

# Tech suppliers share the risk of health care clients

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The benefits of technology to the health care community are inarguable. Yet as the industry becomes more reliant on technology, medical providers are exposed to new liabilities. The emerging risks faced by the health care industry are in turn faced by companies providing the technology.

Technology companies that provide hardware and software to doctors, hospitals and other health care providers are at risk of litigation arising out of the health care providers' operation.

What are the risks?

- **Financial loss.** A health care provider relies on systems to sustain a secure and efficient operation. When technology does not perform as expected, activities may be curtailed, revenue may be lost or additional expense may be incurred. Faulty implementations can lead to costly reworks and delays.

The health care sector faces many of the same technology risks as other industries. However, this sector is exposed to considerable state and federal oversight. For example, the Health Insurance Portability and Accountability Act (HIPAA) exposes health care providers to fines for each improper release of a medical record. Multiply the fine by an errant mass e-mail or the exposure of a massive database and the risk grows considerably.

Billing schemes are also complex and the government is closely watching for fraudulent activities. Unintentional errors facilitated by IT may lead a provider into hot water and the technology provider into litigation.

- **Injury to others.** Technology exposes health care providers to litigation from patients, third-party payers, state and federal governments, suppliers and their equity holders.

When technology fails in the health care sector, patients may suffer injury, die or have their personal information broadcast to the world. The health care provider's reputation may be damaged irreparably.

Further increasing the litigation risk is HIPAA, which has increased public awareness and established a duty of care, something that is likely to be exploited by plaintiff attorneys.

How can technology companies reduce the risk?

A health care technology company can protect itself and mitigate risk in several ways. Many technology providers are considered business associates under HIPAA and may be required to live up to the same standard of care as their clients when it comes to protecting confidential patient information. Tech providers are often required to sign business associate agreements, contractually obligating them to the same standard of care as their health care clients.

All companies should clearly understand their responsibilities and the indemnifications assumed in a business associate agreement, which are:

- Create policies and procedures and train staff on their obligations.
- Perform an internal privacy and security audit and evaluation that includes IT and business operations staff.
- Consider an external certification that encompasses both privacy and security, including traditional security, and HIPAA security and privacy. Certifications establish a standard of care and controls that can be used in the defense of allegations of negligence. A company that subscribes to any publicized standard has a ready defense.
- Make sure that your insurance program will respond not only to traditional technology risk but also risk unique to

the health care industry.

## Risk transfer

The insurance industry has developed specific programs to cover the risks faced by technology companies. There are also programs designed to protect health care providers. However, there are no programs specifically designed for the convergence of health care and technology. The result: Many insurance programs for technology companies fail to protect against the risks associated with the health care industry.

For example, an off-the-shelf insurance program for the technology industry is unlikely to cover the privacy risk contractually assumed in a business associate agreement. If a patient is injured or their medical records are released, the enabling technology may be blamed. The health care provider may have the right coverage but the insurance afforded the technology supplier probably won't cover their risk and related litigation.

There are a host of standard policy provisions and exclusions that are likely to apply. Insurance companies will provide the protection, but the program must be thoughtfully constructed and negotiated with underwriters.

In conclusion, any company that supplies technology to the health care sector should consider the risks, develop policies to reduce the chance of a lawsuit and build a defense before they are sued. Last, but not least, its insurance program should be carefully constructed to cover claims arising out of health care related activities.

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