

HOGAN & HARTSON

L.L.P.

LAURA E. LOEB
PARTNER
DIRECT DIAL (202) 637-5760
INTERNET LOE@DC2.HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

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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**

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 Health Care Financing Administration (HCFA). ARS hired me in 1993 to assist it and the American Academy of Otolaryngology -- Head and Neck Surgery (the Academy) in working with HCFA and the American Medical Association (AMA) on coding and reimbursement questions regarding functional endoscopic sinus surgery (FESS). Over a nine-month period of time, which included several meetings with high level HCFA officials, representatives of the ARS and the Academy worked hand-in-hand with HCFA to develop thoughtful and fair coding and payment policies for FESS, which continue to be in effect.

Nevertheless, in the wake of this carefully developed Medicare policy, you have provided me documentation suggesting that certain select third party payers are flagrantly ignoring the Medicare policy for FESS with respect to global surgical periods, while simultaneously alleging to follow Medicare's resource-based relative value scale to set payment. As explained further below, the global surgery policy is inextricably linked to payment values. Thus, it would be unreasonable, and in certain cases unlawful, for a payer to suggest that it is setting its payments based on the Medicare fee schedule, yet refusing to adopt Medicare's global payment policy.

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Specifically, certain payers are refusing to adopt Medicare's carefully weighed decision that most FESS procedures would have a so-called zero-day global period. 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. I have firsthand knowledge that HCFA 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. HCFA 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 surveyed their members on appropriate payment values for these services assuming a zero-day global period and provided the AMA and HCFA 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 adopting a 90-day global period for FESS procedures. It is indisputably 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, HCFA 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 all worlds. However, such a payer policy is unreasonable and possibly illegal.

Payers usually are confronted with constraints in how they set their payment levels. For example, payers usually have written policies or contracts with employers, enrollees, and/or providers that state that their payment rates will be reasonable. Moreover, many states have insurance laws that explicitly require insurance payment rates to be reasonable.

A 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. Thus, if such a payer also has a written policy of setting reasonable fees, it is in breach of contract and susceptible to significant legal remedies. If such a payer is licensed in a state that requires a payer to set reasonable rates, the payer

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is in violation of the state law and may risk losing its authority to function in the state.

The payers' arguments in the correspondence you provided me were incorrect and misguided. One payer 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 simply inaccurate. No where 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 for a service with a zero-day global period, the surgical procedure includes only the normal uncomplicated follow-up care provided the same day as FESS. Any service provided after the day of surgery is outside the definition of the code and should be paid separately.

Another spurious payer argument was that the post-operative endoscopy and debridement amounted to nothing more than a "postop check." Such a statement by the payer demonstrates a complete lack of understanding by the payer (and its consultants) of FESS. These services are not "checks" of past work, but rather are medically necessary planned next 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 technology, then they probably have the wrong frame of reference. No doubt these consultants would compare FESS to the older, open sinus procedures, that do have a 90-day period. The open procedures bear little resemblance to the FESS technology. HCFA, the AMA, ARS, and the Academy all are very aware of this fact. The payer has an obligation to have its policies reviewed by knowledgeable physicians.

Any physician providing advice to a payer on FESS must, at a minimum, have performed these services. Upon inquiry, the payer should provide to the public information regarding the consultants' experience and training. If a payer refuses to provide this information, the payer should be reported to the state Insurance Commissioner. Most state Insurance Departments will pursue payers

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and require them to provide this 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.

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 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.

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, appearing to read "La E. Loeb".

Laura E. Loeb