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March 2016

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Statistical Sampling Evidence Might, or Might Not, Be Admissible in Class Actions, U.S. Supreme Court Holds

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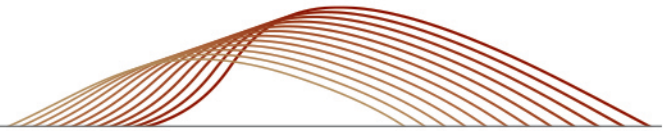
The Supreme Court ruled last week that statistical sampling and other kinds of "representative evidence" may, or may not, be admissible in Rule 23 class actions or collective actions to establish classwide liability, depending on the purpose for which the sample is being introduced, the nature of the underlying cause of action and its elements, and whether the proffered evidence would otherwise have been admissible in a case brought by an individual plaintiff.

When the Court granted *certiorari* in the case of *Tyson Foods, Inc. v. Bouaphakeo et al.*, No. 14-1146, 577 U.S. ___ (2016) (March 22, 2016), many expected the Court to alter dramatically the ground rules applicable to class actions, especially wage and hour class actions, where plaintiffs have often resorted to statistical sampling methods in an effort to avoid highly individualized inquiries that could defeat class treatment. Instead, the Court's anticlimactic resolution of the case turned on its peculiar facts, and the "it depends" standards articulated by the Court will leave litigants in future actions with no shortage of arguments on the permissibility of such evidence. Indeed, the facts of the case are so atypical that *Tyson* may well prove to have limited or no relevance outside the Fair Labor Standards Act or in cases where the employer has failed to keep legally mandated records, thus frustrating the plaintiffs' ability to prove liability through other means.

Background

Respondents, employees in the kill, cut, and re-trim departments of Petitioner Tyson Foods' pork processing plant, were required to wear protective gear before performing their assigned tasks. This "donning and doffing" time was treated as uncompensated time by Tyson until 1998, when, after a federal court injunction (and a Department of Labor suit to enforce it), Tyson began adding four-minutes a day of "K-code" time to employee paychecks. In 2007, Tyson changed its system again; some employees were paid between four and eight minutes of "K-code" time while others were not paid any "K-code" time at all. Significantly, Tyson did not keep any records of the time that employees actually spent donning and doffing their protective gear.

Respondents sued Tyson on the grounds that they were denied overtime pay under the Fair Labor Standards Act ("FLSA") and Iowa Wage Payment Collection Law because they were not compensated for donning and doffing equipment. Respondents also moved for class certification under



Fed. R. Civ. P. 23 and "collective action" treatment under 29 U.S.C. § 216. The district court granted class treatment under both rubrics, and the case proceeded to trial before a jury.

At trial, the parties stipulated that the employees should be paid for donning and doffing equipment that protected them from knife cuts. The remaining questions for the jury were: (1) was the time spent donning and doffing other kinds of protective equipment compensable, (2) was Tyson required to pay for donning and doffing during meal breaks, and (3) what was the total amount of uncompensated working time. However, in order to recover damages, each employee had to show that he or she worked more than 40 hours a week, including donning and doffing time.

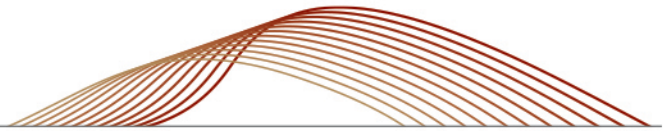
Because Tyson treated the time as uncompensated, it kept no records of the amount of time employees spent putting on or taking off the protective gear. Thus, the Respondents used "representative evidence" to prove liability—a mode of proof approved by the Supreme Court 70 years ago in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–688 (1946), even in individual cases. Specifically, the Respondents primarily relied on two statistical studies performed by retained "industrial relations" experts.

In the first study, Dr. Kenneth Mericle videotaped observations, analyzed how long the donning and doffing activities took, and then averaged the time to produce a time estimate for each activity. In the second study, Dr. Liesl Fox estimated the amount of uncompensated work performed by each employee by adding Dr. Mericle's average to regular work time and subtracting the K-code time. Critically, Petitioner did not challenge the validity of these studies under *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), or present any competing statistical or other sampling evidence. The jury awarded the class $2.9 million in unpaid wages. Petitioner appealed the class certification decision to the Eighth Circuit, which affirmed the district court's ruling. The Supreme Court granted certiorari.

In Certain Circumstances, Representative Evidence May Be Used to Establish Classwide Liability

Justice Kennedy began the majority opinion by explaining that three points were not at issue in this case. First, the parties did not dispute that the standard for certification under Rule 23 and 29 U.S.C. § 216 was the same. Second, the parties also did not dispute that a violation of the FLSA was also a violation of Iowa wage and hour law. Finally, the parties agreed that one question common to all class members was whether time spent donning and doffing protective gear is compensable work. The jury had concluded that the time was, in fact, compensable, and that finding was not challenged in the Supreme Court.

The central question for the Court, then, was whether representative evidence could be used by the Respondents to show that each employee worked more than 40 hours a week when the average time for donning and doffing was added to his or her regular hours. Tyson argued that that "necessarily person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper." Representative evidence, Tyson argued, should not be permitted because it "absolve[d] each employee of the responsibility to prove personal injury," and thus impaired Tyson's ability to present individual defenses to each claim. Tyson noted that even Miericle's work "revealed material variances in the amount of time that individual employees spent on the same activities" and that "[n]o two employees performed the same activity in the same amount of time." There was "a lot of variation within the activity," Mericle conceded.



"A categorical exclusion of that sort, however, would make little sense," the Court explained. The "permissibility [of using statistical sampling, the Court said,] turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702." Further, "[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on 'the elements of the underlying cause of action,'" *citing Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). The Court explained:

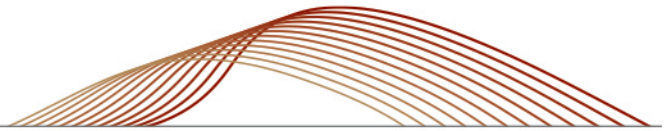
> In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation §11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge . . . any substantive right." 28 U.S.C. §2072(b). . . . One way for respondents to show, then, that the sample relied upon here is a permissible method of proving 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. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.

Nothing in the condemnation of "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), is inconsistent with this result, as the Court explained:

> The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. . . . . In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.

Relying on the fact that the use of representative evidence had been approved in similar circumstances in *Mt. Clemens*, the Court explained that "when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the 'remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'"

> In this suit, as in *Mt. Clemens*, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.



Finally, the Court took pains to mark out the limits of its holding:

> This is not to say that all inferences drawn from representative evidence in an FLSA case are "just and reasonable." *Mt. Clemens*, 328 U.S. at 687. Representative 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. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence.

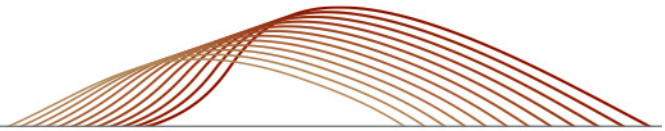
Tyson also argued that the use of representative evidence should be impermissible absent a demonstration that "there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." The Court remanded so that this question could be considered, but found that it was not "fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed." The Court invited Tyson to challenge any method of allocation proposed by Respondents when the case returned to the district court. The Chief Justice's concurring opinion noted that resolving those issues could implicate the finality of the judgment, as "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."

There Are Important Lessons to Be Drawn from *Tyson* Notwithstanding Its Explicit Limits

The plaintiffs' class action bar has responded, immediately and predictably, with the claim that *Tyson* establishes precisely the broad, categorical rule permitting statistical sampling that the Court refused to adopt. It is true that sampling to prove class liability will be at least theoretically available in a range of cases on the basis of *Tyson*, but the limitations to the decision are patent: the Court was constrained by its decision in *Mt. Clemens*, which only applies to cases under the FLSA where the employer had failed in its statutory duty to keep individualized records, leaving employees "no [other] way to establish the time spent doing uncompensated work," and Tyson did not materially dispute the methodology used by the Respondents' experts or offer a competing analysis of its own. The combination of these factors limits *Tyson*'s impact going forward. In particular, *Tyson* does not speak to the appropriateness of class certification in discrimination cases, or even in those wage and hour cases where no specific policy (like donning and doffing doff) is challenged, or where exempt status is at issue for employees with duties that vary on an individual basis. Similarly, *Tyson* will likely have little application to consumer class actions, or to other commercial matters commonly bought as class actions, as *Mt. Clemens*, the foundation of the Tyson decision, has no impact outside its narrow context—where an employer failed to retain legally required records.

There are, however, two very important lessons for employers here.

First, it demonstrates the unenviable choice employers have when they decline to keep accurate time records, either because they determine that the time at issue is not compensable or that certain employees are altogether exempt from the FLSA. Employers make such determinations at no small peril; if the employer gets it wrong, the absence of time records creates an evidentiary void that plaintiffs will be able to exploit. Great care should accordingly be taken in making such decisions, and they should be revisited periodically with competent wage and hour counsel to ensure that once-correct decisions have not been undermined by changes in the law or the underlying facts (*e.g.*, changes in equipment, employment conditions, etc.).



Second, in the event of litigation, employers are well advised to conduct *privileged* sampling studies of their own to determine how best to address the evidence proffered by the plaintiffs. In the wake of Tyson, leaving that evidence unchallenged and unanswered is a high-risk proposition.

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