

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 19
Issue 4 *Journal of Computer & Information Law*
- Summer 2001

Article 3

Summer 2001

Issues for Healthcare Companies When Contracting with ASPs, 19 J. Marshall J. Computer & Info. L. 569 (2001)

Karen K. Harris

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Karen K. Harris, Issues for Healthcare Companies When Contracting with ASPs, 19 J. Marshall J. Computer & Info. L. 569 (2001)

<https://repository.law.uic.edu/jitpl/vol19/iss4/3>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

ISSUES FOR HEALTHCARE COMPANIES WHEN CONTRACTING WITH ASPs

KAREN K. HARRIS†

I. INTRODUCTION

“The concept of having someone else host [and provide] applications [] as a service is certainly not new.”¹ “In the 1960s and 1970s, many healthcare institutions began having their financial applications provided on a hosted basis . . . because they [either] could not afford computers or could not find qualified technical personnel.”² “In the early days of health care computing, larger provider organizations typically used service bureaus and time-sharing approaches, storing financial and administrative information at vendors’ data centers.”³

During the 1980s and early 1990s, computers became more affordable and technical talent became readily available, so most healthcare institutions built their own data centers. In the late 1990s, several major market trends began, which again created a compelling environment to move back to hosted applications.⁴

Among these trends, certainly “[t]he advent of the Internet” was one compelling reason; however, other important business trends such as “the increasing complexity [and] rate of change of technology,” “a world-

† Karen K. Harris is a senior associate in Piper, Marbury, Rudnick & Wolfe’s Healthcare and Information Technology Practice Groups. Her practice includes issues regarding healthcare regulatory compliance and transactional matters, information technology and managed care, as well as venture capital and general corporate law. Prior to returning to private practice Ms. Harris served as the Midwest Regional General Counsel at Aetna U.S. Healthcare, Inc.

1. Dan Emig, Application Hosting: Back to the Future: Planning a Comprehensive Strategy for HIPAA, e-Health and ASPs, 21 Health Mgt. Tech. ¶¶ 3, 5 (Dec. 1, 2000) (available in 2000 WL 8272138).

2. *Id.* In general, ASPs are a throwback to the pre-PC (personal computer) days, where massive central computers ran all a company’s programs for users at dumb terminals. *Id.* This time, however, the servers could be located anywhere – in another state, on another continent. *Id.*

3. Fred Bazzoli, *The Data Has Left the Building*, Health Data Mgt. ¶ 6 (Oct. 1999) (available in LEXIS, News Group File, All).

4. Emig, *supra* n. 1, at ¶ 4.

wide shortage of qualified information technology ("IT") personnel" and reallocation of IT resources and costs, "the need to derive business value out of applications quickly, [and the] lack of capital" all contributed to the trend to once again outsource technology applications.⁵

In particular, technologies have become so complex that it is easy for an organization to get distracted by its tools and pulled away from its core business missions.⁶ Applications are also constantly requiring upgrades and a company needs an experienced IT staff to keep systems current and functioning, but there is currently a shortage of qualified IT personnel.⁷ By outsourcing its IT functions, "[e]xecutives and IT departments no longer need to concern themselves with day-to-day technology issues or staffing woes."⁸ Additionally, "as [the] company grows, [it] will need to adapt its IT platform to meet new business challenges" and outsourcing and/or ASPs can offer "seamlessly integrate[d] new applications" as the need arises.⁹ "Speed is [also] a critical factor for companies that want to compete in today's Internet economy."¹⁰ Outsourcing or using ASPs can allow a company "to have a cutting-edge application up and running in record time."¹¹ The International Data Corporation's ("IDC") White Paper on Purchasing ASP Services entitled *Lessons Learned From Executives* confirms these reasons as one of the driving forces for outsourcing and the use of ASPs.¹² In it, "executives at ten companies" were interviewed about their ASP experiences.¹³ When asked what they found to be the benefits of using an ASP, the executives listed the following benefits: (i) "ability to focus on core business," (ii) "access to applications," (iii) "one-stop shopping and support," and (iv) "lack of in-house expertise."¹⁴ These responses underscore the continuing trend toward

5. *Id.* at ¶ 5.

6. *See id.* at ¶¶ 12-15.

7. Jessica Goepfert & Meredith Whalen, *Purchasing an ASP Service: Lessons Learned From Executives*, International Data Corporation White Paper, 10 (2000) (copy on file with the *Journal*).

8. *Id.*

9. *Id.* at 5.

10. *Id.* at 2.

11. *Id.*

12. *See generally id.* The "IDC has been researching ASPs" since 1997 and focused this study on the following issues: (1) "lessons learned from ASP customers;" (2) "the emerging need for services and service delivery by ASP providers;" and (3) an analysis of "the drivers for selecting an ASP and [] recommendations for . . . procur[ing] the services of an ASP." *Id.* at 1.

13. *Id.* at 1.

14. *Id.* at 9. The executives also listed their biggest challenges with ASP providers, mainly: (1) "Finger pointing: [w]hen ASPs did not have the network under their control, they seemed to blame the networking company for connectivity and vice versa;" (2) "Inexperienced Companies: [s]ince [] ASP is a relatively new concept, most ASP customers are still struggling and learning throughout the process;" (3) "Communication: [b]ecause of commu-

outsourcing and the use of ASPs.¹⁵ Moreover, this trend shows no signs of decreasing but rather only increasing.¹⁶

It is "predict[ed] that by 2002, 40 percent of all [software] applications will be deployed on a hosted basis."¹⁷ In 1988, the application service provider ("ASP") market was only \$23.1 million, but today it is one of the fastest growing portions of the technology industry.¹⁸ "[B]usinesses worldwide will spend \$600 million on application services this year and an estimated \$8 million [by] 2004."¹⁹ "More aggressive figures . . . suggest[s] that ASP revenues will reach \$3.6 billion in 2000 and climb to \$25 billion in the next 4 years" (some of these differences are the result of whether you "count [] spending based [on any] given year despite the length of the contract").²⁰ In terms of the United States' participation in this spending, "researchers concur that the United States will claim at least 75 percent of ASP revenue this year, and [that] it will remain the market leader throughout the forecast period."²¹ "The healthcare [industry] . . . in the United States is a \$1.2 trillion market."²² "United States enterprise ASP spending in the healthcare industry was [only] \$7 million in 1999 [and] . . . double[d] to \$14 million in 2000."²³ By 2004, this amount is expected to rise "to \$95.4 million [], a nearly 70

nication breakdowns, customers were sometimes confused about what was actually included in the service offering;" and (4) "Lack of Control and Security: . . . customers are entrusting control of their [data] to a third party" and are appropriately "concerned about the security of [such] data." *Id.* at 3. However, as discussed previously, many of these issues can be resolved either through careful selection of an ASP or through careful negotiation of the Service Agreement. *Id.* at 13.

15. *Id.* at 9.

16. *Id.*

17. *Emig, supra* n. 1, at ¶ 6.

18. Clare Gillan & Meredith McCarty, *ASPs Are For Real. . . But What's Right for You?*, International Data Corporation White Paper (1999) (copy on file with *Journal*). A basic introduction to the concept of ASPs, this paper discusses (1) what ASPs are and how they differ from other types of service offerings; (2) ASP market drivers, acceptance and success factors; (3) customer experiences with ASPs; and (4) guidelines on issues to consider when looking for an ASP. Particularly useful is the discussion explaining the concept of ASPs and differentiating it from other types of outsourcing and web hosting arrangements. *Id.* For example, ASPs' services are different from business process outsourcing (BPO), where the outsourcing contract encompasses management of entire business processes such as human resources or finance. *Id.* at 2. Similarly, ASPs are different from Internet Service Providers (ISPs) in that ASPs provide access to applications whereas ISPs provide access only to the Internet.

19. David Lake, *Time to Learn Your ASPs*, *The Indus. Stand.* ¶ 3 (Oct. 30, 2000) (available at <<http://thestandard.net/article/0,1902,19726,00.html>>).

20. *Id.* at ¶¶ 4-5.

21. *Id.* at ¶ 4.

22. Dan Spirek, *The Right Partner is Key to ASP Success*, 22 *Health Mgt. Tech.* ¶ 3 (May 2001) (available in 2001 WL 7197615).

23. *Id.* at ¶ 2; see *Apps on Tap*, *Fortune Special* (Dec. 1, 2001) (available at <http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc_id=00000665>).

percent compounded annual growth rate.”²⁴ Not all of this spending will come from large healthcare institutions; “by 2003, [an estimated] 70 percent of physician offices [will] be using software on a Web delivery system, as well as electronic commerce.”²⁵

Another indication of the trend toward outsourcing and the use of ASPs is the fact that a number of large healthcare institutions have already spent large sums to outsource their IT functions.²⁶ “[I]n November [2000], New York Presbyterian Hospital (“NYPH”) announced a seven-year, \$228 million IT outsourcing contract with First Consulting Group.”²⁷ Similarly, “Detroit Medical Center [entered into a] ten-year, \$1 billion agreement with Compuware, and Saint Joseph’s Health System [entered into a] ten-year, \$270 million agreement with Perot Systems.”²⁸ The reasoning behind these types of transactions was that: “NYPH wanted [(i) immediate benefits from the predictable costs, service levels and outcomes offered by outsourcing;] (ii) “to stem attrition exacerbated by Wall Street’s insatiable appetite for systems expertise;” and (iii) “to find a risk and reward incentive arrangement for IT operations.”²⁹

In sum, it appears that outsourcing and the use of ASPs by healthcare entities is a continuing trend. “[Moreover], the specter of the *Health Insurance Portability & Accounting Act of 1996* (“HIPAA”) will undoubtedly accelerate the move to [outsourcing and the use of] ASP model, especially as healthcare organizations weigh the costs and time needed to refurbish systems that are rapidly becoming outdated against the need to meet HIPAA deadlines.”³⁰ After the final HIPAA regulations³¹ were published, the Department of Health and Human Services (“HHS”) projected that HIPAA implementation costs would be \$17.5 billion over ten

24. Spirek, *supra* n. 22, at ¶ 2.

25. Bazzoli, *supra* n. 3, at ¶ 18. There is some debate, however, about this statistic. In particular, some analysts argue that given physicians’ typically slow acceptance of automation overall and concerns about security and reliability, physician acceptance and use of ASPs may be slower than anticipated. *Id.* at ¶¶ 35-42. Others, however, maintain that the costs associated with ASPs compared to the costs of purchasing a practice management application, which can range between \$5,000 and \$10,000 per physician, may spur providers toward ASPs. *Id.* at ¶ 26. This view may be particularly true since providers’ other concerns (*i.e.*, security and reliability) can be addressed through thorough contracting and discussing. *Id.* at ¶¶ 35-42.

26. Bob Smith & Pam Waymack, *Outsourcing on a Grand Scale: Administrators, Physicians and Systems Integrators Play Different Rules*, 21 Health Mgt. Tech. ¶ 2 (July 1, 2000) (available at 2000 WL 8272011).

27. *Id.*

28. *Id.* at ¶ 7.

29. *Id.* at ¶ 5.

30. Spirek, *supra* n. 22, at ¶ 13.

31. 45 C.F.R. § 160.103 (Dec. 28, 2000).

years.³² Nolan Company, Inc. estimated, however, that it would cost \$42.9 billion over five years to come into compliance with HIPAA.³³ Nolan Company, Inc. estimate was based on HIPAA's statutory provisions and not the final HIPAA regulations and since regulations are often more detailed than statutes, the actual cost of compliance could prove to be even more expensive.³⁴ Given that healthcare entities will continue to move towards outsourcing and the use of ASPs, it is important for healthcare entities to review both how they select their ASP providers, and how they negotiate the terms of any agreements they enter into with such providers.

II. CHOOSING AN OUTSOURCING OR ASP PROVIDER

An ASP typically provides rented software that customers access³⁵ through either a Web browser or a custom "thin client" program. In particular, the ASP manages and maintains the servers that house the software applications, while the browser or thin client (a stripped-down machine like the old dumb terminal) communicates across the Internet with the server to send data and display information back and forth. ASPs typically take sole responsibility for making sure that a program runs smoothly and guarantees a certain amount of up-time. An ASP is different from an ISP in that an ISP provides access to the Internet, whereas an ASP provides access to applications. Yet, as one commentator has noted, ASPs are really only in version 0.5 of their business and, unfortunately, a number of ASP vendors are really just pretenders who have just gotten into the business.³⁶ In fact, it is only in the last several years that ASPs have developed and there are really only two generations of such providers.³⁷

The first generation of these providers, including Digex, USInternetworking, Corio and Interliant, has only been around since around 1998.³⁸ This generation of ASPs often host the large, complex programs know as enterprise resource planning software and may, or may not, customize such software for their clients.³⁹

32. *Cost & Impact Analysis: Common Components of Confidentiality Legislation*, Robert E. Nolan Co., Inc., 5 (Fall 1999) (copy on file with *Journal*).

33. *Id.* at 31.

34. *Id.*

35. See Alex Lash, *Hosts with the Most*, *The Indus. Stand.* ¶ 5 (Nov. 1, 1999) (available at <<http://www.thestandard.com/article/0,1902,7278,00.html>>) [hereinafter Lash, *Host with the Most*].

36. See generally Joanie Wexler, *ASPs: Helpful or Hype-ful?*, *Bus. Commun. Rev.*, 32-38 (Sept. 2000).

37. See *id.*

38. Lash, *Hosts with the Most*, *supra* n. 35, at ¶ 5.

39. *Id.* at ¶ 3.

For example, "Corio [is an ASP which] rents Peoplesoft and Siebel enterprise app[lication]s for sales automation-CRM, human relations, and financial management."⁴⁰ Its "eighteen customers include[] Clarent and ExciteAtHome and Vertical Networks [its start]-up fees start at \$50,000," followed by a "three tier pricing [that goes] \$25 to \$50, \$395 [and] \$895 (per user)" depending upon what type of applications and services are being provided to the customer.⁴¹

Another example is Digex, a Maryland-based company "adept at managing hardware, operating software, and [providing] network resources."⁴² Similarly, USinternetworking, another Maryland-based company, is an ASP which "offers nine customized app[lication]s."⁴³ It currently has eighty-one contracts and its pricing "depends [up]on the size and configuration" of the products a customer selects.⁴⁴ With "500 customers including TWA, Nike, [and] Ford Motor," it is one of the larger ASPs.⁴⁵ Finally, "Interliant, [a New York-based company], "hosts app[lication]s in five areas: groupware, low-end rentable applications, sales automation-CRM, e-commerce and distributed learning."⁴⁶

Unlike the first generation of ASP providers which deployed the software of others, "a second generation" of ASP providers have built their "own net-based software from scratch and [have] taken on hosting responsibilities."⁴⁷ These ASP providers have "targeted newer, smaller businesses that haven't built the internal infrastructure to handle enterprise software."⁴⁸ For example, eAlity, a California-based company, has a list of "forty-five rentable online app[lication]s [] for small businesses."⁴⁹ They have twenty-six ASP contracts and their pricing is "based on the number of users and app[lication]s rented."⁵⁰

But before a healthcare entity randomly selects one of these ASP providers, it would do well to first consider its overall IT strategy.⁵¹ Typically, a healthcare entity will use different personnel for HIPAA, e-health and ASP initiatives, without realizing that while there might not be much overlap in the strategy for that particular application, the ac-

40. Alex Lash, *Graceful Hosts*, *The Indus. Stand.* at ¶ 1 (Nov. 1, 1999) (available at <<http://thestandard.net/article/0,1902,7283,00.html>>) [hereinafter Lash, *Graceful Hosts*].

41. *Id.*

42. *Id.* at ¶ 2.

43. *Id.* at ¶ 3.

44. *Id.*

45. *Id.*

46. *Id.*

47. Lash, *Hosts with the Most*, *supra* n. 35, at ¶¶ 5-6.

48. *Id.* at ¶6.

49. Lash, *Graceful Hosts*, *supra* n. 40, at ¶ 6.

50. *Id.*

51. Siemens, *Your Application Service Provider, The Benefits of a Remote Hosting Strategy* ¶ 2 <<http://www.smed.com/solutions/isc/benefits.php>> (accessed on Apr. 8, 2002).

tual implementations for each application are tightly interwoven.⁵² Since it is imperative that an ASP is able to provide a robust network with many hosted applications and extensive connectivity to various e-health services and can operate in a HIPAA compliant manner it is only practical for a healthcare entity to approach its IT strategy globally.

After evaluating its IT strategy, a healthcare organization should next review the services and applications an ASP provides. In particular, if the healthcare entity knows what software it will need, then it can contact that software maker and more than “likely the software maker will steer” the healthcare entity to its ASP partner.⁵³ Many software makers have formed strategic alliances with ASP providers and some software developers are even opening their own ASP units.⁵⁴ Oracle, for example, is opening a unit for hosting its software.⁵⁵

Making sure that an ASP will meet the healthcare organization’s specific needs is particularly important in this phase. For instance, healthcare

payors are large, complex businesses [and] [t]hey are increasingly looking for a single source of healthcare IT solutions to help them achieve competitive advantage by increasing operational efficiencies. The sheer number of routine, daily IT transactions in a large health plan - for example - member inquiries, can be staggering. Even incremental efficiency improvements in these areas can mean huge dollar savings for healthcare payors. Given the size of these organizations and [their IT] systems, [an ASP with] a singular healthcare focus is also crucial” to ensuring that the ASP will be able to provid[e] two of the ASP models most vaunted advantages: cost savings and effective IT solutions. ASPs are often chosen because they “can reduce systems implementation costs and time by up to 50 percent, [h]owever, this can only be accomplished by vendors that have pre-integrated the numerous applications (claims administration, medical management and others) to work together in an out-of-the-box fashion.⁵⁶

An ASP that is “[l]earning to work with these disparate systems ‘on the fly’ (i.e. during major payor implementation)” will not effectuate these costs savings nor effective IT solutions.⁵⁷

“[T]he provider world, [on the other hand], is much more personal.”⁵⁸ Physicians and physician groups require their ASP partners to allow “them to focus on practicing medicine, as well as [helping them to] increase[e] revenues, maximiz[e] efficiency and comply[] with regula-

52. See Spirek, *supra* n. 22, at ¶ 8.

53. Lash, *Hosts with the Most*, *supra* n. 35, at ¶ 16.

54. *Id.*

55. *Id.*

56. See Spirek, *supra* n. 22, at ¶¶ 9-10.

57. *Id.* at ¶ 10.

58. *Id.* at ¶ 11.

tions.”⁵⁹ Given that physicians generally “have less technology expertise and limited financial resources, . . . ASP solutions [for this market] must be more simple and straightforward, but with the flexibility to add or modify technologies as the emerge.”⁶⁰ Additionally, for this sector of the healthcare industry,

ASPs must take on the broader role of business partner, offering services that complement and supplement the ‘traditional’ ASP offerings. These include [services such as] billing, collections and other business office/practice management functions that only a healthcare focused vendor can provide.⁶¹

Unfortunately, however, “a significant number of ASP vendors have no experience in the healthcare industry.”⁶² Yet, “the healthcare industry is much too complex and too specialized” for its operations to be entrusted to novices.⁶³ Instead, as discussed above, “an ASP must not only understand healthcare, but also be able to recognize the distinct and different business needs of the [] market segments - payors [vs.] providers - and their reasons for choosing an ASP.”⁶⁴

Despite the general lack of experienced healthcare ASPs, a few ASPs specializing in the healthcare industry have developed.⁶⁵ For instance, in the area of physician practice management, “NeuMed is an Internet-based practice management solution that allows physicians to manage their operations with quick, secured access from anywhere in the world, at any time.”⁶⁶ “The application’s features and reporting capabilities are designed to automate office administration and financial functions, in addition to providing real-time exchange of information through claims processing, eligibility verification and referral management.”⁶⁷ Similarly, “Health Care Data Systems has roll[ed] out a series of ASP subscription type services designed [] for small physician practices.”⁶⁸ “[Its] applications include accounts receivables management, appointment scheduling and medical records.”⁶⁹ “Asterion.com, . . . one of the Internet application service pioneers in healthcare,” is another example, but it focuses on the payor side.⁷⁰ Asterion’s applications, which help to link

59. *Id.*

60. *Id.*

61. *Id.* at ¶ 12.

62. *Id.* at ¶ 8.

63. *Id.*

64. *Id.*

65. *See generally New Products & Services: ASPs Open for Business*, Health Mgt. Tech. (June 2000) (available in Lexis, News, News Group Files, Most Recent Two Years).

66. *Id.* at ¶ 2.

67. *Id.*

68. *Id.* at ¶ 4.

69. *Id.*

70. *Id.* at ¶ 3.

HMOs to provider networks, "are now used by more than 7,0000 physicians, with another 10,000 physicians in northern California HMO network to pilot the system in the coming months."⁷¹ In particular, Asterion's solutions provide real-time eligibility, referrals, authorizations, claims integration plus connectivity for health plans and their ancillary facilities, providers, physicians and patients.⁷² RIMSLink is an example of a claims repricing and adjudication ASP.⁷³ Specifically, it "automates and simplifies the payment of healthcare claims for preferred provider organizations (PPOs), payers, and their trading partners."⁷⁴

The final aspect of an ASP that a healthcare entity should examine is the ASP's financial stability. As indicated earlier, ASPs are really still in their first, and possibly second, generation.⁷⁵ Additionally, except for the few healthcare oriented ASPs listed above, the majority of these ASPs are not properly prepared to deal with a healthcare entity.⁷⁶ As such, great care must be taken to be sure that the ASP with which a healthcare entity contracts with is solvent, otherwise the entity could be risking relying on a company for mission critical software that goes belly-up.⁷⁷

"When [] asked . . . to share [] lessons learned" from their experiences in contracting with ASPs, most healthcare executives responded by saying that it is important to "Do your homework."⁷⁸ Learn "the different models and types of ASPs, [] the benefits and limitations of each," and realize that since ASPs are new entities, "the financial health of the . . . ASP should be investigated" (one of the most important factors in selecting an ASP).⁷⁹ These steps are exactly what healthcare executives with experience with ASPs would suggest others do.⁸⁰ Once a healthcare company has done its due diligence and selected an ASP provider, the next step is to negotiate an agreement.

III. NEGOTIATING A SERVICE LEVEL AGREEMENT

Once a healthcare entity has selected an ASP, the next step in the process is negotiating what is called a Service Level Agreement

71. *Id.*

72. *Id.*

73. *Id.* at ¶ 8.

74. *Id.*

75. Spirek, *supra* n. 22, at ¶ 9.

76. *Id.* at ¶ 7.

77. *See generally id.*

78. Goepfert, *supra* n. 7, at 3.

79. *Id.* at 4.

80. *Id.*

("SLA").⁸¹ "The basic [SLA] may be thought of as a combination of a web hosting agreement and an online service bureau agreement."⁸² [Specifically], "SLAs identify and define the services provided by, as well as the supported products, measurement criteria, reporting criteria, performance and standards for the ASPs services."⁸³

The concerns traditionally dealt in connection with service bureau agreements apply to ASP agreements today – maintaining the confidentiality of customer data, security, reliability, remedies, disaster recovery, redundancy, scalability, termination grounds and issues related to the effect of termination, dispute resolution, service levels, payment terms, cancellation fees, and other issues that are common to many agreements relating to information technology. Many ASP arrangements also involve implementation, project management, milestones and acceptance testing as well as intellectual property issues.⁸⁴

In order to craft an agreement that will protect it on each of the issues, the healthcare entity will need to be aware of a variety of issues.

A. SERVICE LEVELS

1. *Defining Service Levels*

One of the most important issues when negotiating an SLA is describing the levels of service to be provided by the ASP.⁸⁵ "The source of the largest number of disputes between a healthcare provider and an ASP is likely to result from the gap between the actual performance by an ASP and the performance expected by the [c]ustomer."⁸⁶ Thus, in addition to listing the different types of applications that the ASP will provide, the SLA should also discuss any additional or value-added services, such as customer support, as well as the time periods for providing these applications and services.⁸⁷

Generally speaking, an ASP will guarantee services and performances for particular time periods, but not that a customer's access to the ASP services will be uninterrupted, error free or secure.⁸⁸ For instance, oftentimes an "ASP [will agree to] use its commercially reasonable efforts to provide ASP services twenty-four hours a day, seven days a week throughout the term of the agreement [with specific recognition for] scheduled downtime, service malfunctions and causes beyond the ASP's

81. J.T. Westermeier, *Application Service Providers*, 21 *Inst. on Computer L.* 6, 8 (2000) (copy on file with the *Journal*).

82. *Id.* at 7.

83. *Id.* at 6-7.

84. *Id.* at 8.

85. *Id.* at 9.

86. *Id.* at 34.

87. *See id.* at 15-19.

88. *Id.* at 13.

control.”⁸⁹ Thus, an SLA may contain language such as:

ASP will provide for 99.5 percent Availability for Services . . . within ASP’s “Direct Control” where Availability refers to the ability of an Internet user being able to establish . . . a TCP connection to the appropriate ASP hosted server. ‘Direct Control’ includes all components below:

- (1) Network services to the Internet Service Provider (“ISP”) circuit termination point on the router in ASP’s data center [];
- (2) Network services, beginning with the ASP data center and extending through the router [provided by ASP] located on Customer’s premises [];
- (3) All hardware and software applications provided by ASP; and ASP-managed routers on Customer’s premises.

All Customer-provided software noted below and Customer Content are specifically excluded from the definition of Direct Control.

[The] “Availability Percentage” shall be calculated as follows:

$$x = \frac{(n-y) * 100}{n}$$

where “x” is the Availability Percentage, “n” is the total number of hours in a given calendar month, and “y” is the total number of hours service is not Available (as defined above) in a given calendar month. The calculation of “x” shall be prorated in any month in which services commence on any day other than the first day of the month.

Specifically excluded from “n” and “y” in this calculation and defined as exceptions to the levels of Availability provided herein are (a) scheduled maintenance windows and (b) reasons for *Force Majeure* (as defined in the Agreement).

Specifically excluded from “y” are (a) failures of Availability caused by or related to downtime due to ASP or its designates not being able to access the routers for repair at Customer’s premises; (b) issues associated with Customer-provided hardware, software, and other equipment; (c) issues associated with Customer-provided or Customer-leased local area networks or ASP connections; (d) use of unapproved or modified hardware or software; and/or (e) issues arising from the misuse of the ASP services by Customer, its employees, agents, customers, and/or contractors.⁹⁰

In ASP arrangements *Force Majeure* clauses may be especially important because the customer is dependent on the ASP even with respect to natural disasters and the ASP should have a sufficient disaster recovery and continuity of operations plan to maintain ASP operations notwithstanding many *Force Majeure* events.⁹¹

Another way to approach the problem of defining service levels is not to give “the [c]ustomer any specific service level obligation.”⁹² An exam-

89. *Id.*

90. *Id.* at 16-18.

91. *Id.* at 35.

92. *Id.* at 18.

ple of contract language using this approach is as follows:

In the event that ASP discovers or is notified by Customer of the existence of non-Schedule Downtime, ASP will take all actions reasonably necessary to determine the source of the problem. If the source of the problem is outside of the control of ASP, then ASP will use commercially reasonable efforts to notify the party/parties responsible and cooperate with the party/parties to resolve such problem as soon as possible. If the source of the problem is within the control of ASP, the ASP will use best efforts to resolve the problem within two (2) hours of determining its source.⁹³

Obviously, depending upon whether you are representing the healthcare entity or the ASP, one of these provisions would be preferable over the other. One of the potential risks associated with outsourcing to an ASP is the risk that downtime will be beyond the healthcare entity's control.⁹⁴ Since downtime is always expensive due to both lost revenues and repair costs, when representing the healthcare organization, a very specific service level formula similar to the first example would be preferable.⁹⁵ On the other hand, an ASP would probably prefer a provision which does not specify any particular levels since the business risk an ASP assumes for guaranteeing a particular level of service could be significant.⁹⁶

2. Remedies for Service Level Interruption

Perhaps just as important as specifying the service level to be provided are "[t]he remedies for service interruption."⁹⁷ In particular, since these remedies are typically the only remedies for service interruption, or the ASP's "failure to meet or exceed the specified service levels," such remedies must be clearly articulated.⁹⁸ "Typically, the remedy for a service interruption is a credit against the monthly fees that would otherwise be payable."⁹⁹ For example, an ASP might provide credits under the following circumstances:

If Downtime is: (a) due to a problem within the control of ASP, (b) non-Scheduled Downtime; (c) lasts for a period of at least forty-five (45) consecutive minutes; and (d) is not resolved within two (2) hours of determining its source, then Customer, upon written request to ASP shall be entitled to a pro rata reduction in fees for such Downtime ("Service Credit"). One Service Credit shall equal one-thirtieth (1/30) of the recurring monthly Subscription Charges for the particular subscribed

93. *Id.* at 18-19.

94. *Id.* at 15.

95. *Id.* at 17.

96. *Id.* at 15.

97. *Id.* at 19.

98. *See id.*

99. *See id.*

applications selected by Customer (“Subscribed Applications”) experiencing Downtime for each twenty-four (24) hour period. The maximum number of Service Credits to be issued by ASP for any single calendar month shall not exceed seven (7) Service Credits. In order to receive Service Credit(s), Customer must notify ASP in writing within seven (7) days from the date that Customer’s right to receive Service Credit(s). Service Credits) will be reflected in the ASP invoice in the month following the Downtime, unless the Service Credit(s) are due in the final month of the term, in which case the dollar value of the Service Credit(s) will be refunded.¹⁰⁰

“Since there [i]s no surefire way to make any network failsafe,”¹⁰¹ specifying the particular remedy for a service interruption is very important.¹⁰² At least one insurance company has recognized this need and has begun to offer ASPs insurance that will provide the ASPs with cash compensation for network failures and outages.¹⁰³

“In May [2000], Atlanta-based insurance provider Insuretrust.com launched a program with BMC Software called Assuretrust to provide [such] insurance to . . . ASPs.”¹⁰⁴ In order to qualify for this insurance, the ASP “must meet BMC’s OnSite certification, a program that includes BMC monitoring software, as well as twice annual inspections by BMC consultants.”¹⁰⁵ “[P]remiums and coverage levels can range from \$5,000 a year for \$1 million in liability coverage to as much as \$50,000 a year for \$25 million in coverage, depending on the types of [applications and services the ASP is] offering and the size of the business.”¹⁰⁶ These “[p]remium prices [probably will not] be standardized until more insurance companies enter the market and the policies become ubiquitous – in about three or four years.”¹⁰⁷

So far, other insurance companies have been slow to roll out such new policies since they must first face the tricky task of assessing e-business risk and quantifying potential damages, however, this type of insurance will “put[] sharper teeth into . . . [ASP’s] SLAs.”¹⁰⁸ Whereas, “SLAs [current]ly offer a period of free service or other discounts in the event of failures, [and do not] compensate customers for any financial

100. *Id.* at 20-22.

101. See generally Sean Donahue, *Cover Me: New Insurance Policies Cover Online Businesses and Their Customers Against Failures*, Business 2.0 (July 2000) (available at <<http://www.business2.com/articles/mag/0,1640,13805,FF.html>>) [hereinafter Donahue, *New Insurance*].

102. Westermeier, *supra* n. 81, at 19.

103. Donahue, *New Insurance*, *supra* n. 101, at ¶ 3.

104. *Id.*

105. *Id.*

106. Sean Donahue, *Cover Me: Fear of Fraud*, Business 2.0, ¶ 3 (July 2000) (available at <<http://www.business2.com/articles/mag/0,1640,138052,FF.html>>).

107. *Id.*

108. *Id.* at ¶ 4.

losses they incur because of those outages," this type of insurance will basically offer customers a warranty for any interruptions.¹⁰⁹

B. PAYMENT TERMS

Payment terms in an SLA typically provide for the payment of an initial fee upon contract execution or commencement of a specific application "and then fixed monthly fees for the term of the agreement."¹¹⁰ In particular, "the application software operated and licensed by the ASP may be subject to license fees based on the number of named and concurrent users."¹¹¹ "Moreover, the license fees may be based on a maximum permitted number of named or concurrent users for each applicable application the Customer subscribes."¹¹² "In such circumstances, the monthly charges for ASP services are computed on a subscription basis based on the named and concurrent users."¹¹³ "The monthly ASP service fees for each application are specified to be not less than the sum of the minimum number of named and concurrent users multiplied by the applicable application fee."¹¹⁴ "These application fees are added to a monthly base operations fee that applies irrespective of the number of named or concurrent users."¹¹⁵ "Early termination charges may also be applicable in the event the [c]ustomer elects to terminate before the end of the initial term."¹¹⁶

C. TERM AND TERMINATION

1. *Term*

The term of a SLA "is usually a fixed term of three or more years."¹¹⁷ "The length of the term reflects the economics of the ASP relationship."¹¹⁸ "Much like outsourcing agreements, the term is designed to permit the ASP to make a reasonable profit over the full term."¹¹⁹ "The ASP often needs a number of years to permit it to recover its investment in software, hardware and telecommunications infrastructure to support the [c]ustomer."¹²⁰ "As such, longer terms of agreement may be applicable where the ASP has made significant investments in third-party ap-

109. *Id.* at ¶ 4-5.

110. Westermeier, *supra* n. 81, at 22.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 27.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

plication software and other investments specifically for the [c]ustomer since longer terms may be necessary to spread the costs for recovery purposes."¹²¹ For example, NYPH, Detroit Medical Center and St. Joseph's all entered into seven to ten-year agreements, likely in part because of the large implementation costs.¹²²

2. Termination

"Most ASP agreements provide for termination upon failure to cure a material breach within thirty days after receiving notice."¹²³ Unlike other contracts, however, that have similar termination provisions, the abruptness of a short termination period and the effect such termination can have on an ASP customer needs to be carefully considered.¹²⁴ In the context of an ASP termination, a customer could either be left scrambling to find a replacement ASP for mission critical software, or could find itself having to expend huge sums in order to bring such applications "back in house."¹²⁵

Consideration should also be given to what happens if the ASP's software license with the software application maker is terminated.¹²⁶ In such an event, the SLA would also be effectively terminated and unless provisions had been made, the healthcare entity could be left with even less notice within which to find replacement coverage.

D. LANGUAGE REQUIRED DUE TO THIRD-PARTY SOFTWARE LICENSING AGREEMENTS

1. Third Party Licensing Requirements

Part of the ASP model is that the application software provided to a ASP customer may be third-party software licensed by the ASP, software licensed or developed by the customer, or proprietary software developed by or for the ASP or a combination of any of the foregoing.¹²⁷ As such, additional provisions may be required to deal with these licensing issues.¹²⁸ Since the ASP may not necessarily be the maker of the software, but only be licensing it if certain other provisions must also be included.¹²⁹ For instance, many SLA agreements will contain "an Acceptable Use Policy."¹³⁰ An "Acceptable Use Policy is very much like a

121. *Id.*

122. Smith, *supra* n. 26, at ¶¶ 2, 5, 7.

123. Westermeier, *supra* n. 81, at 28.

124. *Id.*

125. *Id.*

126. *Id.* at 9.

127. *Id.* at 26.

128. *Id.*

129. *Id.*

130. *Id.* at 25.

Website Terms of Use or Terms of Service that most websites are implementing aggressively today to manage, avoid and/or mitigate every potential risk imaginable.”¹³¹ In general, such use policies outline all of the uses that a customer may make of the ASP’s applications.

In addition to the restrictions in the Acceptable Use Policy, most SLAs may also have additional “software license restrictions” that “may be necessitated by [license agreement between] the ASP [] [and] the third party application software provider.”¹³²

An example of these restrictions [include]:

- (1) Customer will not alter or permit a third party to alter, any part of the Application Software.
 - (2) Customer will not copy or permit a third party to copy the Application Software.
 - (3) Customer will not reverse engineer, decompile, disassemble, or otherwise attempt to derive source code from the Application Software or the ASP Service.
 - (4) Customer will not license, sell, transfer, lease or disclose the ASP Service or Application Software.¹³³
- . . .
- (5) A related risk “is what happens in the event that the ASP’s license for third-party software terminates. Such a termination would “effectively terminate[] the ASP service” and therefore the SLA should specifically address this issue in the termination section.¹³⁴

2. *Ownership of Materials*

Another important issue is defining the ownership of the content of the site and any software specifically adopted for the customer.¹³⁵ In particular, the SLA should state that the “[c]ustomer retains all right, title and interest in and to the Content and any Customer Software at all times.”¹³⁶ Additionally, in order to avoid any concerns that ASPs will hold the customer’s data hostage in the event of a dispute, the SLA should clearly state that upon termination, non-renewal or expiration of the agreement, such software will immediately be returned to the customer regardless of the reason for the termination, expiration or non-renewal.¹³⁷

3. *Source Code Escrows*

“Source code escrow arrangements should not be overlooked” in a SLA,

131. *Id.* at 26.

132. *Id.*

133. *Id.* at 26-27.

134. *Id.* at 28.

135. *Id.* at 26.

136. *Id.*

137. *Id.* at 28.

either.¹³⁸ In the event that the application software was actually developed by the ASP (or perhaps the ASP merely customized the software for the customer) it would be wise for the customer to ensure that a source code escrow is in place to protect against an ASP's insolvency.¹³⁹

E. CUSTOMER RESPONSIBILITY

The SLA should also clearly specify the customer's responsibilities.¹⁴⁰

[F]or example, [they] might include the following:

1. Customer content must comply with the ASP's Acceptable Use Policy.
2. Customer may be responsible for obtaining some form of Internet connectivity to perform the required Applications.
3. Customer must designate qualified personnel to act as liaisons between the Customer and the ASP respecting technical, administrative and content matters, providing accurate and current contact information.
4. Customer shall not take any actions that interfere, disable, or affect ASP's back-up processes.
5. Customer is responsible for obtaining license terms for customer furnished application software which are sufficient to allow use of the software on ASP's servers through the life of the contract.
6. Customer is responsible for knowing who has access to Customer's applications and servers, keeping track of who has login accounts, and making sure that proper security precautions are being taken with respect to the user name and password information for those accounts.
7. Customer is responsible for providing information for acceptance testing.¹⁴¹

F. DESCRIPTION OF PROJECT PLAN

Many SLAs include "a Project Plan."¹⁴² "The Project Plan includes the project schedule and explains how the implementation [of the applications] will be accomplished."¹⁴³ "It provides a basis for tracking the project" and should "provide a definition of each major task" as well as contain a "provision dealing with changes to the plans as are mutually approved by the parties so that the plan will reflect current information and performance."¹⁴⁴

138. *Id.* at 34.

139. *See id.*

140. *Id.* at 24.

141. *Id.* at 24-25.

142. *Id.* at 30.

143. *Id.*

144. *Id.*

The following stages are typically in the ASP implementation of an Application:

- Stage I – Project Planning and Discovery
- Stage II – Design
- State III – Development
- Stage IV – Deployment
- State V – Post Implementation Support and Audit¹⁴⁵

Additionally, “[I]t is important to designate project managers who are given day-to-day authority, provide for approval over replacements and continuity of operations.”¹⁴⁶ If the ASP agreement is fairly basic, then acceptance testing, “if any, may be limited to basic platform and database accessibility and storage capacity verification.”¹⁴⁷

F. DISPUTE RESOLUTION

“There will always be disputes where the parties are not able to agree on performance issues.”¹⁴⁸

Since resolution of disputes in this arena is particularly important, every minute down is time that is costing revenue – the courts should be the last alternative. Therefore, a dispute resolution provision to manage the dispute resolution process is highly desirable. For large contracts, a multi-tiered dispute resolution process may be appropriate. For smaller contracts, a single-tiered dispute resolution process is more cost effective.¹⁴⁹

G. CONFIDENTIALITY

Lastly, but by no means least, healthcare entities must go to great lengths to ensure that the SLA provides adequate confidentiality protections for their health care information in order to ensure compliance with HIPAA.¹⁵⁰ Pursuant to HIPAA, covered entities may only disclose protected health information to “Business Associates” if they obtain satisfactory assurance through a written agreement that the Business Associate will appropriately safeguard the information.¹⁵¹

HIPAA defines a business associate as a person or entity who, on behalf of a covered entity, participates or performs functions or activities that involve “the use or disclosure of” protected health information (e.g.

145. *Id.* at 28-29.

146. *Id.* at 31.

147. *Id.* at 33.

148. *Id.* at 34.

149. *Id.*

150. CyraCom Intl., *The Health Insurance Portability & Accountability Act of 1996* ¶ 3 <<http://www.cyracom.net/subpages/custsup-regnews-laws-hipa.html>> (accessed Apr. 8, 2002).

151. *Id.* at ¶ 4.

“claims processing or administration,” utilization review, “billing, quality assurance).”¹⁵² Examples of business associates include auditors, lawyers, consultants, and vendors.¹⁵³ Although the commentary to the HIPAA regulations specifically states that telecommunication entities that provide connectivity or mechanisms to convey information, such as telephone companies and Internet service providers, are not considered covered entities, such entities can be considered business associates. In the written agreement, or business associate agreement, the business associate must agree to:

- Establish permitted and required uses and disclosures;
- Not use or disclose information other than as provided by the contract;
- Use appropriate safeguards;
- Report unauthorized use or disclosure of PHI;
- Bind agents to contract requirements;
- Make PHI available as required;
- Destroy PHI at termination of the contract (if feasible); and
- Authorize the covered entity to terminate the contract if a violation occurs.¹⁵⁴

Given that a covered entity can be held liable for the violations of its business associate if the covered entity knew that the business associate was breaching its obligations and did nothing to cure such violations, before entering into any SLA, a healthcare entity *must* be sure these provisions are included.¹⁵⁵

IV. CONCLUSION

As discussed, the use of ASPs and outsourcing of IT services is here to stay. In order for healthcare entities to benefit from this trend, they would do well to evaluate their global IT strategy, review ASPs’ services and financial statements of ASPs carefully, and negotiate a well thought-out SLA.¹⁵⁶

152. H. Kennedy Hunder, Esq., *HIPPA Tune-up: Your Business Associates*, Phys. Ins. Agency of Mass. ¶¶ 2-3 <http://www.piam.com/compliance/HIPAA_0301.html> (accessed Apr. 8, 2002).

153. *Id.* at ¶ 3.

154. *Id.*

155. *Id.*

156. Goepfert, *supra* n. 7, at 13.

