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# Statistical Sampling Debate: A Growing Web Of FCA Cases

*Law360, New York (January 19, 2016, 5:41 PM ET) --*


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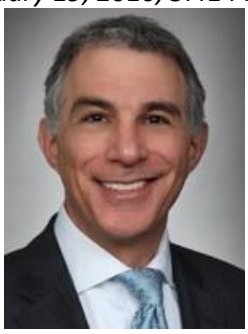
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The government and qui tam plaintiffs are increasingly employing statistical sampling in False Claims Act cases, particularly in cases where addressing and analyzing large numbers of allegedly false claims poses substantial challenges to judicial resources. The health care, financial services, and government procurement sectors face greater risk of qui tam litigation involving thousands of allegedly false claims, and it is in these types of cases that plaintiffs are aggressively arguing for the use of statistical sampling.

Statistical sampling and extrapolation involves 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 in certain types of cases, such as administrative agency actions, governing statutes specifically authorize its use.[1] Nevertheless, the FCA is silent with respect to the use and appropriateness of statistical sampling.

In recent years, FCA plaintiffs have begun to assert that extrapolation of statistical samples is appropriate to determine not only damages, but also to address questions of liability in cases with large numbers of allegedly false claims. Defendants are vigorously resisting such uses of statistical extrapolation, raising objections about how the use of representative samples affects 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 troubling when plaintiffs seek to employ statistical sampling to prove liability in FCA cases.

The emerging case law is complicated further by the fact that statistical sampling is being challenged at all stages of qui tam litigation. Plainly, statistical sampling is viewed differently when lawyers argue for its use in pretrial or dispositive motions, rather than after liability has been established or the court has some measure of fact-finding to rely upon. As a result, the handful of published FCA opinions in which courts have endeavored to provide some guidance are often highly fact-specific, making their broader

application unclear.

Courts facing these questions in qui tam litigation seem to have a growing understanding of the dangers of steaming full speed ahead. Developments in the closing months of 2015 in two cases in particular, United States ex rel. Michaels v. Agape Senior Community Inc., et al., No. 12-cv-03466-JFA (D.S.C.) and United States ex rel. Paradies et al. v. AseraCare Inc. et al., No. 2:12-cv-00245 (N.D. Al.), signal that the debate is far from over regarding how, when and to what end statistical sampling is properly used in FCA cases.

**What Are You Trying to Prove? Statistical Sampling to Prove Damages vs. Liability**

Statistical sampling was initially presented in FCA cases as a way to address the extent of damages after liability had been established. A case where both defendants failed to appear at any time, resulting in a default judgment presents a much easier question as to whether or not a court should allow statistical sampling to prove damages.[2]

In United States v. Rogan,[3] the Seventh Circuit quickly dispatched an argument made by the defendant that the district court should have individually considered almost 2,000 claims before finding damages in excess of $64 million. The court of appeals, satisfied with the trial court's findings on liability, characterized the defendant's objection to the use of sampling to determine damages as "a formula for paralysis."[4]

Similarly, in United States v. Fadul,[5] the court addressed statistical sampling in the context of an unopposed motion for summary judgment, where after "a thorough review of the Government's damages evidence, the extrapolated total ... represent[ed] the soundest measure of damages." Notably in that case, even after crediting the "ample" evidence of falsity presented by the claims in the statistical sample, the court declined to find evidence of scienter because that issue was better addressed by the trier of fact at trial.

Even in the damages phase, some courts have demonstrated a reticence to use statistical sampling. In a case commonly cited by defendants, United States v. Friedman,[6] after determining liability at a bench trial, the court preferred to review each of the 676 individual claims to determine damages, declining the government's invitation to use a statistical sample for that purpose. Not surprisingly, a number of courts have seized upon the small number of claims in Friedman to distinguish it from FCA cases that involve thousands of alleged false claims. This includes, recently, a federal district court in Tennessee, which distinguished Friedman and approved the use of a random sample of 400 (out of over 154,000) claims.[7]

Whether statistical extrapolation is appropriate becomes even less clear when plaintiffs seek to use it to address issues of liability in FCA cases. Plainly, the use of statistical sampling solely in the damages phase simplifies concerns raised by defendants that allowing plaintiffs to extrapolate from a statistical sample lowers their burden of proof. A number of courts have expressed reluctance to accept statistical sampling because of these concerns. Plaintiffs have the burden of proving each FCA violation they claim, including that those claims are, in fact, false. When statistical sampling enters the equation, courts are challenged to weigh the efficiencies presented by statistical sampling with the reality that extrapolation of statistical samples necessarily eliminates the individualized review of evidence related to each claim alleged to be false. This is a result that some courts have not been willing to accept.[8]

The court in United States ex rel. Martin et al. v. Life Care Centers of Am. Inc. recently grappled with

these questions.[9] Recognizing that the use of statistical sampling to prove liability presented unique challenges, the Life Care court nevertheless held that it was appropriate to use statistical extrapolation with respect to certain questions related to liability as a matter of practical necessity.[10] Simply, the Life Care court accepted that "courts now consider mathematical and statistical methods [to be] well recognized as reliable and acceptable evidence in determining adjudicative facts."[11]

Nevertheless, the Life Care court highlighted the problems with using statistical sampling in the liability phase. The court admitted that "[i]n the context of the FCA ... statistical sampling has been generally limited to determine damages, rather than liability" and that "[u]sing extrapolation to establish damages when liability has been proven is different than using extrapolation to establish liability." The court explicitly acknowledged that using "statistical sampling to find liability for extrapolated claims could be in conflict with the Government's burden to establish the elements of a FCA claim."[12] Although the court ultimately rejected arguments that individualized review was necessary to prove falsity because it "would consume an unacceptable portion of the Court's limited resources,"[13] the Life Care court still sounded a cautious tone, explicitly stating the limitations of its ruling:

While Defendant makes several compelling arguments regarding the inherent limitations associated with statistical sampling, these arguments are better considered by the fact finder rather than the Court. The Court's ruling today simply holds that statistical sampling may be used to prove claims brought under the FCA involving Medicare overpayment, but it does not and cannot control the weight that the fact finder may accord to the extrapolated evidence. Rather, the burden of determining the weight of the evidence lies with the fact finder.[14]

**Proceeding With Caution: AseraCare and Agape**

Given the cautious note sounded by courts even when accepting statistical sampling, it comes as no surprise that courts are proceeding carefully in this complicated landscape. In the past year, two cases in particular have confronted the tension between the practical efficiencies posed by statistical sampling and the risks it may present to the burden of proof. The unique procedural paths of both United States ex rel. Paradies et al. v. AseraCare Inc. et al.[15] and United States ex rel. Michaels v. Agape Senior Community Inc. et al.[16] highlight how hard it can be for courts to address these issues, even when they proceed deliberately and thoughtfully.

Last May, a federal district court in the Northern District of Alabama ordered that an FCA trial involving AseraCare, one of the country's largest for-profit hospice providers, be bifurcated, agreeing that the company would be prejudiced if the government were allowed to present evidence that false claims were submitted knowingly at the same time that it presented evidence that the claims were false. The two-step trial was largely unprecedented in the FCA realm. The first phase of the trial was to focus on the falsity element and, once proven, a second phase of the trial would focus on the scienter element. In the court's view, the two-step trial was necessary to show that each separate claim included in a sample set proposed by the government was objectively false. Based on extrapolation of their statistical sampling evidence, the government intended to seek more than $200 million in damages.

After a 10-week trial, including two weeks of deliberations, the jury found for the government in the first phase of the trial, concluding that AseraCare fraudulently billed Medicare for a sample of 104 patients. But in a surprising twist, two weeks after the verdict was handed down, the judge threw the jury's verdict out and ordered a new trial, explaining that she had given the jury incomplete instructions and, in her view, committed "major reversible error," when she improperly instructed the jury about objective falsity and failed to include an instruction proposed by the defendant regarding differences of

opinion with respect to the falsity of claims. One can only sympathize with Judge Karon O. Bowdre as she wrote:

False Claims Act cases have been particularly hot in 2015—and not only in this court ... Yet, the law in this area is still developing. Many key issues remain undecided ... In traversing this uncharted territory, the court has carefully considered each of the novel issues presented by this case, and has attempted to render its decisions in a way that aligns with the current state of the law. Nonetheless, the court misstepped. The court committed reversible error in failing to provide the jury with complete instructions as to what was legally necessary for it to find that the claims before it were false.[17]

The new phase one trial will likely be set for early 2016.

The Agape case reveals a similarly cautious judicial approach. When first presented with statistical sampling evidence in that case, the judge scheduled a "bellwether" trial, in which the parties would initially try to a jury claims involving a sample of 95 patients. The court felt that a bellwether trial was "particularly appropriate in this case because ... each and every claim at issue in [the] case [was] fact-dependent and wholly unrelated to each and every other claim."[18] When the parties reached a settlement before the bellwether trial occurred, the case seemed to be winding down, until the government, after declining to intervene in the qui tam case, objected to the settlement. The basis of the government's objection was the size of the settlement, which the government felt was too small based on its use of statistical extrapolation to identify the universe of potential claims.[19]

Without the benefit of a trier of fact to provide clarity, the Agape court looked for guidance elsewhere. Recognizing that the claims asserted in the case were "highly fact-intensive ... involving medical testimony [based on] a thorough review of the detailed medical chart of each individual patient,"[20] the court certified two questions for review[21] by the court of appeals, including whether the use of statistical sampling to prove liability and damages was appropriate under these circumstances. The Fourth Circuit accepted both questions and is expected to rule later this year.

**No Bright-Line Rules, For Now**

As the Agape court aptly stated about case law addressing statistical sampling, "the cases are legion on each side of the issue, and ultimately, it is [the] Court's responsibility to determine the fairest course of action based upon the facts presented and the claims asserted in [each] case."[22] These words necessarily bring to mind the Life Care court's view of the importance of the fact finder to determine what weight should be accorded to evidence presented through statistical sampling. Both the AseraCare and the Agape courts' approaches to addressing the legal and practical issues raised by statistical sampling in those cases were attempts to do just that — recognize the practical benefits of statistical sampling, but also guarantee that evidentiary and procedural safeguards were not thwarted.

And yet, even as those courts strove to proceed cautiously, their efforts were met with more questions and greater procedural complexity. When one recognizes how active this area of FCA litigation is becoming and the fact-intensive nature of existing case law, is it any wonder that courts are second-guessing decisions and seeking guidance from higher courts? As courts strive to delineate the role of statistical sampling, some general guidance does emerge for FCA litigants:

- There is a growing acceptance that statistical sampling is an appropriate tool to establish damages in FCA cases, providing qui tam defendants and the government with another significant weapon to establish staggering damages

figures. Given the FCA's explicit language that the statue is intended to ferret out fraud and punish those who would steal from the federal government, courts are increasingly willing to entertain ambitious and creative arguments about the use of statistical sampling when it comes to establishing damages, particularly when some measure of liability has been established.

- Even as courts agree that statistical sampling is a practical necessity in large FCA cases, there is still a demonstrated concern that extrapolation of statistical evidence will short circuit factual and procedural safeguards for proving liability. The bifurcation of trials, the use of bellwether trials, and the vacating of the jury's verdict in AseraCare all speak to the kind of steps courts are willing to take to insulate cases from such errors. Although plaintiffs will continue to press the validity of statistical sampling to prove liability, particularly in larger cases, courts seem poised to resist such arguments.

- Because the use of statistical sampling is evolving, and doing so quickly, whether or not sampling is appropriate is being questioned at every stage of litigation. As a result, many of the key and often-cited cases in this area, whether they approve of or refuse to use statistical sampling, are easily distinguished because of their factual and procedural peculiarities. Although the lack of bright-line rules can make this a perilous area of FCA litigation, the factual and jurisprudential variety in these cases also creates opportunities for novel defense arguments. Moreover, even where courts approve of statistical sampling, there is little judicial guidance on the standards to be applied in the face of dueling experts both as to statistics and the underlying standards of conformance with the law.

One thing is certain: As a result of factual and jurisprudential variability in statistical sampling decisions and the increasing use of sampling in qui tam cases, we are likely to see a significant increase in the number of opinions on this topic in the near term. Certainly, the AseraCare and Agape cases alone are guaranteed to make this an area to watch in 2016.

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[1] As one court explained, "[c]ourts have routinely endorsed sampling and extrapolation as a viable method of proving damages in cases . . . where a claim-by-claim review is not practical." United States v. Fadul, No. CIV.A.DKA 11-0385, 2013 WL 781614 (D. Md. Feb. 28, 2013).

[2] See United States v. Cabrera-Diaz, 106 F. Supp. 2d 234 (D.P.R. 2000). Not surprisingly, the court's acceptance of sampling to determine damages in that case was premised, in part, on the fact that there was no question as to liability. Other courts have also preferred to address statistical sampling after some measure of liability has been proven. See, e.g., United States ex rel. Loughren v. UnumProvident Corp., 604 F. Supp. 2d 259, 263 (D. Mass. 2009) (court considered statistical sampling on a deferred Daubert motion only after holding a bellweather trial); United States v. Krizek, 859 F. Supp. 5 (D.D.C. 1994) supplemented, 909 F. Supp. 232 (D.D.C. 1995) (court held that defendant consented to sampling during a three-week bench trial); United States ex rel. Ruckh v. Genoa Healthcare LLC, Case No. 8:11-cv-01303-SDM-TBM (M.D. Fla Apr. 28, 2015) (question of whether sampling was appropriate was premature because no such testimony had been proffered, although the court noted that there was "no universal ban on expert testimony based on statistical sampling" in qui tam cases).

[3] 517 F.3d 449, 452 (7th Cir. 2008).

[4] Id. at 453.

[5] No. CIV.A.DKA 11-0385, 2013 WL 781614 (D. Md. Feb. 28, 2013).

[6] No. 86-610-MA, 1993 U.S. Dist. LEXIS 21496 (D. Mass. July 23, 1993).

[7] United States ex rel. Martin et al. v. Life Care Centers of Am., Inc., No. 1:08-cv-251, Order, (E.D. Tenn. Sept. 29, 2014).

[8] See also United States ex rel. El-Amin v. George Washington Univ., 533 F. Supp. 2d 12, 31 n.9 (D.D.C. 2008) (ruling on pre-trial motion, court required relator to provide evidence "both comprehensive and exact" of each allegedly false claim, including the date the claim was filed, the name of the attending physician, the type of procedure involved, and the amount of the claim); United States v. Medco Phys. Unlimited, No. 98-C-1622, 2000 U.S. Dist. LEXIS 5843, at *23 (N.D. Ill. Mar. 15, 2000) (on motion for summary judgment, court rejected extrapolation of expert's findings to support finding that Medicare was fraudulently billed and noted lack of "case law or other authority to support such a request"); United States ex rel. Trim v. McKean, 31 F. Supp. 2d 1308 (W.D. Okla. 1998) (after bench trial, court held state billing audits were "persuasive evidence of false claims," but were "insufficient to constitute a statistical sample of the universe of fraudulent claims" and court was "unwilling to extrapolate [audit] findings to all other claims").

[9] No. 1:08-cv-251, Order, (E.D. Tenn. Sept. 29, 2014).

[10] Id. at 15.

[11] Nevertheless, the court was not willing to go so far as the government urged, acknowledging that the administrative agency decisions cited by the government were distinguishable because of the differing standard of review that governed appeals of such decisions, as well as the level of discretion

granted to agency action. “Unlike the standard of review in an appeal from an administrative agency decision, in order to sustain a claim under the FCA, a plaintiff must prove the elements of a false claim by preponderance of the evidence.” Id. at 20. The court also recognized that the use of statistical sampling in administrative agency decisions is explicitly authorized by statute, a clear difference between those statutes and the FCA. Id. at 21.

[12] Id. at 16, 22.

[13] Id. at 26.

[14] Id. at 38.

[15] No. 2:12-cv-00245 (N.D. Al.).

[16] No. 12-cv-03466-JFA (D.S.C.).

[17] United States ex rel. Paradies et al. v. AseraCare Inc. et al., Mem. Op. at 1-2, No. 2:12-cv-00245 (N.D. Al. Nov. 3, 2015).

[18] United States ex rel. Michaels et al. v. Agape Senior Comm., Inc. et al., No. 12-cv-03466-JFA, Order and Certification for Interlocutory Appeal at 4 (D.S.C. June 25, 2015).

[19] Id. at 5-6.

[20] Id. at 17.

[21] The second question certified by the court involved whether the government, having declined to intervene in the case, could essentially veto the settlement.

[22] United States ex rel. Michaels et al. v. Agape Senior Comm., Inc. et al., No. 12-cv-03466-JFA, Order and Certification for Interlocutory Appeal at 17 (D.S.C. June 25, 2015).