

DECANTING THE SOFTWARE LICENSE IN HEALTH INFORMATION TECHNOLOGY

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ABSTRACT

If you are a software product provider, you do not want to negotiate your standard software license. That contract is presumably refined to maximize the licensor's interests. You might do so for significant business reasons, such as a customer purchasing in large volume. The ultimate implementation of this principle is retail software products and the click-wrap EULA. The success of the retail EULA induces normative pressure for enterprise software to resist sale-by-sale tinkering with standard licenses. These phenomena have been addressed in the literature from contract and product liability perspectives as to software licensing. A notion from the literature is the suggestion for top-down license terms promulgated by a governmental authority. Uptake for this is tepid at best, putting aside the situation where the government is a licensor.

There is, however, a small but perhaps significant natural experiment ongoing in relation to top-down promotion of better licensing terms for a certain class of software users. Structures within the federal Medicare program have created incentives for health care providers (such as physician offices) to install electronic health record (EHR) software. The incentives have both a carrot and a stick. Initially, providers making "meaningful use" of EHR software will receive additional Medicare payments. That program sunsets into the stick: providers without meaningful use of EHR software will experience reduced Medicare payments. The "meaningful use" rubric is itself a complex regulatory structure in Medicare.

In conjunction with this, a grant-based program from the federal government established regional extension centers (RECs) with a mission to assist providers, and particularly physician offices, with information technology procurement, including license negotiation.

Meeting "meaningful use" is mostly a function of the EHR software. Once installed in a physician office, the software implements the business processes and clinical processes of the office. REC efforts to assist providers include user-side leverage in negotiating EHR software contracts that speak to meaningful use obligations. The REC approach is not necessarily lawyerly assistance on a transactional basis, but may include pre-negotiating a set of terms with potential EHR providers. The RECs are regional, and what they might obtain from each software vendor varies. Thus, this approach has greater natural heterogeneity than top-down promulgated terms. There are two notable effects of this innovative approach. First, at least within the health information technology market, efforts to signal from regulatory authority the need for licensing flexibility might dampen the relentless march of the EULA upward into enterprise software. Second, the REC efforts provide a beneficial learning effect within this developing marketplace: software vendors are more likely to capitulate to meaningful "meaningful use" clauses when confronted with an authorized approach to promote better licenses to the end user providers.

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