Healthcare Dive

4 reasons we may see more hospitals suing IT vendors

By Katie Bo Williams | March 24, 2014

It cost Cerner $106 million this month to settle a dispute with a North Dakota hospital that alleged its financial software did not perform as promised. In Montana, Mountainview Medical Center is suing its EHR vendor for failing to meet a contractual deadline for installation of a meaningful use-certified system. And in North Carolina, a class-action suit is in progress on behalf of up to 70,000 providers who bill Medicaid, seeking retribution for a new billing software that "shorted" the providers half a billion dollars in the first 90 days following installation.

When Healthcare Dive reported (http://www.healthcaredive.com/news/cerner-to-pay-106m-settlement-over-defective-software-claims/237750/) the Cerner settlement, we remarked that the big IT vendors make hospitals sign their life away when they agree to purchase their software. Generally authored by the vendor, contracts of this kind are difficult to get out of, and contain clauses to mitigate "consequential damages." In other words, the damages hospitals can demand are limited to the cost of the product, although a hospital's total losses from defective technology are much broader—training costs, de-installation and system conversion costs, to name a few. These contracts have historically been a safety net for vendors, protecting them from virtually all litigious action.

That trend may be coming to an end, as legislative changes shift the landscape of the EHR market. The Cerner case may mark the beginning of a new era in which hospitals act as more demanding consumers of health IT products—and take action when those products don't fulfill their needs.

Here are four reasons you're liable (pun intended) to see more hospitals filing suit against health IT companies.

1. Fewer vendors with certified products

A recent Modern Healthcare review of the Certified Health IT product list compiled by HHS' Office of the National Coordinator for Health Information Technology demonstrated a dramatic decrease in the number of companies whose software was certified to 2014 edition meaningful use criteria—from 1,000 IT vendors suitable for Stage 1 in 2011, to just 79 in 2014. That drop creates two problems: Firstly, demand for certified products may outpace supply, making it difficult for

some hospitals to acquire the necessary technology for attestation; secondly, hospitals that have already invested huge sums of money in technology purchased to meet federal requirements may find themselves with systems that do not deliver. Those hospitals are going to be looking for compensation.

2. Regulation, market forces and precedent create incentive for IT vendors to over-promise and under-deliver.

There have been two major buying waves of EHR systems (http://www.klasresearch.com/blog/view.aspx?id=115&ReturnURL=%2fblog%2fview.aspx%3fid%3d115) -- one from 2005 to 2008, initiated by proactive hospitals trying to improve standard of care and efficiency, and one in 2009, prompted by the American Recovery and Reinvestment Act's meaningful use legislation. With the advent of MU, IT vendors suddenly had a captive audience—a market that was required to purchase products that they had to offer. Given that purchase prices for EHRs start at five and six figures (http://www.healthcaredive.com/news/out-with-the-old-health-systems-making-big-emr-changes/238006/) , meaningful use created a huge business opportunity for IT vendors—even IT vendors that up until then had not specialized in EHRs.

Michael Dagley, an expert in health care IT at a Nashville law firm, suggested that motivated to garner a piece of the ever-growing EHR market, and confident in the "safety net" of their contracts, IT companies may find it advantageous to overstate the capabilities of their products:

Dagley proposed a hypothetical situation between a hospital and a vendor, very successful with one kind of software (for example, patient accounting software), but with a less competitive track record in the EHR market. The company is called on by a hospital to submit a proposal, and is competing against other vendors. The hospital administrator asks to hear about their EHR software as well.

"What [is the IT company] going to do?" Dagley asked in a Q&A (http://www.tennessean.com/article/20140219/BUSINESS05/302190113/Attorney-Michael-Dagley-why-bad-medical-software-can-break-bank) with the *Tennessean*. "If they don't over-promise on [their weaker software], then they won't get the clinical business. So they have to have a full suite of products. That's what has caused the problem: Vendors are promising a functionality and capability of software that either doesn't exist or is far inferior to what they say."

But, Dagley suggested to Healthcare Dive, knowing that their purchase agreements would protect them in the event of litigious action, IT companies may feel confident in over-promising to make a sale.

Dagley, the lead attorney in Trinity Health's case against Cerner, remarked in a *Modern Healthcare* interview: "I've never seen—so uniformly across all the vendors—[vendors] overpromise and under deliver. The other thing is the seeming lack of concern at the consequences. It's really remarkable."

The proof is in huge number of hospitals displaying dissatisfaction with their existent EHR software.

3. Widespread customer dissatisfaction. (http://www.healthcaredive.com/news/out-with-the-old-health-systems-making-big-emr-changes/238006/)

A recent survey by *Medical Economics* revealed that nearly 70% of physicians say EHR systems have not been worth the money. Two-thirds of respondents would not purchase their EHR system again because of poor functionality and high costs. Perhaps the most staggering statistic in the study, 45% of physicians reported spending more than $100,000 on an EHR, with 77% of the largest practices spending nearly twice that on their systems. So although physicians are eligible for $44,000 through the Medicare EHR Meaningful Use incentive program, and $63,750 through the Medicaid MU program (http://medicaleconomics.modernmedicine.com/medical-economics/news/physician-outcry-ehr-functionality-cost-will-shake-health-information-technol?contextCategoryId=146) , for some physicians, that's not sufficient to cover the costs. And providers are jumping ship because of it: Two reports, conducted by Black Book and KLAS Research, found that from one-third to half of all large hospitals are looking to trade out their old EHRs by 2016, according to *HealthcareITNews.*

Given that EHR systems are the reality now, the associated market is hardly going to accept subpar systems for long. The days of IT vendors exercising free reign may be coming to a close.

4. Healthcare providers acting as "consumers."

The days of IT vendors exercising free reign may be coming to a close.

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In a phone call with Healthcare Dive, Dagley said he expects to see many more cases brought against vendors as time goes on, as hospitals "get creative" to protect themselves. He encouraged hospitals to look beyond breach of contract and instead concentrate on courses of action under state and common law provisions of consumer fraud. Hospitals, after all, are consumers of EHR products,

and under consumer fraud statutes, manufacturers cannot misrepresent product capabilities and benefits.

While Dagley could not comment on the Cerner case specifically, it seems likely that this is the legal avenue Trinity Health took—but whatever the legal justification for the success of the suit, the fact that it did succeed to the tune of $100-plus million will surely encourage other hospitals facing malfunctioning EHRs to file suit against vendors.

According to Dagley, in preparing a consumer law case, "you try to recreate the meeting" where the sales pitch was made, interviewing everyone who heard a sales pitch and gathering all the associated notes and materials.

Taking that approach, hospitals have a good chance of success.

"Courts have held companies' feet to the fire about functionality," Dagley said (http://www.modernhealthcare.com/article/20140307/NEWS/303079954/cerner-trinity-reach-106m-settlement-in-software-dispute) . "The cases are very favorable to consumers."