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SCOTUS: STATISTICAL OR REPRESENTATIVE EVIDENCE CAN BE USED IN CLASS AND COLLECTIVE ACTIONS

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Class and collective action plaintiffs can establish liability through statistical or "representative" evidence, the U.S. Supreme Court ruled in Tyson Foods, Inc. v. Bouaphakeo, released last week. The decision could have significant implications for class and collective actions throughout the country.

Tyson Foods marks a departure from the High Court's recent class and collective action jurisprudence as articulated in the *Dukes v. Wal-Mart* and *Comcast Corp. v. Behrend* decisions which questioned the validity of representative proof as an impermissible "trial by formula." The 6-2 decision written by Justice Anthony Kennedy embraced a case-specific approach allowing for the introduction of statistical or representative proof if the evidence is reliable and can prove elements of the underlying cause of action.

In *Tyson Foods*, employees of the company's processing plant in Storm Lake, Iowa, filed suit under the Fair Labor Standards Act and Iowa state law, claiming they were entitled to compensation for the time it took them to don and doff their protective gear. Over Tyson's strong objections, U.S. District Judge John Jarvey certified the case as both a collective action under the FLSA and a class action under Rule 23. Tyson did not maintain time records documenting how long it took each employee to don and doff their equipment, a fact that proved central in the Supreme Court's ultimate decision.

At trial, the centerpiece the employees' case was the testimony of an industrial relations expert who, after conducting videotaped observations showing how long donning and doffing activities took depending on the department in which the various employees worked, determined employees spent, *on average*, 18 or 21.25 minutes a day in uncompensated time donning and doffing their equipment. Using these estimates, plaintiffs added the uncompensated time to the number of hours each employee was documented to have worked in a given week. Any employee who, after adding this uncompensated time to his or her weekly total, worked in excess of 40 hours was determined to be entitled to overtime.

While the plaintiffs' expert witness on damages calculated the employees were entitled to $6.7 million in uncompensated time, the jury, finding most of the donning and doffing activities constituted compensable work under the FLSA, awarded the plaintiffs $2.9 million in unpaid wages. Tyson's motion to set aside the jury's verdict was denied by the district court. Quoting the U.S. Supreme Court's 1946 decision in *Anderson v. Mt. Clemens Pottery, Co.*, the Eighth Circuit Court of Appeals upheld the verdict finding the jury could have drawn a "reasonable inference of class-wide liability" based on the evidence presented. The Eighth Circuit further denied Tyson's argument that the class should never have been certified in the first place because of the variations in the donning and doffing time between individual employees.

Writing for the majority, Justice Kennedy made clear that, before certifying a class under Rule 23(b)(3), district courts must find that questions of law or fact common to class members predominate over any questions affecting only individual members. This predominance inquiry rests on whether the class or classes are sufficiently cohesive to warrant adjudication by representative proof. The central dispute in *Tyson* was whether plaintiffs could rely on the "average" amount of time it took an employee to don and doff their safety equipment to determine if they worked in excess of 40 hours in a given week.

The Supreme Court rejected Tyson's invitation to broadly rule against the use of "representative evidence" or statistical proof in class actions, instead holding that representative or statistical proof, like all other evidence considered, should be evaluated under the Rules of Evidence. In so holding, the court stated that "whether 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." Noting that in many cases, "a representative sample is the only practicable means to collect and present relevant data," the court held that, in cases 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." In a concurrence, Chief Justice John Roberts, Jr. wrote, "despite the differences in donning and doffing time for individual class members, respondents could adequately prove the amount of time for each individual through generalized, class-wide proof."

The majority was clearly persuaded by the fact that the statistical proof put forward by the plaintiffs could have been used by each employee were he or she to bring an individual cause of action. Because Tyson did not satisfy its legal obligation to keep records on how much time each of its employees worked, the employees had to "fill [the] evidentiary gap" with the statistical proof developed by their experts. As such, Tyson's primary defense (which it did not avail itself of) was to attack the plaintiffs' expert report as unrepresentative or inaccurate – i.e., inadmissible under the Rules of Evidence. The court's decision encourages district courts to consider the admissibility of representative proof, holding that the absence of proof as to an element of plaintiffs' action should be addressed on summary judgment, not when challenging class certification. Perhaps most importantly, the court's decision signals future fights regarding representative or statistical proof will be another front in the "battle of the experts."

The *Tyson* decision is significant in light of the court's 2011 decision in Wal-Mart v. Dukes. In that 5-4 decision, with the late Justice Antonin Scalia writing for the majority (joined by Justices Roberts and Kennedy), the court reversed the certification of a class of 1.5 million female employees based on the plaintiffs' use of representative proof to establish liability in the absence of a common discriminatory policy. The *Wal-Mart* opinion cast significant doubt on the permissibility

of representative or statistical proof. In its *Tyson* decision, the Supreme Court stated in no uncertain terms that "*Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability," reasoning instead that unlike in *Wal-Mart*, the plaintiffs in *Tyson* could have relied on the representative evidence to establish liability and damages on an individual basis.

The Supreme Court's analysis on the issue of representative proof raises an interesting point about Tyson's litigation strategy. That Tyson did not challenge the methodology of the employees' expert witness who calculated the average donning and doffing times proved significant. Tyson's silence, combined with their lack of time records relating to how long it took each employee to don and doff their equipment, left them in the difficult position of fighting something (i.e., the plaintiffs' expert's report) with nothing. By not challenging the admissibility of the report, the court seemed to indicate its hands were tied as to whether the report should have been considered by the jury. It is distinctly possible this decision comes out differently (or is at least a closer question), if plaintiffs' methodology was challenged on the merits.

The major takeaway is companies seeking to discredit representative or statistical proof need to show such proof does not satisfy the Rules of Evidence and should not be considered. The court was clear in saying that just because statistical methods were used in this case does not mean they will be appropriate in all circumstances: "The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases." Thus, going forward, companies defending themselves against class and collective actions need to be prepared to challenge the methodology of the representative proof put forward by plaintiffs at summary judgment. The use of representative and statistical proof remains viable, meaning class and collective actions are alive and well. Businesses must proceed accordingly.

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