

Supreme Court and Appellate Alert

March 31, 2016

If you read one thing...

- SCOTUS declines to adopt broad or categorical rules governing use of representative evidence in class actions, holding instead that the use of such evidence will depend on the purpose for which the sample is being used and nature of the cause of action.
- How to ensure uninjured class members do not receive any recovery remains unresolved.



***Tyson Foods v. Bouaphakeo*: SCOTUS Says Statistics Okay in Class Actions – Sometimes**

Last week, the Supreme Court issued a significant, albeit narrow, decision concerning the use of representative and statistical evidence in class actions. In *Tyson Foods, Inc. v. Bouaphakeo*, the Court declined to establish “broad and categorical rules” either endorsing or rejecting the use of representative evidence in class actions, holding instead that the use of such evidence will depend on the purpose for which the sample is being introduced and on the underlying cause of action.

The plaintiff employees at a pork processing plant alleged that they were denied overtime compensation for time spent donning and doffing protective gear. To prove the amount of time for which they should have been compensated, plaintiffs retained an expert who performed a videotape study and analyzed how long various donning and doffing activities took and then averaged the time taken by workers in two separate departments at the facility. Using those averages, plaintiffs estimated the amount of uncompensated work for each class member in these departments.

On appeal, the employer argued that the class should never have been certified, because there was significant variation in the protective gear that each employee wore, and, thus, the time spent donning and doffing that gear. The employer asserted that under Federal Rule of Civil Procedure 23(b)(3), common questions did not predominate over individual questions and that relying on a representative sample “absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.”

By a 6-2 vote, the Supreme Court rejected the employer’s arguments, holding that, as in many individual cases, the representative sampling may be the only way for a plaintiff to establish a defendant’s liability. When an employer fails to keep proper records of time worked, workers are not required to prove the “precise extent of uncompensated work.” In the absence of such records, an employee can prove liability

by establishing that he or she performed work for which he or she was improperly compensated and by producing sufficient evidence for a jury to reasonably infer the amount and extent of that work. If the employee does so, the employer must prove the precise amount of work the employee performed or prove that the jury cannot infer an amount from the employee's evidence.

The Court explained that one way to show that a representative sample is a permissible way to prove class wide liability "is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." Notably, Tyson Foods never challenged the statistical validity of the videotape study under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This was important because the Court noted that "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked."

The Court distinguished *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011). In *Wal-Mart*, the plaintiffs were held barred from using representative evidence "as a means of overcoming th[e] absence of a common policy" on a classwide basis. The study in *Tyson Foods*, by contrast, "could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." Given that "each employee worked in the same facility, did similar work, and was paid under the same policy," the jury could permissibly find, in contrast to *Wal-Mart*, that "the experiences of a subset of employees can be probative as to the experiences of all of them"—particularly in light of Tyson Food's failure to challenge the admissibility of the experts' evidence.

The employer also argued that, because some class members likely did not suffer any injury, the plaintiffs were required to demonstrate how to identify uninjured employees. The Court agreed with the plaintiffs that this question was premature, because the method for disbursing the \$2.9 million damages amount has not been determined.

While *Wal-Mart* placed constraints on class certification where class members' experiences are dissimilar, *Tyson Foods* declined to extend a general bar to the use of representative evidence in the class action context. At least where, as here, the plaintiffs would be able to introduce the representative evidence in an individual suit, it was permissible to use that same evidence on a classwide basis to prove liability, making the use of any other evidence dependent "on the purpose for which the sample is being introduced and on the underlying cause of action."

Thus, although plaintiffs will surely try to use *Tyson Foods* to support the broad use of representative evidence in class actions, by declining to adopt broad and categorical rules, the Supreme Court has made clear that "[t]he fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases."

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