

Using Extrapolation in Investigations

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Caselaw Supplement

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CASES CRITICAL OF SAMPLING APPROACHES

- *United States ex rel. Kusner v. Osteopathic Medical Center*, 1997 U.S. Dist. Lexis 16855 (E.D. Pa. Oct. 23, 1997). (In *Kusner*, a civil False Claims Act case, the relator (Kusner) had no knowledge of whether underlying individual patient billing records existed, and defendants submitted evidence that individual patient records did not exist and that the billing records that did exist contained inconsistencies and data integrity issues, Kusner argued that an expert statistician could make a projection of damages. The court held otherwise, noting that *Ratanasen* and like cases were “distinguishable, however, because they all involve, in some form or another, actual billing records from which extrapolations were made.”)
- *Holland & Hart, Roaming the Random Range*, March 2003 Health Care Law Bulletin (describing *In re American Health Services*, HICN 103-01-0077 A (2000) (In this overpayment case, a representative of the Office of Inspector General (“OIG”) testified that his office did not review a 400-claim sample, the minimum necessary statistically, due to “lack of audit resources and availability of staff.” The OIG also failed properly to document and preserve its sampling methodology such that it could be replicated.)
- *United States v. Medco Physicians Unlimited*, 2000 U.S. Dist. LEXIS 5843 (N.D. Ill. 2000) (rejecting use of statistical sampling to prove liability under the federal False Claims Act).
- *HCA Health Services of Kansas, Inc. v. State of Kansas*, 21 Kan. App. 2d 141 (1994) (rejecting government’s attempt to use sampling to calculate damages due to failure to follow statistical sampling policies).
- *Garden City Treatment Center, Inc. v. Coordinate Health Partners, Inc., et al.*, 852 A.2d 535 (R.I. 2004) (denying use of statistical sampling to extrapolate overpayment amounts because the parties’ contractual audit provision did not expressly contemplate statistical sampling methodology).
- *United States ex rel. Trim v. McKean*, 31 F. Supp. 2d 1308 (W. D. Okla. 1998) (Court held that results from a small sample could not be extrapolated to the population of all claims.).
- *United States ex rel. Hockett v. Columbia/HCA*, 498 F. Supp. 2d 25 (D. D.C. 2007) (Court rejected relators’ proposed method to estimate liability.).
- *United States v. Skodnek*, 933 F. Supp. 1108 (D. Mass. 1996) (Disparaging the government’s extrapolation sample for purposes of determining fraud “loss” under U.S. Sentencing Guidelines; “the interviewers were searching out ‘horror’ stories”).

CASES GENERALLY AFFIRMING THAT SAMPLING A RECOGNIZED EVIDENTIARY APPROACH

- *United States ex rel. Loughren v. Unumprovident Corp.*, No. 03-11699-PBS, 2009 U.S. Dist. LEXIS 20320, (D. Mass. Feb. 24, 2009) (extrapolation is a reasonable method for determining the number of false claims so long as the statistical methodology is appropriate. The court found, however, that plaintiff's statistical expert did not use an appropriate method and denied admission of that expert testimony.)
- *Illinois Physicians Union v. Miller*, 675 F.2d 151, 158 (7th Cir. 1982) (“[I]n view of the enormous logistical problem of Medicaid enforcement, statistical sampling is the only feasible method available.”).
- *Mile High Therapy Centers, Inc. v. Bowen*, 735 F.Supp. 984 (D. Colo. 1988) (case-by-case review not administratively feasible).
- *Chaves County Home Health Service, Inc. v. Sullivan*, 931 F.2d 914 (D.C. App. 1991) (HHS could use extrapolation based on statistical sampling where defendant provider had the opportunity to challenge the statistical sampling methodology).
- *Ratanasen v. California*, 11 F.3d 1467, 1471 (9th Cir. 1993) (“We now join the other circuits in approving the use of sampling and extrapolation as part of audits in connection with Medicare and other similar programs, provided the aggrieved party has an opportunity to rebut such evidence.”).
- *Pruchniewski v. Leavitt*, 2006 WL 2331071 (M. D. Florida 2006) (District court upheld a statistical sample of Medicare overpayments from a sample of thirty claims).
- *New York State Department of Social Services, Department of Health and Human Services Departmental Appeals Board*, Docket No. A-91-128, No. 1531 (1995) (Rat-Stats software performs reliably as a random number generator. Overpayment estimates sufficiently reliable even though the Administration for Children and Families did not possess the seed numbers or original order of the sampling units drawn. Creators of Rat-Stats provided testimony.).
- *United States v. Cabrera-Diaz*, *United States v. Cabrera-Diaz*, 106 F.Supp. 2d 234 (D.P.R. 2000) (Upheld use of sampling to calculate damages under the False Claims Act, but found penalties to be excessive.).
- *United States v. Pierce*, 409 F.3d 228, 234 (4th Cir. 2005) (extrapolation is an acceptable method to use in making a reasonable estimate of the amount of loss under the sentencing guidelines).

OTHER REFERENCES

Medicare Program Integrity Manual

3.10.4.2 - Random Number Selection

(Rev. 282, Issued: 01-08-09, Effective: 01-26-09, Implementation: 01-26-09)

The PSC *or* ZPIC BI unit or the contractor MR unit shall identify the source of the random numbers used to select the individual sampling units. The PSC *or* ZPIC BI unit or the contractor MR unit shall also document the program and its algorithm or table that is used; this documentation becomes part of the record of the sampling and must be available for review. The PSC *or* ZPIC BI unit or the contractor MR unit shall document any starting point if using a random number table or drawing a systematic sample. In addition, the PSC *or* ZPIC BI units or the contractor MR units shall document the known seed value if a computer algorithm is used. The PSC *or* ZPIC BI units or the contractor MR units shall document all steps taken in the random selection process exactly as done to ensure that the necessary information is available for anyone attempting to replicate the sample selection.

There are a number of well-known, reputable software statistical packages (SPSS, SAS, etc.) and tables that may be used for generating a sample. One such package is RAT-STATS, available (at time of release of these instructions) through the Department of Health and Human Services, Office of Inspector General Web Site. It is emphasized that the different packages offer a variety of programs for sample generation and do not all contain the same program features or the same ease in operation. For any particular problem, the PSC *or* ZPIC BI unit's or the contractor MR unit's statistician or systems programmer shall determine which package is best suited to the problem being reviewed.

Skwara, Steven E., *Statistical Sampling in Health Care Fraud Litigation*, BCBSA National Internal Audit & Anti-Fraud Conference, May 2008, [www.ebglaw.com/files/22326_Statistical%20Sampling%20Article%20 2 .pdf](http://www.ebglaw.com/files/22326_Statistical%20Sampling%20Article%202_.pdf).
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