

CLIENT ALERTS

Crackdown on Surgeons Double-Booking Patients

Client Alert

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In 2016, the *Boston Globe* ran a story presenting severe allegations against a local hospital. The story told of a practice occurring at Massachusetts General Hospital (MGH) that violated Medicare supervision rules for academic medical centers and left patients in potentially life-threatening situations.¹ After years of litigation, MGH finally agreed in 2022 to pay out a hefty total of \$47.3 million in settlement costs – \$14.6 million to the U.S. government, and \$32.7 million to three individual plaintiffs.²

The practices complained about are referenced by several names – double-booking, concurrent surgeries, and patient ghosting. It occurs when lead surgeons schedule multiple operations for the same day and time, leave the room during portions of one surgery to attend to the other, and bill Medicare for work done by residents while they are away.³

Now that the MGH case has provided a blueprint, both plaintiffs and the government are pursuing hospitals in hopes of collecting large settlements.

Additional Hospitals Under Fire

Although each of the above matters takes on a slightly different flavor, they are based upon one of two theories, and sometimes both – either that surgeons were improperly and illegally double-billing Medicare under the False Claims Act (FCA), or patients were left at risk or unduly injured from surgeons leaving the operating room.

In New York, a star surgeon, Dr. David B. Samadi, was alleged to have bounced from operating room to operating room, leaving residents to operate on the patients. Lenox Hospital agreed to pay the DOJ a \$12.3 million settlement.⁴ In Pennsylvania, The University of Pittsburgh Medical Center settled with the DOJ for

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CLIENT ALERTS

\$ 8.5 million after allegations that their top surgeon followed a similar practice which “abuse[d] patients’ trust, inflate[d] anesthesia time, (and) have resulted in serious harm to patients.”⁵

In May of 2022, the University of Maryland resolved a similar FCA lawsuit for nearly \$300,000. There, a former employee alleged the hospital billed for radiation therapy and other diagnostic services rendered by improperly supervised residents.⁶ And just recently, another FCA case involving billing for services rendered by unsupervised residents was resolved with Meharry Medical College agreeing to pay over \$100,000.⁷

Currently, two major lawsuits are ongoing against the University of Southern California⁸ and the Chattanooga Hamilton County Hospital Authority⁹ for similar practices.

Where These Hospitals Went Wrong

On the legal side, the primary mechanism for holding these hospitals liable has been through the FCA. Whistleblowers are incentivized to bring these claims forward, as they may receive 15–25% of the settlement award through the FCA *qui tam* provision.¹⁰

The FCA is invoked when an individual knowingly submits false or fraudulent claims for payment or approval to the United States government.¹¹ Under the Medicare rules, “[i]n order to bill for surgical, high-risk, or other complex procedures, the teaching physician must be present during all critical and key portions of the procedure and be immediately available to furnish services during the entire procedure.”¹² Even “[d]uring non-critical or non-key portions of the surgery, if the teaching surgeon is not physically present, he/she must be immediately available to return to the procedure, i.e., he/she *cannot be performing another procedure*. If circumstances prevent a teaching physician from being immediately available, then he/she must arrange for another qualified surgeon to be immediately available to assist with the procedure, if needed.”¹³

In the cases cited, the general allegations are that these teaching physicians are not present during all critical portions, and indeed are not generally available to return to the procedure during even non-critical portions. Therefore, the government argues, the Medicare billing is false, and the taxpayer is paying more than they should.

In addition to the FCA, personal injury plaintiffs have been successful because the hospitals fail to receive patient consent to be operated on by anyone other than the lead surgeon.¹⁴ These patients also face an increased risk of surgical complications.¹⁵

Preventing False Claims Exposure

To prevent False Claims of the nature described in the cases referenced in this Alert, hospital compliance teams should address procedures to ensure surgeons are present as required by the Medicare rules during surgery. Further, surgeons and other staff should be notified of these requirements and alert compliance if they observe a deviation from them. If needed, your attorneys at Butzel are ready and willing to help make sure you continue to provide the best patient care while

CLIENT ALERTS

avoiding any potential litigation.

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[1] Jenn Abelson et al., *Clash in the Name of Care*, Boston Globe (Oct. 25, 2015), <https://apps.bostonglobe.com/spotlight/clash-in-the-name-of-care/story/>.

[2] Jonathon Saltzman, *Mass. General pays \$14.6 million to settle whistle-blower suit over concurrent surgeries*, Boston Globe (Feb. 18, 2022), <https://www.bostonglobe.com/2022/02/18/business/mass-general-pays-146-million-settle-suit-it-defrauded-governments-by-leaving-surgeries-unsupervised-trainees/>; *Wollman v. Massachusetts General Hospital Inc. et al*, D. Mass., No. 1:15-cv-11890.

[3] John Holland, *Surgeons Are Double and Triple Booking Procedures That Residents Must Perform*, Bloomberg (Aug. 31, 2023), <https://www.bloomberg.com/news/articles/2023-08-31/doctors-ghost-patients-charge-for-surgeries-left-to-residents?embedded-checkout=true>.

[4] *United States of America, ex rel., et al. v. David B. Samadi, M.D., et al.*, S.D.N.Y., No. 1:17-cv-07986; Defendants Admit Practices Resulted in Submission of Several Million Dollars of Inappropriate Claims to Medicare, US DOJ (last updated Nov. 8, 2019), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-123-million-settlement-lenox-hill-hospital-submitting>.

CLIENT ALERTS

[5] Doe et al v. Luketich et al, W.D. Pa, No. 2:19-cv-00495.

[6] University Of Maryland Shore Regional Health Agrees to Pay \$296,870 to Settle Federal False Claims Act Allegations of Billing for Unsupervised Radiation Therapy and Diagnostic Services, US DOJ (last updated May 17, 2022), <https://www.justice.gov/usao-md/pr/university-maryland-shore-regional-health-agrees-pay-296870-settle-federal-false-claims>.

[7] See Meharry Medical College Agrees To Settle False Claims Act Allegations, US DOJ (April 17, 2023), <https://www.justice.gov/usao-mdtn/pr/meharry-medical-college-agrees-settle-false-claims-act-allegations>.

[8] United States of America et al v. University of Southern California, C.D. Cal, No. 2:18-cv-08311.

[9] United States of America et al v. Chattanooga Hamilton County Hospital Authority et al, E.D. Tenn, No. 1:21-cv-00084.

[10] 31 U.S.C. § 3730(d)(1).

[11] 31 U.S.C. § 3729.

[12] See CMS, Medicare Claims Processing Manual: Chapter 12 – Physicians/Nonphysician Practitioner § 100.1.2 (last updated Feb. 9, 2023), <https://www.cms.gov/Regulations-and-guidance/Guidance/Manuals/Downloads/clm104c12.pdf>.

[13] *Id.* (emphasis added)

[14] Holland, *supra* note 3.

[15] *Id.* (“Increasing duration of overlap with another procedure is associated with progressively increasing risk for complications.”) (quoting the Journal of American Medicine).