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Baylor Settles FCA Case on Overlapping Surgeries; Surgeons Allegedly Skipped Time-Outs

By Nina Youngstrom

In the largest false claims settlement ever about overlapping surgeries, Baylor St. Luke's Medical Center, Baylor College of Medicine and Surgical Associates of Texas P.A. (SAT) have agreed to pay \$15 million to settle allegations they submitted Medicare claims for high-risk heart surgeries that surgeons performed two at a time, the U.S. Attorney's Office for the Southern District of Texas said June 24.^[1] The government alleged the defendants violated Medicare regulations when they billed for procedures performed by three teaching surgeons who often ran two operating rooms at the same time, falsely attested they were at the surgery and skipped the surgical time-out, which ensures the patient is having the right surgery, according to the settlement.^[2]

Baylor St. Luke's Medical Center is a joint venture between CommonSpirit Health, a national hospital chain, and Baylor College of Medicine in Houston. Baylor St. Luke's runs a teaching hospital at Texas Medical Center and Baylor College of Medicine employs teaching physicians, including Joseph Coselli and Joseph Lamelas, who provide services at Baylor St. Luke's, the U.S. attorney's office said. SAT is a medical practice affiliated with cardiothoracic surgeons, including David Ott.

The False Claims Act (FCA) case was set in motion by a whistleblower, Jeffrey Morgan, M.D., a former employee of Baylor College of Medicine. According to his complaint, Morgan became aware of the alleged "systematic practice of scheduling cardiothoracic surgeries to occur simultaneously with the same attending physician listed as the lead for each surgery."^[3] The surgeries included coronary artery bypass grafts, valve repairs and aortic repair procedures, the U.S. attorney's office said. The defendants didn't admit liability in the settlement.

Surgeons are expected to have concurrent cases in a teaching facility, but "this is one of the rare situations where there's a regulation requiring documentation," said attorney David Glaser, with Fredrikson & Byron. Medicare requires documentation of the physician's presence during the critical or key portions of the surgeries. "Presence during the whole procedure is neither required nor expected," he noted. Because the Baylor FCA lawsuit was settled, it's impossible to know exactly what happened, but the whistleblower alleged the surgeons sometimes attested to their physical presence during the entire surgery. "If the physicians were routinely documenting that they were present for the whole procedure, this was a self-inflicted wound that is difficult to fix retroactively because it calls the credibility of the record into question," Glaser said.

This is the latest in a series of false claims settlements about overlapping surgery. Last year, University of Pittsburgh Medical Center (UPMC), University of Pittsburgh Physicians and James L. Luketich, M.D., agreed to pay \$8.5 million over allegations they billed for overlapping surgeries in a way that violated Medicare regulations.^[4] Luketich, a cardiothoracic surgeon employed by UPMC, allegedly performed up to three surgeries at the same time without always being present for the critical or key portions and left some patients under anesthesia for hours while he attended "to other matters," according to the FCA complaint filed by the U.S. Department of Justice (DOJ).

In 2022, Massachusetts General Hospital 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,” its settlement states.^[5]

According to Chapter 12 of the *Medicare Claims Processing Manual*, “In order to bill Medicare for two overlapping surgeries, the teaching surgeon must be present during the critical or key portions of both operations. Therefore, the critical or key portions may not take place at the same time. 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. 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. In the case of three concurrent surgical procedures, the role of the teaching surgeon (but not anesthesiologist) in each of the cases is classified as a supervisory service to the hospital rather than a physician service to an individual patient and is not payable under the physician fee schedule.”^[6]

Baylor Settlement Describes Alleged Noncompliance

Baylor St. Luke’s Medical Center, Baylor College of Medicine and SAT (the defendants) allegedly were at odds with these billing requirements and submitted false claims to Medicare from June 3, 2013, to Dec. 21, 2020, for heart surgeries performed by Ott, Coselli and Lamelas, according to the settlement. The government alleges some claims didn’t meet Medicare requirements for concurrent surgeries and the supervision of residents “when they oversaw surgeries in multiple operating rooms at one time.” The surgeries and related services allegedly didn’t qualify for payment because:

- “i. The teaching physician was absent from the surgical timeout, which is a critical portion of the surgery;
- “ii. The teaching physician was not immediately available during the entirety of the surgery;
- “iii. The teaching physician presented a false attestation as to their presence during the surgery;
- “iv. The teaching physician did not provide any attestation as to their presence during the surgery;
- “v. The teaching physician falsely attested to the need for a second-attending surgeon (in lieu of a resident or fellow) when the second-attending surgeon was merely used to enable the teaching physician to run two operations simultaneously;
- “vi. On isolated occasions, the teaching physician was overseeing three operations at one time; and
- “vii. Patients were not aware that their surgeon would be handling multiple surgeries at one time, and therefore did not provide informed consent for the services rendered.”

‘Troubled’ by Consent in FCA Settlement

Although the manual requires surgeons to be physically present for the critical or key portions of the surgery, Glaser said it’s up to physicians to decide what the critical or key portions are. The manual itself says so. “It’s a reminder that the critical or key portions aren’t determined by the government,” he said. “Reasonable people can differ.”

It’s also surprising to see the alleged lack of informed consent as a false claims allegation, Glaser said. “I am

troubled by that as a basis for settlement,” he said. “I don’t think consent is a condition of payment.” Informed consent is a condition of participation “but it’s quite clear [violations of the] conditions of participation are not automatically false claims.”

Because overlapping surgeries also take place at nonteaching hospitals, they may want to consider comparing their practices against 2016 guidance from the American College of Surgeons (ACS). ACS says concurrent surgeries occur “when the critical or key components of the procedures for which the primary attending surgeon is responsible are occurring all or in part at the same time” and states that “a primary attending surgeon’s involvement in concurrent or simultaneous surgeries on two different patients in two different rooms is inappropriate.”^[7]

Residents Allegedly Were Left Unsupervised

In his FCA complaint, the whistleblower alleged two surgeries were scheduled at the same time for the attending physicians. As a result, they often weren’t “present at the pre-incision time-out (a key and critical part of each procedure), routinely left a resident or fellow in the operating room alone and unsupervised performing critical surgical tasks in these complex procedures, often falsified the patient’s medical record to obscure their presence, or lack thereof, in the operating room, and never informed their patients that they would be scheduling their procedure simultaneously with other procedures where they were also the primary attending teaching physician,” the complaint alleged.

For example, Ott allegedly was scheduled to perform surgery on the same day in 2015 on one patient from 7:30 a.m. to 8:15 p.m. and the other from 7:30 a.m. to 4:33 p.m. “Ott attested to being present for the entire time of both procedures. He did this even though all nine hours of surgery” for the second patient happened during the first nine hours of surgery for the first patient, the complaint alleged.

Coselli allegedly did the same sort of thing. He was slated to perform 32 hours of surgery over a 16-hour period one day in 2018. Similarly, Lamelas allegedly performed hundreds of simultaneous overlapping surgeries during his two years at Baylor, “often attesting in the medical record that ‘I performed this procedure,’” according to the complaint. He confided in the whistleblower that his compensation was based on a payment per procedure, incentivizing him to “consistently double book his surgical patients.”

The whistleblower alleged that “Baylor knew about and facilitated the submission of these false statements by its teaching physicians,” providing the three surgeons with two dedicated operating rooms at the same time every day.

The complaint also alleged that Baylor consent forms only listed the name of the attending surgeon who was performing the procedure. Patients weren’t told a resident or fellow would be operating on them without a certified surgeon there, the complaint alleged.

In a statement, Baylor St. Luke’s Medical Center said it has reached an agreement with DOJ “to resolve a documentation and billing matter involving compliance and billing requirements set forth by” CMS. “The DOJ claims are strictly allegations and the settlement by Baylor St. Luke’s is not an admission of liability. Baylor St. Luke’s remains committed to complying with all CMS regulations. Baylor St. Luke’s is a world-renowned academic medical center that cares for patients from throughout the world with the most complex conditions. The hospital provides its patients with safe, high-quality care and remains committed to compliance with all applicable regulations.”

In a statement, SAT said it was previously affiliated with a surgeon “involved in a recent settlement agreement entered into with the Department of Justice. The settlement agreement relates to documentation and billing

requirements set forth by the Centers for Medicare and Medicaid Services, and the DOJ's allegations did not involve patient harm. SAT disputes the DOJ's allegations and does not admit any liability related to the settlement agreement. The case was settled to avoid the costs related to a lengthy legal dispute."

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- 1** U.S. Department of Justice, U.S. Attorney's Office for the Southern District of Texas, "Texas medical center institutions agree to pay \$15M record settlement involving concurrent billing claims for critical surgeries," news release, June 24, 2024, <https://bit.ly/4eDhIUD>.
- 2** Settlement agreement, United States v. Baylor St. Luke's, Baylor College of Medicine and Surgical Associates of Texas, P.A., No. 4:19-cv-02925 (S.D. Tex. 2024), <https://bit.ly/3ztYQak>.
- 3** Complaint, United States v. Baylor St. Luke's, Baylor College of Medicine and Surgical Associates of Texas, P.A., No. 4:19-cv-02925 (S.D. Tex. 2024), <https://bit.ly/4cDV9xf>.
- 4** Nina Youngstrom, "UPMC Settles FCA Case on Overlapping Surgeries, Agrees to External Audit but Not CIA," *Report on Medicare Compliance* 32, no. 9 (March 6, 2023), <https://bit.ly/3KYRYEu>.
- 5** Nina Youngstrom, "Mass General Hospital Pays \$14M in FCA Case on Overlapping Surgeries, Changes Informed Consent," *Report on Medicare Compliance* 31, no. 8 (February 28, 2022), <http://bit.ly/3KOMjC7>.
- 6** Centers for Medicare & Medicaid Services, "Chapter 12 - Physicians/Nonphysician Practitioners," *Medicare Claims Processing Manual*, Pub. 100-04, March 7, 2024, <https://bit.ly/3ToAipp>.
- 7** American College of Surgeons, "Statements on Principles," April 12, 2016, <https://bit.ly/4bjmmnL>.

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