



**Tyson Foods, Inc. v. Bouaphakeo,**  
**136 S.Ct. 1036, 1046 (2016)**

**“A representative or statistical sample, like all evidence, is a means to establish or defend against liability.”**

## Steps for using statistics and extrapolation in False Claims Act case involving numerous claims

- **Step 1: Get all the claims (e.g. 250,000)**
- **Step 2: Hire a competent statistician and subject matter expert**
- **Step 3: Have your statistician use a random number generator to draw a sample of 200 of the claims**
- **Step 4: Give the 200 sample claims to a subject matter expert to review each for falsity**
- **Step 5: Divide the number of false claims by the total statistical sample of 200 (say 30 of the 200 = 15%)**
- **Step 6: Extrapolate the falsity rate from Step 4 to the entire universe from Step 1 (15% of 250,000 = 30,000 false claims)**
- **Step 7: Obtain the statistician's confidence interval and his opinion on the probable number of false claims and damages (confidence 95% most probable number of false claims = 30,000)**



**United States ex rel. Martin v. Life Care Centers of America, Inc., 114 F. Supp. 3d 549 (E.D. Tenn. 2014) (Honorable Harry S. Mattice)**

**“Life Care represents the first time a court has allowed the use of sampling to prove liability under the FCA. ...Life Care ensured perpetrators of fraud would not be able to escape liability because of the broad scope of their fraud.”**

**128 Harvard L. Rev. 2074 (2015)**



# **Universal Health Services v. United States ex rel. Escobar, 136 S.Ct. 1989; 195 L.Ed.2d 3348 (2016)**

## **HOLDINGS:**

- **1. Implied false certification theory of liability is valid if:**
  - a) the claim makes specific representation about the provided goods or services and
  - b) Defendant's failure to disclose its non-compliance with material statutory, regulatory, or contractual requirements makes the representations misleading half-truths

# Materiality (a demanding standard)

- **2. Any misrepresentation must be material to the Government's payment decision to be actionable.**
  - **Means having a natural tendency to influence or be capable of influencing payment**
  - **Government designation that a requirement is a condition of payment is relevant BUT not dispositive**
  - **Government option to decline payment if it knew of defendant's noncompliance is not sufficient**
  - **Minor or insubstantial noncompliance is not material**
  - **Government payment with actual knowledge that requirements were violated is strong evidence the requirement was NOT material**