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Mass General Hospital Pays $14M in FCA Case on Overlapping Surgeries, Changes Informed Consent

By Nina Youngstrom

Massachusetts General Hospital (MGH) has agreed to pay $14.6 million to settle false claims allegations about overlapping surgeries and add language to its informed consent for patients that "my surgeon has informed me that my surgery is scheduled to overlap with another procedure she/he is scheduled to perform," according to its settlement with the Department of Justice (DOJ), Massachusetts attorney general and the whistleblower.[1]

News of the settlement came down from the attorneys representing the whistleblower, Lisa Wollman, M.D., who was an anesthesiologist at MGH for patients whose surgeons allegedly performed concurrent surgeries from 2010 to 2015,[2] according to her False Claims Act (FCA) complaint.[3] Some teaching surgeons allegedly didn't perform or weren't present for the "key and critical portions" of certain procedures, as required by Medicare, or didn't wait for the key and critical portions to be completed before moving on to another procedure, the settlement stated. MGH didn't admit liability or wrongdoing.

Although DOJ and the Massachusetts attorney general didn't intervene in the complaint, Wollman pursued it on the government's behalf. Neither DOJ nor the attorney general announced the settlement.

False claims lawsuits, settlements and self-disclosures about overlapping surgeries are mounting, partly sparked by a newspaper's investigative reporting, said attorney Lauren Gennett, with King & Spalding. "It was a *Boston Globe* article in 2015 that catalyzed increased focus and enforcement attention on overlapping surgeries," she said. "It will be an area of continued focus." Complicating matters, the COVID-19 pandemic may drive more overlapping surgeries at teaching hospitals, she said. "We have observed trends where elective procedures were postponed due to COVID-19, and overlapping surgery practices help facilities get through those backlogs and provide needed care. In cases where elective procedures were postponed and surgical rooms opened up again based on waves of COVID-19, it's important those facilities' policies and controls are consistent with CMS guidance and documentation requirements in this area." There also may be a quality-of-care aspect to overlapping surgery cases if patients are kept under anesthesia longer than required, Gennett said. "The government may be more interested in an FCA case when there's a quality-of-care issue," she noted.

CMS Allows Overlapping Surgeries, With Restrictions

In the teaching hospital context, Medicare allows surgeons to bill for two overlapping surgeries if the "critical or key portions" don't take place simultaneously. "When all of the key portions of the initial procedure have been completed, the teaching surgeon may begin to become involved in a second procedure," according to Chapter 12 of the *Medicare Claims Processing Manual*.[4] "The teaching surgeon must personally document in the medical record that he/she was physically present during the critical or key portion(s) of both procedures. When a teaching physician is not present during non-critical or non-key portions of the procedure and is participating in another surgical procedure, he/she must arrange for another qualified surgeon to immediately assist the resident in the other case should the need arise."

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According to the settlement, the whistleblower alleged that MGH, MGH's Physician's Organization and Mass General Brigham Incorporated billed Medicare and Medicaid (MassHealth) for certain overlapping surgeries in violation of state and federal regulations. Specifically, the whistleblower alleged that "(1) teaching surgeons were not present for or performing the key and critical portions of certain surgeries...; (2) teaching surgeons did not wait until the key and critical portions of one surgery had been completed before beginning a second, overlapping surgery...; [and] (3) teaching surgeons did not designate another qualified surgeon to be immediately available to assist as needed in the non-key and non-critical portions of overlapping surgeries for which the teaching surgeons were no longer present." The whistleblower also alleged the defendants billed Medicare or MassHealth for allegedly excessive anesthesia services performed during some overlapping surgeries and for overlapping surgeries they didn't get the patients' informed consent for with respect to the overlapping surgery.

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