The Latest On Statistical Sampling In FCA Cases

Law360, New York (March 22, 2017, 12:42 PM EDT) -- After waiting over a year to hear what the Fourth Circuit would say about statistical sampling in False Claims Act cases, the court of appeals recently chose to keep us in suspense. Despite initially granting the relators' petition to appeal the district court's ruling that statistical sampling was not an appropriate means of demonstrating liability, the Fourth Circuit ultimately declined to decide the issue in United States ex rel. Michaels v. Agape Senior Community Inc., because it was not a "pure question of law" and, therefore, not appropriate for interlocutory review. Thus, the Fourth Circuit dismissed the relator's appeal regarding statistical sampling as "improvidently granted."[1]

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Statistical sampling and extrapolation involve identifying a representative sample of claims and using that sample to draw inferences and make conclusions about the larger pool of claims. The use of statistical extrapolation is not new, and though governing statutes specifically authorize its use in certain types of cases, such as administrative agency actions, the FCA is silent with respect to the use and appropriateness of statistical sampling. This silence has left lower courts and practitioners alike with little guidance regarding the appropriate parameters of the practice in FCA cases.

Not surprisingly, then, FCA plaintiffs have tried to push the envelope, increasingly seeking to use sampling to prove not only damages but liability when asserting large numbers of false claims. They argue, among other things, that using sampling in this way conserves judicial and other resources. Defendants have vigorously resisted these efforts, raising objections about how

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the use of representative samples affect the burden of proof and a plaintiff's duty to prove threshold issues in FCA cases, such as the falsity of each claim at issue. These concerns are particularly pressing when plaintiffs seek to employ statistical sampling to prove liability rather than damages.

The question of whether and how relators may use statistical sampling in FCA cases has been percolating through the lower courts for some time, with only a small handful of circuit courts weighing in. Although the recent Agape decision failed to provide the more definitive guidance practitioners on both sides were hoping for, it does offer an opportunity to look at settlements and court decisions involving sampling in the past year since we last looked at this issue in a Law360 guest column.[2] The trends that emerge from that review suggest that while plaintiffs continue to convince courts that sampling is an appropriate cornerstone for establishing damages, often resulting in large-dollar settlements, courts are still struggling and rejecting the idea that liability can be proven by means of statistical extrapolation.

Statistical Sampling: A Review of Recent Cases

Several recent settlements clearly highlight the government's reliance on statistical sampling for establishing damages and, more importantly, district courts' comfort with this practice.

In late October of 2016, the U.S. Department of Justice announced a $145 million settlement with Life Care Centers of America Inc. to resolve allegations that Life Care had submitted false claims to Medicare and Tricaer for rehabilitation therapy services that were not reasonable, necessary or skilled.[3] Counsel for the relators trumpeted the use of statistical sampling to prove "fraud and improper billings" in the case. The relators' experts examined claims for 400 randomly selected patient admissions, and estimated the total number of false claims by extrapolating the findings, rather than evaluating "more than 150,000 individual claims from 54,000 patient admissions."[4]

In another settlement publicized this past February, the government relied on statistical sampling as part of the settlement process in an FCA case before a Colorado district court.[5] The case involved allegations that defendants knowingly submitted, or caused to be submitted, claims for Medicare hospice expenses for patients who were ineligible for such benefits. The parties ultimately settled for $18 million, but, in an interesting turn of events, the government declined to give the relators the percentage of the award requested. In the course of deciding the award dispute, the district court noted that the government used statistical sampling to effectively fix liability and determined damages. The court took no issue with the practice, accepting that the government "retained a medical expert to conduct a medical review of a statistically significant random sample of Evercare patients"[6] and passing no judgment on the suitability of the method.

A third example, from a district court in Kentucky, demonstrates that even when a district court sanctions the practice of statistical extrapolation for purposes of determining damages, courts continue to question the practice with respect to finding liability. In the context of a defendant's request for a new trial in United States v. Robinson, the district court credited statistical sampling by the government's experts as a reasonable basis for the jury's damages award in the context of denying the defendant's request for a new trial.[7]

The government alleged that a doctor had knowingly submitted claims to Medicare for medically unnecessary services, or for services he had not actually provided. The government presented testimony at trial from a federal auditor who specialized in claims data analysis, and a statistician, who reviewed the creation of the statistical sample of 30 Medicare claims at issue in the case. These government relied on testimony from both experts to establish that there were a universe of 25,779 Medicare claims at issue and how much Medicare paid for those claims during the relevant time period. Following a jury verdict in favor of the government, the doctor challenged only the jury's determination of damages, and was silent as to whether the evidence was appropriate in helping the jury determine liability, which the court called "significant." Because the defendant had not challenged the liability finding, the court ruled only on the damages component, finding it was adequately supported by the evidence the government presented. Nevertheless, the district court's decision suggest that the defendant may have left an argument on the table by not raising the question of whether the government's statistical sampling evidence was a factor in the jury's finding and, more importantly, appropriate to deciding the question of liability under the FCA.

Unlike the defendant in Robinson, the defendant in United States v. Vista Hospice Care Inc., successfully argued that statistical extrapolation was not appropriate for deciding the question of liability in FCA cases, relying in part on the lower court's ruling in Agape, which, in light of the Fourth Circuit's unwillingness to consider the issues in that case, continues to be good law.

In United States v. Vista Hospice Care Inc., the district court found that statistical sampling could not be used to establish liability for fraud in submitting claims for patients ineligible for hospice care, as the "underlying determination of eligibility for hospice is inherently subjective, patient-specific, and dependent on the judgment of involved physicians."[8] The case involved allegations that defendants, who had provided hospice services in fourteen states during the relevant time period, had among other things, caused patients who were not eligible for the Medicare Hospice Benefit to be certified as eligible and then submitted claims for these ineligible patients. Part of the eligibility determination is a physician's judgment that a patient is terminally ill, which means he or she is likely to pass away within six months. This determination is made, not on the basis of a set of "criteria," but by taking into account the patient's medical history, present state, and any other potentially contributing factors.

The relator attempted to prove that defendants submitted false claims for approximately 12,000 patients by using a statistical sample of 291 patients, but the court rejecting this approach.[9] While recognizing that the Fifth Circuit has permitted the use of inferential statistics, the district court expressly stated that "extrapolation is not always appropriate," and was not appropriate here because of the individualized nature of the claims.[10] Moreover, the court stated that it "disagree[d] with the proposition that sampling and extrapolation are always reliable, regardless of the nature of the data and the nature of the claim."[11] The district court took the position that courts are "required to engage in a particularized analysis of the whether extrapolation from a particular data set can reliably prove the elements of the specific claim,"[12] and, in this instance, the court found that it could not.

And so, the battle over statistical sampling and how plaintiffs may use it to prove FCA cases continues. While the Fourth Circuit has held the issue at bay, it is entirely possible that we will see it again soon, either on appeal in the Agape case, or before another court of appeals as plaintiffs and defendants continue to press their arguments about how the practice can be used to prove liability and damages alike. One thing is clear: FCA practitioners will certainly be watching for the next opportunity to hear what an appellate court has to say about it.

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[1] United States ex rel. Michaels v. Agape Senior Cmty., Inc., No. 15-2145, 2017 WL 588356, at *1 (4th Cir. Feb. 14, 2017).

[2] Demme Doufekias, Steven M. Kaufmann, Law360, Statistical Sampling Debate: A Growing Web Of FCA Cases, https://www.law360.com/articles/746380/statistical-sampling-debate-a-growing-web-of-fca-cases.

[3] DOJ Press Release, Life Care Centers of America Inc. Agrees to Pay $145 Million to Resolve False Claims Act

Allegations Relating to the Provision of Medically Unnecessary Rehabilitation Therapy Services, https://www.justice.gov/opa/pr/life-care-centers-america-inc-agrees-pay-145-million-resolve-false-claims-act-allegations.

[4] Business Wire, $145 Million Settlement in Groundbreaking Health Care Fraud "Whistleblower" Case by Atlanta's Finch McCranie LLP and U.S. Department of Justice: Landmark Decision Established "Statistical Sampling" Can Prove Health Care Fraud in Large Cases, http://www.businesswire.com/news/home/20161024006164/en/.

[5] United States v. Evercare Hospice, Inc., No. 11-CV-00642-PAB-NYW, 2017 WL 491168, at *4 (D. Colo. Feb. 7, 2017).

[6] Id. at 4, n.4.

[7] United States v. Robinson, No. CV 13-27-GFVT, 2016 WL 7030447, at *2 (E.D. Ky. July 8, 2016).

[8] United States v. Vista Hospice Care, Inc., No. 3:07-CV-00604-M, 2016 WL 3449833, at *11 (N.D. Tex. June 20, 2016).

[9] Id. at *5.

[10] Id. at *11.

[11] Id.

[12] Id. at *13.