

March 25, 2016

## **The U.S. Supreme Court Issues Decision Allowing Use of Statistical Sampling and Representative Evidence by Class Action Plaintiffs in *Tyson Foods***

On March 22, 2016, the United States Supreme Court, in its widely anticipated decision *Tyson Foods, Inc. v. Bouaphakeo, et al.*, No. 14-1146, ruled 6-2 that statistical evidence and representative sampling could be used by plaintiffs in a class action to establish liability under certain circumstances.

Justice Kennedy, writing for the Court, affirmed the Eighth Circuit's affirmance of the district court's certification and maintenance of a Fair Labor Standards Act ("FLSA") collective action and a Rule 23(b)(3) class based on the use of statistical evidence and representative sampling where such evidence could have supported a reasonable jury finding as to hours worked in each individual plaintiff's action.

In *Tyson Foods*, defendant Tyson Foods appealed following a jury trial in which a class of employees received \$2.9 million in compensatory damages from their employer for the employer's failure to pay statutorily mandated overtime pay for time spent donning and doffing protective equipment. Specifically, these employees worked in the kill, cut, and retrim departments at Tyson Foods' pork processing plant. The employees' work requires that the employees wear certain protective gear, although the precise composition of the gear depends on the specific tasks an employee performs on a given day. Tyson Foods compensated the employees only for time spent at their workstations, not for the time required to put on and take off their protective gear. And, Tyson Foods did not keep records of the amount of time it took the employees to don and doff the protective gear. At trial, the plaintiffs presented representative evidence and a study performed by a labor relations expert who analyzed how long various donning and doffing activities took. After a jury verdict for the employees, Tyson Foods argued that, due to variation between class members in donning and doffing time, the classes should not have been certified. When the Eight Circuit affirmed the district court's judgment and the award, Tyson Foods appealed again and the Court granted certiorari.

The Court's decision is significant in several respects.

First, the Court declined to "establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class action cases," but rather noted that "[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purposes for which the evidence is being introduced and on the elements of the underlying claim." The Court found that, at times, a representative sample is the only practicable means to collect and present relevant data establishing a

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defendants' liability and, where representative evidence would be relevant to prove a plaintiff's individual claim, that evidence should not be deemed improper merely because the claim is on behalf of a class.

Applying *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946), which was an early FLSA case, to reason that the representative sample was permissible "to fill an evidentiary gap created by the employer's failure to keep adequate records," the Court found the sample a permissible means of establishing the employees' hours worked in a class action.

The Court also found that reliance on the study did not deprive Tyson Foods of its ability to litigate individual defenses. Since records did not exist to contradict the study, Tyson Food's primary defense was to show that the study was unrepresentative or inaccurate. The Court found that because that defense was common to the claims made by all class members, Tyson Foods' failure of proof would not have caused individual questions to overwhelm questions common to the class.

Notably, the Court criticized Tyson Foods for not raising a challenge to the plaintiffs' experts' methodology under *Daubert* and therefore concluded there was no basis to find it was legal error to admit that evidence at trial.

The Court was careful to distinguish its *Tyson Foods* decision from its decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), stating that *Wal-Mart* "does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability." Specifically, the Court distinguished the situation in *Tyson Foods* from the fact pattern in *Wal-Mart*: unlike the plaintiffs in *Tyson Foods*, the plaintiffs in *Wal-Mart* impermissibly used representative evidence as a way to overcome the absence of a common policy. Therefore, the Court reasoned, the two holdings are consistent; in *Wal-Mart*, such representative evidence would not have been sufficient to sustain a jury finding if it were introduced in each employee's individual action.

Furthermore, the Court emphasized that *Tyson Foods* does not provide an occasion to adopt broad and categorical rules governing the use of representative and statistical evidence in class actions. Rather, whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced, on the underlying cause of action, and whether the study would be otherwise admissible in an individual suit. In the case before it the Court concluded that it was permissible to infer the hours an employee has worked from a study of representative evidence, given that the employees worked in the same facility, did similar work, and were paid under the same policy, such study would have been admissible in a series of individual suits.

Justice Thomas wrote a dissent, which Justice Alito joined. The dissenters criticized the majority for, among other things, redefining the predominance standard for Rule 23(b)(3) and misreading *Mt. Clemens* to create a "special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative

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evidence in FLSA-based cases.” The dissent makes clear that the impact of *Tyson Foods* should be limited to FLSA-based class actions in which employers do not have time records they are legally required to keep.

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*Tyson Foods* can be read as a plaintiff-friendly clarification of Wal-Mart, although it remains to be seen how broadly its reasoning will apply. Indeed, even with respect to cases brought under FLSA, the Court took pains to state that representative and statistical evidence would not be admissible as proof in every FLSA-based class action case; rather, whether such evidence should be permissible depends on a fact-intensive inquiry. It is not clear whether such evidence could apply in FLSA-cases where employers maintained adequate records. Nor is it certain whether the *Tyson Foods* approach would be appropriate in cases where employees worked at more than one facility, performed different work, or were subject to different policies. For example, it seems very unlikely that such an approach should be permitted where employees do not have a set daily routine with specific tasks performed in unaccounted for time, but rather work irregular or sporadic off-the-clock hours.

Nevertheless, in preparing to defend FLSA-based collective or class actions, employers must be prepared to vigorously defend against plaintiffs’ attempts to use statistical sampling and representative evidence. The Court’s criticism of *Tyson Foods* underscores the important role that *Daubert* motions will play in this arena. Defendants must be vigilant throughout the case in laying the groundwork to exclude such statistical and representative sampling evidence. In addition, as it was the apparent absence of any time records for the alleged work that opened the door for the potential use of representative evidence and statistical sampling, *Tyson Foods* further reinforces the importance of record-keeping.

Plaintiffs may try to rely on *Tyson Foods* outside the employment context as well. How broadly *Tyson Foods* will apply remains unclear. Given the Court’s explicit cabining of its holding and its refusal to announce any broad or categorical rules regarding the applicability of statistical evidence or representative sampling, however, the question of the broader applicability of *Tyson Foods* is likely one that the Court will have to confront in the future.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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