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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.”

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.

Other Hospitals Have Felt the Heat

Several other hospitals have settled recent FCA cases or been accused of FCA violations in connection with overlapping surgeries. For example, the U.S. Attorney's Office for the Western District of Pennsylvania in September partially intervened in an FCA lawsuit filed by a whistleblower against University of Pittsburgh Medical Center (UPMC), University of Pittsburgh Physicians (UPP) and the chairman of the cardiothoracic surgery department.^[5] The U.S. attorney's complaint in intervention alleged they cheated Medicare and other federal health care programs in connection with overlapping surgeries. James Luketich, M.D., allegedly performed up to three surgeries at the same time without always doing the key and critical portions while some patients remained under anesthesia for hours, according to the complaint.

Neurosurgical Associates LTD and St. Joseph's Hospital in Phoenix, which is part of Dignity Health, agreed to pay \$10 million to settle false claims allegations over billing Medicare for certain concurrent and overlapping surgeries, the U.S. Attorney's Office for the District of Arizona said in May.^[6]

Also, Lenox Hill Hospital in New York City agreed to pay \$12.3 million in 2019 in connection with allegations that urologist David Samadi performed "critical or key portions" or the "entire viewing" of two procedures at the same time, one with a surgical robot, the U.S. Attorney's Office for the Southern District of New York said.^[7] Lenox Hill's parent, Northwell Health, is also a party to the settlement. Samadi's employment and privileges at Lenox Hill ended in June 2019.

CCOs May Want to Observe Surgery Practices

For compliance officers, there are a few areas to review internally, although it may require a more creative strategy, Gennett said. Compliance officers could review their policies and controls to ensure they're consistent with CMS guidance and documentation requirements for overlapping surgery, she said. Then they may consider a probe audit, which would be "more nuanced than a run-of-the-mill claim audit," she said. Because documentation practices regarding surgery personnel location and surgery times may vary among facilities, it can be challenging to verify whether attending physicians are physically present for the key and critical portions of a surgery. "The auditing approach would be unique to every facility based on that facility's documentation practices," she said. In some cases, Gennett has found it beneficial to observe overlapping surgical practices to gain a better understanding of a hospital's practices.

"Of course there are documentation requirements that CMS has that are easier to tick off, but they aren't necessarily telling you the full picture of how much the procedure is overlapping," she said. For example, CMS requires surgeons to document their presence for the key and critical portion of the procedure, but they are not necessarily required to say that the key and critical portion started at 2 p.m. and ended at 5 p.m. "The

documentation can be challenging in these cases,” Gennett noted. Also, by design, “there’s discretion given to the attending about what the key and critical portion is, because in every case, it can be different and requires medical judgment.”

Whistleblower: Procedures Booked At Same Time

Wollman filed the complaint against MGH in 2015, but it was dismissed without prejudice because it didn’t include actual claims data, said one of her attorneys, Reuben Guttman of Guttman, Buschner & Brooks. They subsequently obtained the billing information from the state and federal governments, and “the judge issued an opinion confirming the right to bring these kinds of cases when there’s noncompliance with overlapping surgery rules,” Guttman said. The whistleblower then filed the second amended complaint. “DOJ was supportive,” he noted. Other rulings set the stage for more FCA cases about noncompliant overlapping surgeries, including a decision that peer review privileges don’t apply in FCA cases, Guttman said.

In the second amended complaint, Wollman, who joined MGH’s staff in 1995, said MGH assigned her to provide inpatient anesthesia to surgery patients in the Department of Orthopaedic Surgery around 2010. That’s when she discovered the orthopedic department’s practice of allegedly booking two or three surgeries with the same attending surgeon at the same time. “In fact, she learned that it was not uncommon for a single orthopaedic surgeon at MGH to schedule three surgeries concurrently, including two or more complicated or high risk procedures, such as total shoulder replacement, cervical, lumbar and spine surgeries and the surgical repair of non-emergent fractures,” the complaint alleged.

The whistleblower alleged the procedures didn’t overlap a little bit; they were scheduled at or around the same time, “making it impossible for the teaching physician to assure that he could be physically present and ready to participate in the key or critical parts of each surgical procedure.”

Whistleblower Went to Compliance

For example, on Oct. 27, 2011, Wollman saw that surgeon A scheduled the removal of a right shoulder prosthesis at 9:49 am and a total shoulder joint replacement at 9:50 am. “Each of these surgeries normally requires about 3 hours, and on this day, Relator observed that both patients were put under general anesthesia about the same time and Relator’s patient (Patient 2)—who was over 65 years old—was on medication the entire time to sustain his blood pressure. Surgeon A did not even scrub for patient 2’s surgery until an hour and a half *after* patient 2 was rendered unconscious, paralyzed, intubated and put on a ventilator,” the complaint alleged. “During the time Surgeon A performed surgery on patient 2—for about an hour and fifteen minutes—he was not immediately available for Patient 1’s surgery. Moreover, Patient 1’s surgery, which lasted about six and a half hours, was concurrent with third Patient’s surgery (Patient 3). Relator noticed that Surgeon A attested that he participated in the entire surgery for patient 2 even though it was false.”

Wollman told MGH’s compliance department what transpired. Although the attestation was later corrected, she alleged the surgeon was never reprimanded as far as she knows.

The complaint also alleged that MGH lacked an official policy requiring “anyone at MGH to disclose concurrent surgery to patients who are affected by the practice.” In the settlement, Mass General Brigham (which includes MGH and Brigham and Women’s Hospital) agreed to include the following language in the informed consent given to its patients: “My surgeon has informed me that my surgery is scheduled to overlap with another procedure she/he is scheduled to perform. I understand that this means my surgeon will be present in the operating room during the critical parts of my surgery but may not be present for my entire surgery. I understand that my surgeon or another qualified surgeon will be immediately available should the need arise during my surgery.”

MGH Revised Policies to Ensure ‘Ongoing Compliance’

In response to RMC’s request for comment, MGH provided a statement that

its leadership sent to staff. It stated in part that “while the MGH continues to believe it always has complied with legal requirements regarding overlapping surgery, we determined that it would be most prudent to resolve the matter fully by settlement at this time. Specifically, without any admission of liability, the MGH will pay a total of \$14.6 million to the United States and the Commonwealth of Massachusetts to resolve claims related to overlapping surgeries, most of which were performed more than a decade ago, with some dating as far back as 2005. During the past ten years the MGH, like other hospitals, has continued to revise its policies and procedures related to overlapping surgery to ensure ongoing compliance with evolving requirements. We remain committed to delivering the highest quality, individualized, world-class treatment and care to patients. We are pleased we were able to reach a resolution that fully concludes the matter without further litigation.”

Wollman now practices at New England Baptist Hospital, Guttman said.

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1 Settlement agreement, United States ex rel. Wollman v. Gen. Hosp. Corp., No. 15-cv-11890-ADB, 394 F. Supp. 3d 174 (D. Mass. 2019).

2 Guttman, Buschner & Brooks PLLC, “Mass General Hospital to Pay \$14.6 Million to Resolve Overlapping Surgery Claims; Standardized Consent Forms to Be Amended,” Cision, February 19, 2022, <https://prn.to/3heKs9z>.

3 Second amended complaint, United States ex rel. Lisa Wollman, M.D. et. al. v. Massachusetts General Hospital, et al., No. 1:15-CV-11890-ADB (D. Mass. 2018).

4 CMS, “Chapter 12 – Physicians/Nonphysician Practitioners,” Pub. 100-04, *Medicare Claims Processing Manual*, revised January 20, 22, <https://go.cms.gov/2XXxnb5>.

5 Nina Youngstrom, “DOJ Intervenes in FCA Case Against UPMC on Concurrent Surgeries,” *Report on Medicare Compliance* 30, no. 33 (September 20, 2021), <https://bit.ly/3BKxFFz>.

6 Department of Justice, U.S. Attorney’s Office for the District of Arizona, “Neurosurgical Associates, LTD and Dignity Health, D/B/A St. Joseph’s Hospital, Paid \$10 Million to Resolve False Claims Allegations,” news release, May 5, 2021, <https://bit.ly/36qk3U7>.

7 Nina Youngstrom, “Hospital Pays \$12M to Settle FCA Case on Overlapping Surgeries, Stark Violations,” *Report on Medicare Compliance* 28, no. 43 (December 9, 2019), <https://bit.ly/37PgTXL>.

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