

HOGAN & HARTSON
L.L.P.

LAURA E. LOEB
PARTNER
(202) 637-5760
LELOEB@HHLAW.COM

September 19, 2002

Joseph B. Jacobs, M.D.
Chairman, SocioEconomic Committee
American Rhinologic Society
Department of Otolaryngology
New York University
530 First Avenue, Suite 3C
New York, New York 10016-6402

**RE: Potentially Unlawful Reimbursement Policies of
Certain Third Party Insurers With Respect to Functional
Endoscopic Sinus Surgery (FESS)**

Dear Dr. Jacobs:

As you are aware, I have been outside legal counsel for the American Rhinologic Society (ARS) since 1993. I specialize in health care coverage and reimbursement issues and have longstanding relationships with former and current officials at the Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Financing Administration). Over the years, I have assisted members of the ARS and the American Academy of Otolaryngology -- Head and Neck Surgery (the Academy) in working hand-in-hand with CMS officials to develop thoughtful and fair coding and reimbursement policies with respect to functional endoscopic sinus surgery (FESS).

Unfortunately, you have provided me documentation suggesting that certain third party payers are flagrantly ignoring sound reimbursement policy for FESS with respect to global surgical periods, while simultaneously alleging to follow Medicare's resource-based relative value scale to set payment rates. Specifically, as I understand the situation, certain payers are refusing to adopt Medicare's carefully weighed decision that most FESS procedures would have a so-called zero-day global

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period. As explained further below, the global surgery policy is inextricably linked to payment values.

Thus, it would be impossible, and actually unlawful under the terms of most plans and/or state laws, for a payer to suggest that it is setting its payment rates based on the Medicare fee schedule, yet refusing to adopt Medicare's global payment policy. Any denials of payment for services provided outside the zero-day global period should be appealed by physicians and patients.

CMS's careful decision to set a zero-day global period for FESS included consideration of the appropriate payment levels for FESS and subsequent medically necessary procedures. For procedures, like FESS, with a zero-day global, any additional physician service provided on the same day would not be separately reimbursed. However, a service provided the next day, next week, or next month would be paid separately.

As you are aware, I have firsthand knowledge through meetings with CMS officials that CMS assigned payment values for FESS assuming that medically necessary subsequent diagnostic endoscopies (CPT code 31231) or surgical endoscopies with debridement (CPT code 31237) would be reimbursed separately as outside the zero-day global period. CMS staff spent considerable time reflecting on the appropriate payment level and global policy for these codes. The AMA also reviewed these codes and recommended values based on Medicare's global payment policy. Further, the ARS and the Academy conducted an extensive survey of their members on appropriate payment values for these services assuming a zero-day global period and provided the AMA and CMS with these results to assist these groups in assessing payment values.

According to the correspondence you sent me, despite the strong arguments supporting a zero-day global period, certain payers are, nevertheless, adopting a 90-day global period for FESS procedures. It is inappropriate for a payer to base its payment amounts on the Medicare fee schedule and yet not adopt Medicare's same global payment policy for the services. Clearly, CMS would have valued the FESS procedures at a much higher level if the procedures had a 90-day rather than a zero-day global period, because under the 90-day global payment policy, the payment would have included post-operative endoscopies or other post-operative services. A payer basing payments on Medicare's fee schedule yet refusing to adopt the same global surgery period wants to have the best of both worlds.

However, as mentioned above, such a payer policy is unreasonable and most likely in violation of state insurance regulations and/or the payer's own contractual terms with physicians.

Payers usually must abide by certain basic constraints in how they set their payment levels. For example, payers typically have written policies or contracts with employers, enrollees, and/or providers that state that their payment rates will be "reasonable." If a rate is not reasonable, the payer most likely is in breach of contract and susceptible to significant legal remedies by injured parties. Moreover, many states have insurance laws that explicitly require insurance payment rates to be reasonable. In those states, a payer that sets unreasonable rates is in violation of the state law and may risk losing its authority to function in the state.

Any payer policy that states it is basing payment on the Medicare fee schedule, yet does not follow Medicare's global surgery period, is on its face unreasonable. The payers' arguments in the correspondence you provided me attempting to justify the validity of such policies simply were incorrect. One payer's argument was that a 90-day global period for FESS procedures is supported by the AMA's Surgery Guidelines in its annual CPT book. That statement is inaccurate. Nowhere in the Guidelines does the AMA take a position on the length of global surgery periods for particular procedures. Surgeries may have zero-day, 10-day, or 90-day global surgery periods, and the AMA has nothing to do with the setting of these periods.

The payer argues that the AMA stated, "Listed surgical procedures include the operation per se, . . . and normal uncomplicated follow-up care." What the payer neglects to state is that the AMA's statement applies equally to services with a zero-day global period, a 10-day global period, or a 90-day global period. CMS in setting its fee and global period for FESS assumed that the FESS codes included the procedure and the normal uncomplicated follow-up care, which is only anticipated to be care provided the same day. Any other care provided on subsequent days is deemed to be not normal follow-up care and should, therefore, be separately paid. The AMA recognizes that some surgical codes, like those for FESS, may have zero-day global periods.

A related payer argument that again shows a complete misunderstanding by the payer (and its consultants) of the nature of FESS services

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was that the post-operative endoscopy and debridement amounted to nothing more than a "postop check." These post-operative services are not "checks" of past work, but rather are medically necessary, planned services of a sequential nature that are essential to patient outcome.

Lastly, the payer suggests that three consultants who are certified by the Academy and have been in practice for more than 20 years agree that FESS procedures should have a 90-day global period. As you are aware, FESS is a very specialized service. If these consultants have not been specially trained in the use of this breakthrough technology, then they probably have the wrong frame of reference. No doubt these consultants are comparing FESS to the older, invasive sinus procedures that do have a 90-day period. These open procedures bear little resemblance to the FESS technology. CMS, the AMA, ARS, and the Academy all are very aware of this fact. Again, I am aware through my personal interactions with CMS officials that these CMS officials were acutely aware of the open sinus procedures with the 90-day global period but understood from a clinical perspective that the FESS procedures were fundamentally different and required only a zero-day global.

The payer cannot assume that any otolaryngologist is able to provide a knowledgeable opinion on payment policy. Rather, at a minimum, the payer has an obligation to have its policies reviewed by physicians who have performed these services. Upon inquiry by a provider, the payer should provide to the provider information regarding the consultants' experience and training. If a payer refuses to provide this information, the provider should report the payer to the State Insurance Commissioner or the Office of the State Attorney General. Most State Insurance Departments and/or Attorney General's Offices will pursue payers and require them to provide this type of information. In addition, the payer should provide great deference to the positions of the Academy and ARS regarding what services are outside a global surgery period. Attached is a letter from the Academy in support of a zero-day global period for FESS procedures.

In sum, physicians who are denied payment for post-operative endoscopies and debridement should vigorously appeal these denials through meetings with payer medical directors, complaints to the State Insurance Commissioner, the State Attorney General, the Better Business Bureau, the local Chamber of Commerce, and the local press, appeals to fair hearings, and perhaps even a legal action against the payer.

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Please do not hesitate to contact me with any further questions regarding this matter. Hopefully, once you bring these important facts to the attention of a payer the payer will adjust its policies accordingly.

Sincerely,

A handwritten signature in cursive script that reads "Laura E. Loeb". The signature is written in black ink and is positioned above the printed name.

Laura E. Loeb