



INVESTIGATIVE CPA, LLC

FALSE CLAIMS ACT ACCOUNTING AND FRAUD CONSULTING



Eileen K. Leslie
Certified Public Accountant
Certified Fraud Examiner
Master of Taxation

Eileen Leslie is a former financial analyst for the U.S. Attorney's Office and the Federal Bureau of Investigation.

She now helps qui tam attorneys, government agencies and businesses investigate fraud schemes and prepare whistleblower cases involving:

- False Claims Act
 - Medicare fraud
 - Defense contractor fraud
 - Royalties fraud (oil, gas, etc.)
 - Pharmaceutical fraud
 - Anti-Kickback & Stark Laws
- State False Claims cases
- Municipal False Claims filings
- IRS whistleblower law
- SEC whistleblower law
- Corporate fraud investigations

Contact Eileen Leslie to discuss a potential whistleblower case or other fraud matter.

303-870-0625
eileen@investigativecpa.com

Statistical Sampling in False Claims Act Litigation

By Eileen K. Leslie, CPA, CFE

Courts have allowed statistical sampling and extrapolation for decades, particularly to determine damages or calculate losses in cases involving large data sets. Frequent usage of these techniques can be seen in matters ranging from mass torts to antitrust and employment law cases.

"Sampling is not new or unusual," notes the U.S. Government Accounting Office (predecessor to today's Government Accountability Office) in a 1992 Revised Manual titled, "Using Statistical Sampling." The GAO goes on to describe that in a sample survey, "data are collected from a sample of a population ... to determine the prevalence, distribution, or interrelationship of events and conditions."

The application of statistical sampling and extrapolation methodologies is increasingly being seen in False Claims Act cases. As FCA litigation grows in complexity—often covering thousands of Medicare claims over a period of multiple years—courts have ruled favorably on the use of statistical sampling to determine liability as well as damages in a number of recent cases, some of which are outlined below.

Court Rulings on the Use of Statistical Sampling in FCA Cases

The U.S. District Court for the Middle District of Florida ruled in 2015 that "no universal ban on expert testimony based on statistical sampling applies in a *qui tam* action (or elsewhere), and no expert testimony is excludable in this action for that sole reason (although defects in method, among

other evidentiary defects, might result in exclusion)." The case was *U.S. ex rel. Ruckh v. Genoa Healthcare LLC et al.*, Case No. 8:11-cv-1303-T-23TBM.

Statistical sampling was also allowed by a Massachusetts federal court in the matter *United States ex rel. Loughren v. UnumProvident Corp.*, where a large volume of disability claims required resolution. An initial trial was held based on a sampling of false claims. The court determined in the first trial that extrapolation was an acceptable way to calculate the number of total false claims.

A federal court in Tennessee also allowed statistical sampling to prove liability under the False Claims Act in the case *United States ex rel. Martin v. Life Care Centers of America*. The dispute involved Medicare fraud allegedly perpetrated by a corporate owner of skilled nursing facilities.

The Accountant's Role in Statistical Sampling

An accountant who brings a deep understanding of both the False Claims Act and the appropriate use of statistical sampling can be particularly helpful to a whistleblower attorney who seeks to prepare a case involving high volumes of healthcare claims, such as Medicare billing submissions.

Visit www.investigativecpa.com to read the full article and get more information.

See the back page for the next article ...

Services Provided by Investigative CPA, LLC

Whistleblower Investigations

Investigative CPA, LLC serves as a strategic advisor to clients in False Claims Act lawsuits throughout their life cycle, from initial case development through resolution.

Founder Eileen Leslie's unique blend of experience, education and perspective in FCA cases goes beyond that of a typical accounting firm. Her insight helps clients streamline case preparation time, while increasing the likelihood of a favorable case outcome.

Fraud Investigations

Forensic Accounting

- Damage calculation
- Ability to pay analysis
- Wage loss calculation

Fraud Examinations

- Criminal / civil investigations
- Occupational fraud
- Embezzlement

Litigation Support

- Expert testimony
- Discovery assistance
- Case organization

Data Analytics

Investigative CPA, LLC applies computer-assisted audit techniques to identify, analyze and organize relevant data for use in a whistleblower case.

Disclaimer

This newsletter is for educational purposes only. It is not intended to provide an expert opinion or legal advice. Every case is different and circumstances vary widely depending on the governing state or federal law, policy provisions, and related considerations.

INVESTIGATIVE CPA, LLC

False Claims Act: Can the Falsity Claim be Enhanced by Numbers?

By Eileen K. Leslie, CPA, CFE

The requirement to establish falsity under the False Claims Act ("FCA") is drawing increased scrutiny in recent court cases. A number of matters involve "false certification" claims, which can be more difficult to address than "factually false" or "direct fraud" FCA claims.

Several elements to falsity are, of course, considered within the scope of the FCA. The person submitting the false claim may have express knowledge of the falsity, or a claim could be implicitly false even if it is not false on its face. The omission of a material fact may also cause a claim to be categorized as false, fictitious, or fraudulent.

The element of falsity was central to the case *U.S. ex rel. Paradies, et. al., v. GGNSC Administrative Services*, which is now the subject of an amicus curiae brief filed in September by the Taxpayers Against Fraud Education Fund ("TAFEF"). The dispute centers on hospice services funded by federal Medicare dollars.

The matter is on appeal from the U.S. District Court for the Northern District of Alabama, Southern Division (Case. No. 2:12-CV-245-KOB). Defendants named in the litigation include AseraCare Inc., GGNSC Administrative Services, Hospice Preferred Choice, Inc., and Hospice of Eastern Carolina, Inc. (collectively "AseraCare").

Golden Gate Ancillary LLC, the parent company operating under the name AseraCare Hospice, offers hospice services in 19 states. Hospice care is typically prescribed when a patient is diagnosed with a life-threatening illness or condition that gives the patient six months or less to live. The diagnosis is supported by medical records and the professional opinion of trained doctors or other medical professionals.

The original complaint alleged that AseraCare violated the FCA by submitting false claims to Medicare for hospice care provided to patients who did not meet the requirements for hospice diagnoses.

The U.S. District Court bifurcated the case, requiring separate trials for the elements of falsity and knowledge.

The jury in the falsity phase found in favor of the government, after determining that 104 of 121 hospice claims presented as evidence were false. The court nevertheless decided to set the jury verdict aside and granted summary judgment for AseraCare.

The district court determined that "a difference of opinion between physicians and medical experts about which reasonable minds could differ" was insufficient to prove that a claim is false.

TAFEF takes the position that the FCA was interpreted incorrectly by the U.S. District Court. It asks that the appellate court not adopt the lower court's ruling on falsity. Further, TAFEF seeks to overturn the lower court's invalidation of a jury verdict based in part on expert opinion presented during the trial.

This brings into question whether falsity can be proven outside of subject matter expert opinion. A fraud examiner, working in conjunction with a subject matter expert, may help prove falsity by statistically analyzing the raw data associated with the claim.

In this and future cases of a similar nature, the government or relator's counsel might apply data analytics to massive amounts of original healthcare claims data to go beyond statistical sampling and actually enhance the objective analysis of potentially fraudulent claims. For example, the statistical analysis of the raw data of hospice patient diagnoses, age of patients and length of life after diagnosis may provide a tangible understanding of the practices of the hospice entity. It could even be possible to generate comparative statistics across a universe of healthcare service providers.