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IF YOU'VE FOOLED ME ONCE, YOU'VE FOOLED ME A THOUSAND TIMES: THE DUE PROCESS CONCERNS OF EXTRAPOLATING FCA LIABILITY

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Your client, Willy, is a door-to-door insurance salesman. Willy spent the last month visiting every single one of the 500 households in Greenacre County. The police, suspecting that Willy sometimes stole jewelry from the homes he visited, randomly choose 50 Greenacre County households to investigate. Following the investigation, the police had probable cause to believe that Willy stole jewelry from 10 households, and Willy is charged and prosecuted. At trial, though it is stipulated that Willy visited all 500 households in Greenacre County, the only evidence submitted to the court pertains to the aforementioned 10 homes. Nevertheless, the District Attorney submits that if Willy stole jewelry from 20 percent of the households investigated by the police, it should follow that he stole jewelry from 20 percent of the 500 households he visited in Greenacre County. Therefore, argues the district attorney, if Willy is found guilty of stealing from 10 homes, he should be found guilty of – and punished for – stealing from 100 homes.

You vehemently object. You explain that, far from proving that Willy stole jewelry from 90 other homes, the DA has offered no evidence that any other thefts even took place. The District Attorney is dumbfounded. Do you know how much time and money the County would have to expend to investigate *each and every* house that Willy visited? Greenacre County just doesn't have those kinds of resources. Besides, says the DA, there *is* evidence that Willy stole jewelry from 90 other homes. Willy admits to visiting 450 other homes to make an insurance sale, and the County's investigative sample shows that Willy stole jewelry from 20 percent of the homes he visited to make an insurance sale.

But isn't Willy entitled, at the very least, to know which homes are at issue? Isn't this the only way he can mount a proper defense? "Don't worry," says the Judge. "I will instruct the jury not to convict Willy for 90 more jewelry thefts if you can convince it that the County's statistical methodology is incorrect."

Such a scenario in a criminal proceeding would, of course, be ludicrous. However, Willy's predicament is not too far afield from what civil False Claim Act ("FCA") defendants may sometimes face. Federal courts are in the midst of a debate as to whether proof of liability for a small number of false claims may be extrapolated to prove liability for a larger universe of unexamined claims. To put it in terms Willy may understand, if a doctor submits 500 Medicare

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claims, and a random sample of 50 of those claims shows that 20 percent of them were false, may the doctor be held liable and punished for 100 false claims, even when no claims outside the sample were even examined or determined to be false? And while FCA defendants are certainly distinct from criminal defendants, the severe statutory punishments they face also distinguish them from run-of-the-mill civil defendants.

While much has been said about the due process implications of extrapolating liability, this essay raises the simple question of whether the quasi-criminal nature of the FCA should be considered in determining whether such extrapolations violate an FCA defendant's due process.

A. Recent Case Law

It can hardly be contested that criminal liability for some acts cannot be extrapolated to prove criminal liability for acts that may or may not have happened. However, on the flip side of the coin, we know that extrapolating liability against a civil defendant is not always impermissible. For example, just last term, the U.S. Supreme Court held that, at least in some instances, representative samples may be used to establish classwide liability under the Fair Labor Standards Act.[2] Courts are currently grappling with the question of whether the government (or an FCA relator) may use statistical sampling to extrapolate FCA liability.

In *United States v. Life Care Centers of Am.*,[3] the government, faced with a universe of 154,621 claims, presented a random sample of 400 Medicare claims.[4] It wished to extrapolate from the random sample an estimate on the total number of claims (out of 154,621) for which the defendant would be liable.[5] While the court recognized that, in the context of the FCA, statistical sampling was generally limited to determine damages rather than liability, the court permitted such extrapolation.[6]

In support of its determination, the court relied on several factors, which could fairly be summarized as follows: First, it noted the large number of claims at issue and reasoned that "it would be impracticable for the Court to review each claim individually . . . ."[7] Second, it relied on the purpose of the FCA in light of the expansion of federal programs:

> The purpose of the FCA as well as the development and expansion of government programs as to which it may be employed support the use of statistical sampling in complex FCA actions where a claim-by-claim review is impracticable . . . . Unlike when the FCA was originally enacted in the 1800s, those who commit fraud today

[2] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).
[3] 114 F. Supp. 3d 549 (E.D. Tenn. 2014)
[4] *Id.* at 556.
[5] *Id.*
[6] *Id.* at 560, 570-71.
[7] *Id.* at 565.

> have the aid of tools of technology and a relative unlikelihood of detection deriving from the sheer scale of the Medicare program itself. . . . If [defendant's view that statistical sampling could not be applied to an FCA case involving Medicare overpayment were accepted], it would materially limit the efficacy of the FCA as a tool to combat fraud against the government . . . . Armed with the knowledge that the government could not possibly pursue each individual false claim, large-scale perpetrators of fraud would reap the benefits of such a system. [8]

Third, the court found the *absence* of statutory language prohibiting statistical sampling to support its determination.[9]

The court rejected defendant's defenses that "its due process rights would be violated because the Government ha[d] not identified specific claims, thereby precluding Defendant from investigating, developing and presenting factual and expert evidence related defenses to each of the essential FCA elements[,]" and that statistical sampling "improperly shifts the burden of proof . . . onto Defendant."[10] The court held that the Fifth Amendment did "not entitle [defendant] to individually defend each claim . . . ."[11] In support of this holding, the court noted that statistical extrapolation is often used by courts to calculate overpayment, and defendant's due process was protected, because it could present evidence to challenge the extrapolations.[12]

The court in *United States ex rel. Michaels v. Agape Senior Cmty., Inc.* reached a different conclusion.[13] In *Agape*, after the court prohibited statistical sampling for both damages *and* liability purposes, the defendant and *qui tam* relators entered into a settlement for $2.5 million which covered claims relating to 38 nursing home patients.[14] Though the government had not intervened in the case, it exercised its purported statutory right to object to the settlement amount.[15] The Government, having applied statistical sampling to the claims at issue, claimed that the recovery should have been about 10 times as much. [16] The court explained that statistical sampling was inappropriate for *both* damages and liability in this case, primarily because of the highly fact-intensive and individualized questions of medical necessity pertinent to each claim,

[8] *Id.* at 571 (internal citation omitted).
[9] *See id.* (noting that Congress has not addressed the use of statistical sampling in FCA cases even though it was "disputed in FCA cases as early as 1993").
[10] *Id.* at 570 (internal quotations omitted).
[11] *Id.*
[12] *See id.*
[13] No. 0:12-3466-JFA, 2015 WL 3903675 (D.S.C. June 25, 2015).
[14] *Id.* at *1, *2
[15] *Id.* at *2.
[16] *Id.*

and because all of the pertinent evidence was intact and available for review by either party.[17] However, the court was careful to confine its decision to the facts of the case, and noted that sampling may be appropriate in other circumstances.[18]

Most recently, in *United States v. Vista Hospice Care*,[19] the court reached a conclusion similar to the one reached in *Agape*, and for similar reasons. In *Vista*, the relator claimed that the defendant had falsely certified to Medicare the eligibility of approximately 12,000 hospice patients and sought to extrapolate liability from a random sample of 291 of them.[20] Given that each claim was based on clinical judgments concerning the life expectancy of individual patients, the "proof regarding one claim [did] not meet Relator's burden of proof regarding other claims involving different patients, different medical conditions, different caregivers, different time periods, and different physicians."[21] In stark contrast to the *Life Care* court, the *Vista* court was not moved by the potential impracticability of reviewing such a large number of patients. Relator chose to place those 12,000 claims at issue, and those choices, "made by Relator, [did] not reduce her burden to produce reliable evidence of liability."[22]

As is evident from these recent cases, several factors – including evidentiary, statutory and constitutional factors - may be valid in determining whether statistical sampling may be used to prove FCA liability. But while due process concerns have certainly been considered to some extent, courts do not appear to have meaningfully addressed the possibility that the punitive nature of the FCA may affect the due process analysis.

B. Punishment Under the FCA

Though actions brought under the FCA constitute civil actions, those who are found to violate the FCA incur severe penalties, including three times the amount of damages they caused the government to sustain, and a civil penalty of up to $11,000 per violation.[23] To put this in perspective, this means that if a jury finds, by preponderance of the evidence, that a defendant submitted four false claims to the government for $500 a piece, his ill-gained profit of $2000 would put him on the hook for up to $50,000. In 1989, this large gap between actual loss and statutory liability caught the eye of the U.S. Supreme Court.

[17] *See id.* at *7, *8. It is also notable that, despite the voluminous number of claims at issued (somewhere between 53,280 to 61,643), the court, unlike the *Life Care* court, did not explicitly take into account the number of claims at issue when determining whether statistical sampling should be permitted. *See id.* at *1.
[18] *See id.* at *6-*7. The court also certified to the Fourth Circuit the question of whether statistical sampling could be used to prove FCA liability. Oral arguments in the case were heard in October 2016.
[19] No. 3:07-CV-00604, 2016 WL 3449833 (N.D. Tex. June 20, 2016)
[20] *Id.* at *10.
[21] *Id.* at *13.
[22] *Id.*
[23] 31 U.S.C. § 3729(a)(1).

In *United States v. Halper*,[24] the government brought an FCA action against a defendant who had allegedly submitted 65 claims to Medicare mischaracterizing the nature of services rendered and causing the government to overpay each claim by nine dollars.[25] This resulted in a total loss to the government of $585.[26] However, given the statutory penalties in place at the time, the defendant was subject to a penalty of more than $130,000.[27] Prior to bringing a civil FCA claim, the government had obtained a criminal conviction against the defendant for the exact same claims.[28] The Court unanimously held that the FCA's statutory penalty constituted a second punishment for the same offense in violation of the Fifth Amendment's Double Jeopardy Clause.

The Court reasoned that, while a civil remedy did not constitute a "punishment" just because Congress provided for civil recovery in excess of actual damages, a civil penalty may be "so extreme and so divorced from the Government's damages and expenses as to constitute a punishment."[29] The Court held that when "the civil penalty sought . . . bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word," a trial court may discern that the civil penalty constitutes a punishment for double jeopardy purposes.[30] The Court jettisoned this double jeopardy analysis eight years later in *Hudson v. United States*, in which it held that only *criminal* punishments could run afoul of the Double Jeopardy Clause.[31] However, the Court acknowledged that it would be possible for a civil statutory scheme to be so punitive as to constitute a criminal penalty, and expressly recognized – without undermining – its earlier finding that an FCA violation may be "so grossly disproportionate to the harm caused to constitute 'punishment.'"[32]

The Court has also explicitly recognized that Congress' decision to make the FCA's statutorily-mandated punishments even more severe leaves no doubt as to its punitive purposes. In *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, the Court noted that the FCA's increase from double to treble damages rendered the FCA "essentially punitive in nature."[33] "'The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."[34]

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[24] 490 U.S. 435 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93 (1997).
[25] *See id.* at 437.
[26] *Id.*
[27] *Id.* at 438. At the time, the FCA mandated a civil penalty of $2,000 and damages equal to twice the amount of damages suffered by the Government. *See id.* While certainly a stiff penalty, the penalty at issue in *Halper* was therefore less severe than what the FCA currently mandates.
[28] *See id.* at 437.
[29] *Id.* at 441.
[30] *Id.* at 451.
[31] *See Hudson*, 552 U.S. at 95-96, 98-99.
[32] *See id.* at 99, 101. While the Court recognized that "all civil penalties have some deterrent effect," *id.* at 102, it stopped short of characterizing all such penalties as "punishments" akin to the FCA penalties at issue in *Halper.*
[33] 529 U.S. 765, 784-85 (2000) (holding, inter alia, that the punitive nature of the FCA was "inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities").
[34] *Id.* at 786 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*,451 U.S. 630, 639 (1981)).

C. Quasi-Criminal Actions and Heightened Due Process

Given the increasingly-severe and punitive nature of the FCA's statutorily-mandated damages, it is understandable why they are often described "quasi-criminal."[35] As such, FCA damages are very similar to other civil damages which courts have determined require a heightened degree of due process before being meted out.[36]

This concept did not escape the *Life Care* defendant. In support of its argument that due process prohibited statistical sampling and extrapolation to determine FCA liability, it argued, albeit in a footnote, "The due process concerns in this case are even more heightened than in a traditional civil action because of the FCA's quasi-criminal aspect and the risk that punitive damages . . . may be imposed."[37] In its opposition brief, the government purported to respond to the defendant's challenge, but ultimately dodged the question:

> [Defendant] argues that the "due process concerns in this case are even more heightened than in a traditional civil action because of the FCA's quasi-criminal aspect and the risk that punitive damages . . . may be imposed." However, [Defendant] neglects to mention that controlling Sixth Circuit precedent allows the use of statistical sampling in *actual* criminal cases, where the sampling determines

[35] *See, e.g., United States ex rel.Atkins v. McInteer,* 345 F. Supp.2d 1302, 1304 (N.D. Ala. 2004) (referring to the FCA's mandated treble damages as "a quasi-criminal aspect" necessitating strict construction against the government); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006) (referring to FCA violations as "quasi-criminal"); *United States ex rel. Feingold v. Palmetto Gov't Benefits Adm'rs*, 477 F. Supp.2d 1187, 1196 (S.D. Fla. 2007) (same). This "quasi-criminal" characterization is further bolstered by the Department of Justice's recently-implemented policy of sharing all new *qui tam* complaints with its Criminal Division "as soon as the cases are filed" in order "to determine whether to open a parallel criminal investigation." *See* Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference (Sept. 17, 2014), *available at* https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against.

[36] *See, e.g., Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 229 (5th Cir. 1998) (attorney disbarment proceeding violated Fifth Amendment's guarantee of procedural due process because proceeding was "quasi-criminal in nature" and the lower court did not afford attorney notice or opportunity to be heard); *AutoMaxx, Inc. v. Morales*, 906 F. Supp. 394, 400 (S.D. Tex. 1995) ("quasi-criminal" nature of state law deriving from substantial penalties required court to apply heightened scrutiny in due process vagueness challenge).

[37] Life Care's Mem. in Supp. of its Mot. for Partial Summ. J. at 21 n.16, *United States v. Life Care Centers of Am.*, Nos. 1:08-CV-251, 1:12-CV-64 (E.D. Tenn. Feb. 18, 2014), ECF No. 141.

> the loss amount – and thus the amount of time a person may spend in prison – in addition to the amount of restitution.[38]

The government's example of statistical sampling being used to determine loss amounts in a criminal proceeding after finding a defendant liable for a crime is inapposite to the use of statistical sampling to determine liability itself. Indeed, the government's example is more akin to the use of statistical sampling to determine FCA damages after a finding of FCA liability – a practice that, while controversial, is more widely accepted (but outside the scope of this article). Alas, much like the government, the *Life Care* court made no meaningful effort to distinguish the extrapolation of damages from the extrapolation of liability, and it certainly did not consider whether the punitive nature of the FCA affected the due process analysis.[39]

But while it is easy to castigate the *Life Care* court for allowing the government to extrapolate a potentially severe amount of punitive liability against an FCA defendant, it bears noting that the courts' analyses in *Agape* and *Vista* did not foreclose the possibility of extrapolating liability based on the type of claim, the nature of the evidence, or other case-specific characteristics. While both courts ultimately did not permit the government/relator to use statistical sampling to extrapolate liability, neither considered whether and to what extent the punitive nature of the FCA affected the defendants' due process.[40]

Meaningful consideration of the FCA's mandated punishments should be essential to a court's determination of whether extrapolating liability would violate due process. This does not necessarily obviate case-by-case analyses. Indeed, whether the severity of a punishment necessitates heightened due process concerns could plausibly depend on the claims being made. This article takes no position on whether every FCA action requires a heightened level of due process. However, it is evident that the FCA at least has the potential to trigger heightened due process protections. While courts may take different views as to what a "heightened due process" analysis entails, it would seem that, at the very least, such process would require notice and an opportunity to mount a defense against the alleged violation. Extrapolating liability for unexamined and unidentified claims cannot be consistent with such requirements. Moreover, it is doubtful that heightened due process should permit the type of burden shifting that necessarily accompanies the extrapolation of liability. As the FCA metes out punishments for *each individual* claim, extrapolating liability means that an FCA defendant, rather than the government/relator, will bear the burden of proving that he did not violate the FCA as to most of

[38] United States' Mem. in Opp'n to Def. Life Care Centers of Am., Inc. Mot. for Partial Summ. J. at 23 n.8, *United States v. Life Care Centers of Am.*, Nos. 1:08-CV-251, 1:12-CV-64 (E.D. Tenn. Mar. 21, 2014), ECF No. 152 (emphasis in original) (internal citations omitted).

[39] *See supra* at 3 (discussing the court's reliance on the history of using statistical sampling to calculate damages in determining that extrapolating FCA liability did not violate due process).

[40] The *Vista* court explicitly passed on the due process analysis because it was able to reach the pertinent question on narrower grounds. 2016 WL 3449833, at 13 n.105.

the claims at issue. Such an arrangement in light of such heavy punishments seems suspect to say the least.

D. Conclusion

The actions giving rise to FCA liability are certainly grave. The government has legitimate and understandable reasons to punish – and punish severely – those who defraud it. But in its zeal to bring fraudsters to justice, the government should not be permitted to bypass basic due process protections. The practice of using statistical sampling to extrapolate FCA liability and impose severe punishments raises serious due process concerns that courts should not ignore.