

Doctors, Unhappy with their EHR System, Sue the Vendor in a Class Action

Now May Be the Time to Reassess EHR Solutions and Formulate a Plan to Remedy Deficiencies



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With the encouragement of meaningful use incentive payments, doctors and other eligible professionals (EPs) are implementing electronic health record (EHR) systems in their practices. As of May 2013, more than half of EPs have received Medicare or Medicaid incentive payments for the adoption or meaningful use of an EHR.¹ Additionally, Medicare and Medicaid EPs have received more than \$6.3 billion in incentive payments as of September 2013.²

But, not all physicians are satisfied with their EHR system. According to survey results released in March 2013 by the American College of Physicians and AmericanEHR Partners, “user satisfaction [with their EHR] fell 12% from 2010 to 2012.”³ Further, “34% of users were ‘very dissatisfied’ with the ability of their EHR to decrease workload — an increase from 19% in 2010.”⁴ Many practices are also considering moving to a different EHR system. In polling 2,880 EHR ambulatory physician practice users — 35% of which were practice administrators/financial officers and 44% were the practice’s lead information technology (IT) staff member or chief information officer (CIO) — Black Book Rankings advised in a July 2013 report that, “81% of respondents were on track to replace their original EHR solution within the next twelve months.”⁵ This is a staggering number when considering the costs — both in time and money — involved with implementing an EHR system.

Recognizing the high costs of implementation, some physicians have taken a more aggressive approach against EHR vendors who physicians perceive as not living up to their expectations. One such physician is

Dr. Robert Joseph, the owner of Pain Clinic of Northwest FL, Inc., who filed a Florida-based class action lawsuit against Allscripts Healthcare Solutions, Inc. on December 20, 2012.⁶ Since the initial filing in December 2012, three additional plaintiffs have joined the Florida litigation: Pain Care Specialists, LLC (a Florida company), Advanced Pain Specialists, Inc. (a Missouri company), and South Baldwin Family Practice, LLC (an Alabama company).⁷

BRIEF OVERVIEW OF THE ALLSCRIPTS CLASS ACTION LITIGATION

The class action litigation involves Allscripts's MyWay EHR system, which was sold to about 5,000 physicians from 2009 until 2012, when Allscripts advised that it would no longer support the software.

After acquiring the EHR system from Misys Healthcare in 2008, Allscripts rebranded the product as MyWay and targeted physician practices with one to five practitioners.⁸ The plaintiffs allege that the EHR was defective and "buggy" when it was launched, and Allscripts simply exacerbated the problems with its attempts to bring the technology into compliance with meaningful use requirements.⁹ The plaintiffs further allege that, unable to repair the defects, Allscripts phased out the MyWay system and offered existing customers a free upgrade to Allscripts's Professional Suite Electronic Health Record System ("EHR Pro").¹⁰ The plaintiffs contend that the so-called upgrade was not free because the transition required employee retraining, data migration, hardware upgrades, and increased licensing fees.¹¹ Further, for those practices that opted to transition to another EHR platform, plaintiffs allege that Allscripts has "impos[ed] thousands of dollars in fees to release" the physicians' data, and, for others, Allscripts has simply transitioned the physicians' without their prior consent.¹²

Plaintiffs sued Allscripts alleging a number of claims, including unjust

enrichment, tortious interference with business relationships, and violation of Florida's Deceptive and Unfair Trade Practices Act.

Allscripts unsuccessfully attempted to compel arbitration because the master software agreement included an arbitration clause requiring binding arbitration in Raleigh, North Carolina. The agreement also provided that, "no other party may sue or be sued under this agreement" except for the plaintiffs (individually) and Allscripts Health Care, LLC (the "subsidiary"), a wholly-owned subsidiary of Allscripts Healthcare Solutions, Inc. (the "parent"). But, plaintiffs sued the parent, and not the subsidiary, and the parent company was not a signatory to the master software agreement. In denying Allscripts's motion to compel arbitration, the Court ruled "that the [Master Software] Agreement at Section 14.6 (which provides that a claim arising out of, or in connection with the [Master Software] Agreement, will invoke the arbitration provision) is not applicable to [the parent company], a non-party to the Master [Software] Agreement."¹³

Allscripts appealed the lower court's decision, and a decision from the appellate court was pending at the time of this writing.¹⁴

DOES A NEW YEAR MEAN IT'S TIME FOR NEW EHR SOFTWARE?

As physician practices implementing an EHR system already know well, EHR implementation is a difficult and costly process. Successful implementation requires stakeholder buy-in and a continuous commitment from the entire team because EHR systems do, at least at the beginning, negatively impact productivity. They also may change workflow, increase documentation requirements, and impact the physician's ability to focus on patient care. Moreover, the EHR implementation process requires continuous effort, particularly as the Department of Health and Human Services releases additional meaningful use requirements.

But, importantly, successful implementation also requires a software product that meets or exceeds users' expectations and a vendor that is at least as committed to the EHR system as is the physician practice. As practices enter the New Year, now may be the time to reassess the EHR solution employed by the practice and to formulate a plan to remedy deficiencies. In planning their approach, physician practices should consider the following:

- *Seek feedback from everyone who uses the EHR system.* Generally, almost everyone in a physician practice interacts with the EHR system in one way or another, but not everyone interacts with the system in the same way. As a result, different users will have different experiences with the system. Each experience is valuable, and seeking feedback from every user will help the practice assess the system's benefits and deficiencies.
- *Feedback must be actionable.* Feedback that is not actionable is useless. Practice leaders must push for detailed responses to enable them to evaluate the EHR system as well as the reasons why a user is experiencing difficulty with the system.
- *Evaluate feedback impartially.* Feedback from every user should be evaluated impartially, to the extent possible. Each user has different technical capabilities. The tasks that are complicated for a relatively novice technology user are unlikely to be complicated for someone who has expertise in information technology. As such, feedback should be considered in the proper context.
- *Use the feedback to make a plan.* After the practice gathers all of the feedback, physician practices should carefully study the feedback and use it in formulating their plan. For example, practice managers may find that users with the least amount of training are encountering the most problems. Thus, the practice may determine that resources

should be reallocated to additional training. Similarly, practice managers may find that existing workflows need to be revised to increase productivity.

- *Work with the EHR vendor.* Practice managers and practice technology leaders should take an active role in working with their EHR vendor to address identified software deficiencies. Most software vendors are in this business for the long-term; they want to increase market share and have a vested interest in improving their technology. They cannot make improvements without detailed feedback from users.

As practices evaluate their EHR software, it is important to keep in mind that the primary role of a physician practice is to treat patients. If after evaluation, the practice finds that the software is truly impeding the mission of the practice, then it is likely time to consider other alternatives. Physician practices suffering with inferior technology do have a number of options, including changing vendors. Physician practices should carefully review the agreements with their vendors to determine any cancellation fees, data migration costs, and other transfer costs. While litigation should never be a first step because, like the Allscripts upgrade, litigation is not “free”, as the case against Allscripts demonstrates, litigation is always an option.

Endnotes:

1. Press Release, Dept. of Health & Human Services, Doctors and hospitals' Use of Health IT More than Doubles Since 2012 (May 22, 2013), available at www.hhs.gov/news/press/2013pres/05/20130522a.html.
2. CENTERS FOR MEDICARE & MEDICAID SERVICES, SEPTEMBER 2013 – EHR INCENTIVE PROGRAM, PAYMENT AND REGISTRATION SUMMARY OVERVIEW (2013), available at www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/Downloads/September2013_PaymentandRegistrationSummaryOverview.pdf.
3. Press Release, Am. College of Physicians, Survey of Clinicians: User Satisfaction with Electronic Health Records has Decreased Since 2010 (Mar. 3, 2012), available at www.acponline.org/pressroom/ehrs_survey.htm.

4. *Id.*
5. Press Release, Black Book Rankings, Black Book's Satisfaction Index Resolves Highest Ranked Vendors in the "State of the EHR Replacement Market" Study (July 23, 2013), *available at* www.prweb.com/releases/2013/7/prweb10553430.htm.
6. Pain Clinic of Northwest FL, Inc. v. Allscripts Healthcare Solutions, Inc., No. 12-49371CA40 (Fla. Cir. Ct. 11th Cir. Dec. 20, 2012), Complaint *available at* allscriptsmywayclassaction.com/wp-content/uploads/2013/02/2012-12-20-Allscripts-Complaint.pdf.
7. Pain Clinic of Northwest FL, Inc. v. Allscripts Healthcare Solutions, Inc., No. 12-49371CA40 (Fla. Cir. Ct. 11th Cir. Dec. 20, 2012), First Amended Class Action Complaint *available at* allscriptsmywayclassaction.com/wp-content/uploads/2013/02/2013-01-29-First-Amended-Class-Action-Complaint.pdf.
8. *Id.* at ¶ 15.
9. *Id.* at ¶ 19, 21.
10. *Id.* at ¶ 23.
11. *Id.* at ¶ 24-25.
12. *Id.* at ¶ 24-25.
13. Pain Clinic of Northwest FL, Inc. v. Allscripts Healthcare Solutions, Inc., No. 12-49371CA40, Order Denying Motion to Compel Arbitration and Dismiss the Lawsuit (Fla. Cir. Ct. 11th Cir. Feb. 27, 2013), *available at* allscriptsmywayclassaction.com/wp-content/uploads/2013/02/2013-02-27_Order-Denying-Allscripts-Motion-to-Compel-Arbitration-and-Dismiss-the-Lawsuit.pdf.
14. On September 17, 2013, the 11th Judicial Circuit Court of Florida for Miami-Dade County approved a temporary stay of the proceedings, while the appeal to the Florida Third District Court of Appeal is pending.

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