HIT Development is Tough Work. So What?

Scott Mace, for HealthLeaders Media **, May 27, 2014**

Why is it that so few healthcare providers take information technology software and services vendors to court when projects run late, yield incomplete results, or fall below the assurances of a contract?

When car repairs go poorly, customers can and do regularly sue auto mechanics. When surgical procedures go poorly, patients or their families can and do sue surgeons and hospitals. It happens all the time.

Given that software development and deployment is so much more complex than fixing a car or even doing an appendectomy, why is it that so few healthcare providers (or corporate IT customers in general) take software and services vendors to court when projects run late, or yield incomplete results, or fall below the assurances of a contract?

Writing software and deploying technology services is hard, of course. Fred Brooks, architect of the IBM System/360 family of mainframe computers in the 1960s, codified just how hard in his 1975 magnum opus, ***The Mythical Man-Month***.

The Trouble with EHRs

One of his contributions to the field is Brooks' Law, which refutes laymen's logic of getting this done faster by adding more resources. Brooks' Law says, in essence: Adding programmers to a software project running behind schedule only puts it further behind.

I would suggest that deliberate neglect of Brooks' Law by IT professionals plus the stranglehold that technology vendors maintain over their customers, explains the rare occurrence of what occurred last December, when Trinity Health of Minot, ND succeeded in obtaining a $102 million arbitration award against Cerner Corp.

Because the details in this case are not being made public, it is impossible to know what exactly went wrong. The possibilities range from unrealistic assurances made by Cerner to unrealistic requirements made by Trinity Health for Cerner.

Recently, I spoke with an attorney for Trinity, Michael Dagley, lead attorney for the case at Bass, Berry & Sims, a Nashville-based law firm. "It was not a settlement. It was an arbitration award, so the arbitration panel heard the evidence over three weeks and unanimously decided this case in Trinity's favor," he told me.

An Unprecedented Action

"What's remarkable about this case is that no hospital has ever done this before. No hospital system has ever successfully litigated against a software vendor for any significant amount of money, and the reason is because the vendor's contract always has very strict limitation of liability provisions, which typically hold the damages to just the amount paid for the software," he says.

Generally, what attorneys representing hospitals do is not look at these episodes as a breach of contract action. Instead, they look at the representations that the vendors made about the software when it was sold, and then determine whether those representations were true, and whether the vendors knew that they were untrue at the time that they were made.

"If that is the case, then the hospitals can pursue actions under consumer fraud statutes in each state, or under common law fraud statutes in many states," Dagley says.

"What we see repeatedly, consistently, is [that] software vendors make representations about these products, about their capabilities, and about their functionality, which is clearly not true, and if they know that there are problems with the software, they seem to feel emboldened to sell the software even though it doesn't work well, because they can hide behind their contracts. Or at least they could until recently," he says.

Seemingly lost to history during the current burst of news coverage of the Cerner settlement is the long tradition the software industry has had of trying to strip IT customers of their rights to sue.

During the 1990s and early 2000s, the industry made a push to update the Uniform Commercial Code by passing a Uniform Computer Information Transactions Act in all 50 states. The effort ultimately failed in 48 states (except Virginia and Maryland), in large part due to an outcry from consumer advocacy groups such as the Electronic Frontier Foundation.

Had UCITA passed, the "clickwrap" agreements we all accept when we install software would have indemnified software vendors for virtually all the bad behavior they exhibit such as Trinity apparently alleged.

The Trinity judgment may finally open the floodgates for other hospitals to bring forth complaints about bad IT vendor behavior, and could lead to a general enlightenment of how defects in software and services get rectified.

'We're All a Little Bit Bullied'
Many software vendors still contractually prohibit their customers from publicly reporting bugs. It's usually only when a bug rises to the level of a serious security vulnerability such as Heartbleed, that the public is alerted.

But if a bug or flaw doesn't rise to that level of severity (or notoriety), any discussion about it is discreet or even confidential.

"I have had calls from colleagues and peers across the country whom I've never met," says John M. Kutch, president and CEO of Trinity Health. "We have healthcare executives who have read about or heard about this case. They are relieved to know that there is recourse, there is action that can be taken, because I've always sensed, whether it was myself or through colleagues or peers of mine, that to some degree, we're all a little bit bullied by the IT companies, because they represent that they have the solution."

Ultimately, the Trinity suit may mean that IT vendors will be held as accountable as the healthcare providers themselves are for the care they provide, Kutch says.

Not being deeply versed in the technology of health IT, Kutch was unwilling, as some vendors will be inclined, to point to the demands of the federal government's Meaningful Use program as a scapegoat for all of health IT's ills.

Certainly, last week's notice by CMS of proposed rulemaking to push stage 2 implementation of Meaningful Use out one more year is another sign that hospitals and IT vendors are in over their heads.

CMS Proposes Meaningful Use Extensions

But while we gnash our teeth about just how far Meaningful Use may or may not have gone astray, let's not forget the very real ripple effect that the Trinity Health judgment will have on all EHR vendors to get their acts together, temper the hype, and redouble their efforts to deliver quality products and services on time.

Healthcare providers, too, should remember that Brooks' law still applies, and deploying EHR software and services is not at all like taking your car to JiffyLube. In an age of Google Glass and iPhones, healthcare leadership would also do well not to forget that.

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