



## FMVantage Point™

HealthCare Appraisers' Industry Insight

# APPELLATE COURT DECISION CASTS SHADOW ON WRVU-BASED COMPENSATION PLANS

**JIM D. CARR, ASA, MBA AND MATTHEW J. MILLIRON, CVA, MBA**

On September 17, 2019, the United States Court of Appeals for the Third Circuit issued a decision<sup>1</sup> that has the potential to send shockwaves throughout the healthcare industry. In reversing the District Court's decision to dismiss, the Court acknowledged that an employed surgeon's compensation that is based on the surgeon's work relative value unit ("wRVU") production *could* violate healthcare fraud and abuse laws if certain factors are present. Specifically, the majority opinion summarized the Relators' allegations with respect to the employed surgeons' compensation plan as follows:

*[T]he surgeons' pay was facially based only on the services they personally performed. But every time they performed a surgery or other procedure at the UPMC Hospitals, [they] made a referral for the associated hospital claims.... As a result, the surgeons' salaries rose and fell with their referrals.... Thus, their aggregate compensation varied with their referrals' volume and value.*

At this point, the Circuit Court has only determined that the Relators' complaint is sufficient to survive a motion to dismiss, and the case will return to the District Court for continued proceedings. However, the Circuit Court's opinion sheds light on situations in which a compensation plan that has been prevalent for employed physicians could potentially form the basis for a government inquiry or *qui tam* action.

Specifically, the Circuit Court cited that "[e]xcessive compensation is thus a sign that a surgeon's pay in fact takes referrals into account." Its opinion pointed to five allegations from the Relators' complaint which, if true and when considered in the aggregate, could form a credible claim that the surgeons' compensation plan based on personally performed work was structured in such a manner that violated the Physician Self-Referral (*i.e.*, Stark) Law and the Anti-Kickback Statute. Those assertions included:

- 1) "[S]ome surgeons' pay exceeded their collections;"
- 2) "[M]any surgeons' pay exceeded the 90<sup>th</sup> percentile" compensation reported for neurosurgeons nationally;
- 3) "[M]any [surgeons] generated Work Units far above industry norms;"
- 4) "[T]he surgeons' bonus per Work Unit exceeded what the defendants collected on most of those Work Units;" and
- 5) In a previous settlement agreement, "the government alleged that the Medical Center had fraudulently inflated the surgeons' Work Units."

<sup>1</sup>Specifically, the Court reversed the District Court's decision to dismiss and remanded the case for further proceedings. See, *United States ex rel. Bookwalter, et. al. v. UPMC, et al, Case No. 2:12-cv-00145 (W.D. PA)*



After reviewing these allegations, the majority opinion concluded “[t]hat much smoke makes fire plausible.” The potential impact of this case on the future of wRVU-based compensation plans will be determined in the near future, and HealthCare Appraisers will provide relevant updates as the litigation progresses.

In the meantime, HealthCare Appraisers reiterates the importance of confirming FMV compensation for employed physicians, regardless of the form of the compensation plan. Additionally, employers must ensure their calculation of wRVUs for purposes of determining compensation is accurate, logical, and defensible in order for the resulting compensation to be consistent with FMV.

#### **FMV PITFALL**

With higher levels of production and compensation come increased scrutiny and increased complexity in the determination of FMV compensation. In all instances, it is a best practice for employers to account for the impact of procedure modifiers, “split/shared” and “incident to” services, rejected or denied claims, and other factors to better align wRVU credit with physician work effort and payor reimbursement. Engaging a qualified healthcare valuation expert to evaluate physician compensation plans can mitigate the risks inherent in developing compensation plans for physicians of all productivity levels.

