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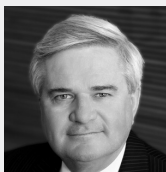
BASS BERRY ✛ SIMS PLC

August 2014

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Trinity Health is known for its IT and recognized for quality and expertise in technology, including recognition as a "Most Wired" hospital by Hospitals & Health Networks magazine. They have already been through several successful software conversions.

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Protecting Your Hospital from an IT Crisis

By: John M. Kutch, President & CEO, Trinity Health and

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When information technology (IT) works, it can make the healthcare industry more efficient, encourage innovation, save money and help us achieve feats never thought possible thirty years ago.

But when IT doesn't work, it will result in a system-wide crisis. Glitches in IT systems may even create an existential threat to your entire organization.

The authors of this article recently litigated and won a substantial award against one of the world's largest healthcare IT solution providers. The case involved a defective patient accounting system that caused thousands of errors. The persistent problems with the software inflicted significant financial damage to Trinity Health, a not-for-profit healthcare organization in Minot, N.D.

In this article, we hope to share some "lessons learned" with others who may find themselves in similar situations. We will discuss what options may be available when your organization has purchased what it thought was a state-of-the-art, ready-for-prime-time software tool that fails to function as advertised.

Pitfalls in the Current Market Landscape

While some healthcare organizations have developed homegrown software to handle their IT needs, the rest of the industry relies on outside vendors. Smaller health systems and independent hospitals, in particular, rely on vendors because it is difficult for them to duplicate the knowledge and experience that vendors can deliver. Further, health care organizations are reeling from and dealing with financial and compliance pressures, and hiring outside vendors to help them meet these demands often presents the best option.

As a result, several Fortune 500 companies have created business models around providing software and services to healthcare organizations. Indeed, the North American healthcare information technology market has been valued at over $20 billion today and estimated to grow to more than $30 billion in the next five years. These companies have been wildly successful – reaping billions of dollars in profit. But the competition for market share between the major players is fierce, and the current environment has created incentives that do not always encourage delivery of quality products.

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One dangerous incentive results from the preference of many healthcare organizations to use a single vendor for substantially all their software needs. A vendor that is primarily known for clinical software may lose out on a bid with a client that was looking for both clinical and revenue cycle software, or vice versa. This preference for a single vendor may encourage software companies to rush products to market before they are adequately tested and proven (or to develop them on the fly).

Software vendors may even market capabilities that have not yet been developed or thoroughly tested. Their aim is to lock clients into a contract with the hope they can develop the promised capabilities before the software actually goes live, which will not occur until years after the contract is signed. There is even a common industry term for this practice – selling "vaporware." The trouble with vaporware is that the purchaser is exposed to an undisclosed risk that the unproven software may not ultimately function as represented.

These practices can catch healthcare organizations off guard – particularly when they are dealing with a familiar vendor that has already delivered for them on other projects. For instance, after a vendor has delivered functioning EMR software, it is reasonable to believe its salespeople when they say that they can do the same for patient accounting software. Unfortunately, that is not always the case, and a healthcare organization may unwittingly buy what is essentially "beta" software.

When a healthcare organization discovers that problems with newly-implemented software are seriously impacting its operations and suspects its software vendor may be at fault, there are several steps that organization can take to mitigate and correct the situation.

STEP ONE:
Differentiate Between a Bumpy System Launch and an IT Disaster

Even a relatively successful software conversion can result in lost revenue and damages to a healthcare system's operations. These problems can be caused by numerous factors, including fixable bugs in the software, configuration issues, or users adapting to a new system. Initially, it is sometimes hard to tell whether what you are experiencing is a temporary bump in the road or a major problem that will cause system-wide damage.

One important factor to consider, when trying to identify a full-blown IT crisis, is time. If your system's go-live date was several months ago and you are still experiencing significant issues – especially if they do not seem to be improving – then that may indicate that you are dealing with something more serious than routine conversion issues.

Another factor is the severity of the issues. How badly is it impacting your organization? In the case of revenue cycle software, for example, if you have an unusually high denial rate or your business office and IT staff is dedicating disproportionate

resources to fixing software issues, then you may have a major problem and need to consider both your legal remedies and the possibility of moving off the software.

STEP TWO:
Finding the Root of the Problem

Next, you will want to determine the primary cause of the flaw. This step sounds simple, but reliable information and advice is not always easy to come by. While looking to the vendor's representatives for guidance makes intuitive sense, they will be unwilling to admit responsibility for defective or underdeveloped software.

Some common responses from software vendors to problems fall along the lines of the following themes:

- "user error" is causing the problems;

- the issue you identified is not a bug, it is a feature, and your purported "custom request" is an enhancement;

- you can implement "manual workarounds," which will inflict unnecessary expense and inefficiencies on your operations;

- we can fix the problems if you pay for additional products or services;

- what you are asking for is not within the scope of your contract;

- your in-house IT staff is not equipped to handle the issues; or

- trust us that the problems will be resolved in forthcoming upgrades.

These responses may just be the vendor's attempt to buy some time, defer responsibility, or sell more services. Remember that the software vendor is not an independent, disinterested party that is always advising you to act in your best interest.

Your in-house IT staff may be able to provide some valuable insight, but that can be complicated if the software vendor attempts to shift blame back to your organization. You may end up with a situation where the vendor is pointing fingers at your staff, and your staff is pointing fingers at the vendor. As the old proverb goes, "success has many fathers, failure is an orphan." In addition, some organizations outsource their IT needs to the same companies that supply the software at issue. In that situation, the organization lacks an objective IT expert source for advice about defective software.

Given these complications, legal counsel or an outside consultant may provide an independent assessment that can be useful in developing a plan. Such neutral observers may be valuable in determining the best course of action, and they can act as your advocate in resolving disputes with software vendors.

STEP THREE:
Understand Your Rights and Responsibilities

Even when a vendor's product has inflicted serious harm, healthcare organizations may fail to realize that they have a potential legal claim. In fact, vendors may use the parties' contractual agreement to pressure the organization to keep an unworkable software product. However, healthcare organizations often have more leverage than they realize in software disputes.

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Part of the reason healthcare organizations may mistakenly assume they have no recourse is that software vendors frequently draft one-sided license agreements. In particular, these agreements often

include a limitation of liability provision that purports to significantly reduce the amount of money damages that may be recovered against the vendor.

Yet, such contractual provisions are not necessarily insurmountable barriers to recovery. Courts around the country have held software vendors liable for misrepresenting their products' capabilities, despite the presence of a limitation of liability provision in the license agreement.

In addition to a potential breach of contract claim, the aggrieved healthcare organization may have a claim for fraud. A provision limiting damages in a contract that has been fraudulently induced should not be applied. Further, depending on the jurisdiction, healthcare organizations may have a claim under their state consumer fraud statute. Such claims may not be limited by contractual provisions and are often less difficult to establish than common law fraud. In addition to consequential damages, such statutes may open the door to punitive damages and recoupment of costs and attorneys' fees.

Other perceived barriers to litigation are not as prohibitive as they may seem. For instance, healthcare organizations may be reluctant to pursue litigation due to concerns that it may affect their use of a vendor's other products. In reality, however, engaging in litigation with respect to one software solution (e.g., patient accounting) should not affect other solutions (e.g., EHR). Further, while legal expenses are a factor when deciding whether to initiate litigation, some firms are willing to accept alternative fee arrangements, such as a contingency fee arrangement, which may lessen the financial risk to the organization.

In short, senior managers and board members of healthcare organizations should strongly consider, at the least, consulting with attorneys who specialize in this area before they summarily abandon a legal claim, which could ultimately be a valuable asset to the organization.

STEP FOUR:
Assessing Your Options

Dealing with software is frustrating. Defective software is scary and time-consuming for senior managers and board members, and – if allowed to go unchecked – it can cripple the organization. Defective software can even threaten executive jobs, especially the CIO. To keep a bad situation from spiraling out of control, the CIO needs to be in constant communication with the CEO about the issues and resolution plan. Further, the CEO and Boards need to understand they have options and recourse.

Even if you ultimately decide that it is in your best interest to keep the software and work through the issues, you may still pursue concessions, settlement, or other dispute resolution with the vendor. Just because you retain all or part of the software does not necessarily mean that you have no recourse.

Alternatively, if there are severe problems that are not improving, then the best option may be to deinstall and convert to another system. Depending on how long the new software has been live and how quickly you can convert, deinstallation can be expensive, disruptive, and time-consuming. Even so, you may be able to mitigate some or all of your damages by pursuing legal remedies against the vendor.

Regardless of whether you end up in formal dispute resolution, attorneys and consultants experienced in this area can be helpful as you assess your options and develop your action plan. They can advise you about your rights and obligations under the contract with the vendor, explain potential remedies outside the contract, and explain the risks, benefits, and potential consequences of any course of action. ■