risk assessments, design decisions, and post-market monitoring to support both regulatory and litigation defenses.

Monitor regulatory developments.

Track state, federal, and international laws affecting software and AI liability. Engage with regulators and industry groups to help shape emerging standards.

Engage in EU advocacy.

As EU member states begin to implement the new product liability directive, participate in advocacy to shape how key provisions are interpreted and applied, especially where the directive leaves room for national discretion.

Evaluate litigation risk.

Review how courts and regulators may interpret key features of digital tools and ensure that internal documents — such as impact assessments and risk analyses — are thorough, accurate and well-documented.

Reassess contracts and insurance.

Clarify liability allocation in agreements involving third-party AI tools and review insurance coverage for software-related product claims.

To conclude, the product line is moving.

The boundary between product and service is no longer a reliable shield. As courts, legislators, and regulators adapt to the realities of software and AI, companies must do the same. Treating software and AI features with the same diligence and foresight historically reserved for physical products is no longer just prudent — it is necessary.

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[1] In re: Soc. Media Adolescent Addiction/Personal Inj. Prods. Liab. Litig., 702 F. Supp. 3d 809 (N.D. Cal. 2023).

[2] In re: Uber Techs., 745 F. Supp. 3d 869 (N.D. Cal. 2024); In re: Uber Techs. Inc., 2025 U.S. Dist. LEXIS 132269 (N.D. Cal. July 8, 2025).

[3] A.F. v. Character Techs., No. 2:24-cv-01014-JRG-RSP (E.D. Tex. Dec. 10, 2024).

[4] Angela Moore v. Meta et al., No. 25SMCV01528 (Cal. Sup. Ct. Mar. 25, 2025).

[5] Mary Doe v. Roblox, No. 3:25-cv-00128 (S.D. Tex. Apr. 30, 2025).

[6] T.V. v. Grindr LLC, No. 3:22-cv-864-MMH-PDB, 2024 U.S. Dist. LEXIS 143777 (M.D. Fla. Aug. 13, 2024).

[7] See, e.g., Doe v. Lyft Inc., 756 F. Supp. 3d 1110 (D. Kan. 2024); Ameer v. Lyft Inc., No. ED112455, 2025 Mo. App. LEXIS 142 (Mo. Ct. App. Mar. 4, 2025).

[8] Garcia v. Character Techs. Inc., No. 6:24-cv-1903-ACC-UAM, 2025 U.S. Dist. LEXIS 96947 (M.D. Fla. May 21, 2025).

[9] Norma Nazario v. Bytedance Ltd., No. 151540/2024, 2025 N.Y. Misc. LEXIS 5818 (N.Y. Sup. Ct. June 27, 2025).

[10] Deditch v. Uber Technologies Inc., No. 1:24-cv-1488-JPC-JEG, 2025 U.S. Dist. LEXIS 133099 (N.D. Ohio July 14, 2025).