Expert Q&A on Representative and Sampling Evidence in Class Actions Post-*Tyson*

In a seeming departure from earlier decisions, the US Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo* held that a representative sample may be used to establish classwide liability for class certification. Practical Law asked *Barbara Hoey* and *James Saylor* of *Kelley Drye & Warren LLP* to explain the state of the law following the *Tyson* decision and the implications for employers and their counsel.

BARBARA E. HOEY
PARTNER
KELLEY DRYE & WARREN LLP

Barbara is the chair of the firm's Labor and Employment practice group and is a member of the firm's Executive Committee. She focuses her practice on employment litigation and counseling, and has litigated and won more than a dozen jury and bench trials involving claims arising under a variety of federal and state employment laws.

JAMES B. SAYLOR
ASSOCIATE
KELLEY DRYE & WARREN LLP

James focuses his practice on consumer class action defense and labor and employment litigation. He has provided extensive support and representation throughout all stages of arbitration and litigation, including motion practice, discovery, summary judgment, and trial.

What was the state of the law on using representative or statistical sampling evidence to support class certification before *Tyson*?

The Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) suggested that class certification is inappropriate where the motion is based, in part, on representative or statistical sampling evidence of classwide injuries.

In *Dukes*, the Supreme Court reversed certification of a nationwide class of nearly 1.5 million women who accused Wal-Mart of gender bias. In reversing the certification order, the Supreme Court found that representative evidence of the treatment of over 100 female employees proffered in support of certification deprived Wal-Mart of the right to litigate individual defenses. As a result, the Supreme Court found that the putative class did not meet the commonality requirement in Federal Rule of Civil Procedure (FRCP) 23(a)(2). (564 U.S. at 353-56.)

By contrast, the certification reversal in *Comcast* was based on the predominance requirement in FRCP 23(b)(3). In that case, the Supreme Court concluded that the lack of a common methodology for proving damages was fatal because issues of individualized damages calculations would "inevitably overwhelm questions common to the class." (133 S. Ct. at 1433.)

Lower courts and the legal community have grappled in recent years with the implications of these decisions, questioning when it is appropriate (if ever) to rely on representative and sampling

evidence in class actions. Indeed, the Supreme Court's decisions in *Dukes* and *Comcast* led many to argue that representative methods of proof were per se unacceptable, a position adopted by the Second, Fourth, Fifth, Seventh, and Ninth Circuits. These courts found that inferring classwide liability and damages from representative evidence was contrary to Supreme Court precedent and violated defendants' due process rights.

Search Class Action Toolkit: Certification for a collection of resources to assist counsel with issues related to class certification, including more on FRCP 23 requirements.

What was the dispute in *Tyson*, and how was representative and sampling evidence used in the case?

In *Tyson*, the plaintiffs brought suit on behalf of an alleged class of over 3,000 employees from certain departments at one of the defendant's pork-processing facilities, seeking compensation for their time donning and doffing (putting on and taking off) protective gear.

The donning and doffing dispute had a fairly lengthy history. In response to the Department of Labor's enforcement of a federal injunction in 1998, Tyson began paying all of its employees an additional four minutes per day. These four minutes, known as K-Code time, represented Tyson's estimate of the average amount of time needed for employees to don and doff protective gear. In 2007, Tyson changed this policy to deny any K-Code time to some employees while compensating other employees for between four and eight minutes per day. The plaintiffs brought suit that same year in the US District Court for the Northern District of Iowa, alleging that this arrangement underpaid certain employees for additional time spent donning and doffing.

The district court certified the class's Fair Labor Standards Act (FLSA) claims as a collective action and the state wage claims as an FRCP 23 class action. At trial, the plaintiffs relied on expert reports and testimony to compute average donning and doffing time. The primary expert report was based on 744 videotaped observations on how long it took for employees to put on and take off their protective gear and walk to their workstations. Based on the observations, the plaintiffs' primary expert estimated that employees in the cut and retrim departments spent 18 minutes on donning and doffing activities, while employees in the kill department spent 21.25 minutes.

Using this data, a second expert estimated the amount of uncompensated work for each employee in the class by adding the estimated average to the time each employee actually spent working, and subtracting any K-Code time already paid to each employee. The plaintiffs used this representative evidence to establish liability on a classwide basis.

Because Tyson did not record the actual time employees spent donning and doffing, it was in a weak position to dispute the accuracy of its employees' hours. Additionally, Tyson did not make a *Daubert* motion to challenge the statistical validity of the plaintiffs' expert evidence nor did it produce a rebuttal expert in opposition (see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). Instead, Tyson argued that class certification was inappropriate because the differing donning and doffing time employees spent was too speculative to support classwide recovery, and the study overstated donning and doffing time.

The jury returned a verdict for the class and awarded almost $6 million in damages. Tyson appealed, and the Eighth Circuit affirmed the jury's verdict. (136 S. Ct. 1036, 1042-45 (2016).)

Search Experts: Daubert Motions for information on preparing motions to exclude expert testimony under Federal Rule of Evidence 702 and *Daubert*, including the grounds for making a *Daubert* motion, evidentiary hearings, and the standard on appeal.

Search Wage and Hour Law: Overview and Defending Wage and Hour Collective Actions for information on defending wage and hour collective actions brought under the FLSA, including more on state law class actions brought under FRCP 23.

What were the key holdings in *Tyson*, and how did the decision treat the Supreme Court's previous holdings in *Dukes* and *Comcast*?

In *Tyson*, the Supreme Court was asked to address whether a class action can be certified where:

- The defendant's liability and the plaintiffs' damages will be determined using statistical techniques that presume all class members are identical to the average observed in a sample.
- The class contains hundreds of members who were not injured and have no legal right to any damages, under FRCP 23(b)(3).

In answering the first question, the Supreme Court found that *Dukes* did not create a bright-line prohibition on using a representative sample as a means of establishing classwide liability (136 S. Ct. at 1048). To the contrary, the Supreme Court held that representative proof, or a representative sample, can be sufficient to establish classwide liability where:

- Class members would be able to rely on the sample to establish their own liability or damages on an individual basis.
- The representative evidence otherwise is not statistically inadequate or based on implausible assumptions.

Unlike the putative class members in *Dukes*, the Supreme Court found that each class member in *Tyson* likely could rely on the same statistical analysis presented for the class if they pursued claims on an individual basis. Further, because Tyson had not challenged the experts' methodology under *Daubert*, there was no basis in the record to conclude that it was error to admit that evidence. (136 S. Ct. at 1048-49.)

The Supreme Court declined to reach the second question but signaled that it might address in an appropriate, future case the issue of whether a class may be certified if it contains members who were not injured and have no legal right to damages. While noting that this issue is one of "great importance," the Supreme Court found the question was not fairly presented in *Tyson* because damages had not yet been disbursed and there was no indication in the record on how they would be disbursed. (136 S. Ct. at 1050.)

How does the *Tyson* decision modify or impact the framework established by *Dukes* and *Comcast*?

Despite the somewhat broad language of the holding, the immediate effects of *Tyson* might be limited. While the decision adds some nuance to the class certification analysis established in *Dukes* and *Comcast*, *Tyson* presents a different factual situation where representative proof makes sense, and where a damages calculation was well-defined by multiple experts. The decision does not necessarily provide support for plaintiffs seeking class treatment in cases where the representative evidence cannot be used to prove individual liability or is otherwise statistically inadequate.

Going forward, however, *Tyson* will likely encourage defense counsel to aggressively challenge representative sampling through *Daubert* motions and rebuttal experts, rather than relying solely on *Dukes* and *Comcast*. Additionally, defense counsel may try to rebut any showing that statistical evidence could be used to prove liability in an individual case.

Does the *Tyson* decision affect best practices for recordkeeping by employers?

Perhaps. In distinguishing *Dukes*, the Supreme Court relied on well-settled employment class action precedent in cases where an employer failed in its statutory duty to keep adequate records. In these types of cases, employees are entitled to a just and reasonable inference in proving the number of hours they worked. These inferences ensure that employees are not precluded from recovering where they are unable to prove damages due to the employer's failure to maintain appropriate records.

As a result, the decision puts employers in a difficult position. The law does not require an employer to track non-compensable time, but if the employer incorrectly identifies time as non-compensable and the time is later found compensable, the employer is hurt by its failure to track it.

Justice Thomas raised this concern in his dissenting opinion, noting that the majority decision requires employers to "either track any time that might be the subject of an innovative lawsuit ... [or] defend class actions against representative evidence that unfairly homogenizes an individual issue" (*Tyson*, 136 S. Ct. at 1059).

Facing this dilemma, some employers might choose to track all time, break it down by task, and pay employees for the time that is arguably compensable. For many employers, this administrative burden must be balanced against the threat of class action litigation in which evidence of wages might become an issue.

Search Conducting an Internal Wage and Hour Audit for information on common wage and hour issues for employers to evaluate, options for responding to problems discovered during an audit, and best practices going forward after an audit.

What can companies and counsel learn from the *Tyson* decision to help avoid or defend against this type of employment class action litigation?

Class actions are still exploding, and the *Tyson* decision might contribute to that trend. To better guard against potential liability, employers and their counsel should:

- **Look for hidden pockets of the workday.** Certain time that is not captured by traditional timekeeping practices may be compensable, so employers should consider informally tracking this time. Some common examples include employee time spent:
  - during meal and rest breaks;
  - opening or closing facilities;
  - cleaning up after clocking out;
  - traveling between jobs or assignments; and
  - training other employees.
- **Have employees confirm the accuracy of time records.** Employers should try to obtain agreement from employees on the accuracy of their hours by having them sign off, on paper or electronically, at the start and end of their work shifts. Employees should affirmatively indicate that they have been paid properly and that all of their hours are accurate. This will make it harder for employees to credibly claim that they were not paid and did not know what action to take. As part of this effort, employers should consider:
  - creating records showing that employees took meal and rest breaks, especially if unpaid, and having the employees sign off on those records;
  - posting notices in many places, including on office walls and the company website, about the importance of accurate timekeeping;
  - reminding employees repeatedly and in different ways that it is part of their job to inform their manager when they work extra time or miss a break; and
  - adopting simple procedures for employees to report extra hours worked or unpaid time.
- **Consider challenging the plaintiffs' expert.** Where a putative class action has been filed, counsel should prepare to challenge both:
  - the admissibility of statistical evidence used at the class certification stage under *Daubert*, relying on the additional argument that this evidence must address individual liability, rather than the broader concept of class liability; and
  - the representative evidence itself, by demonstrating that it is statistically inadequate, based on implausible assumptions, or fails to address unique elements of individual class members.