Tyson Foods Inc. v. Bouaphakeo

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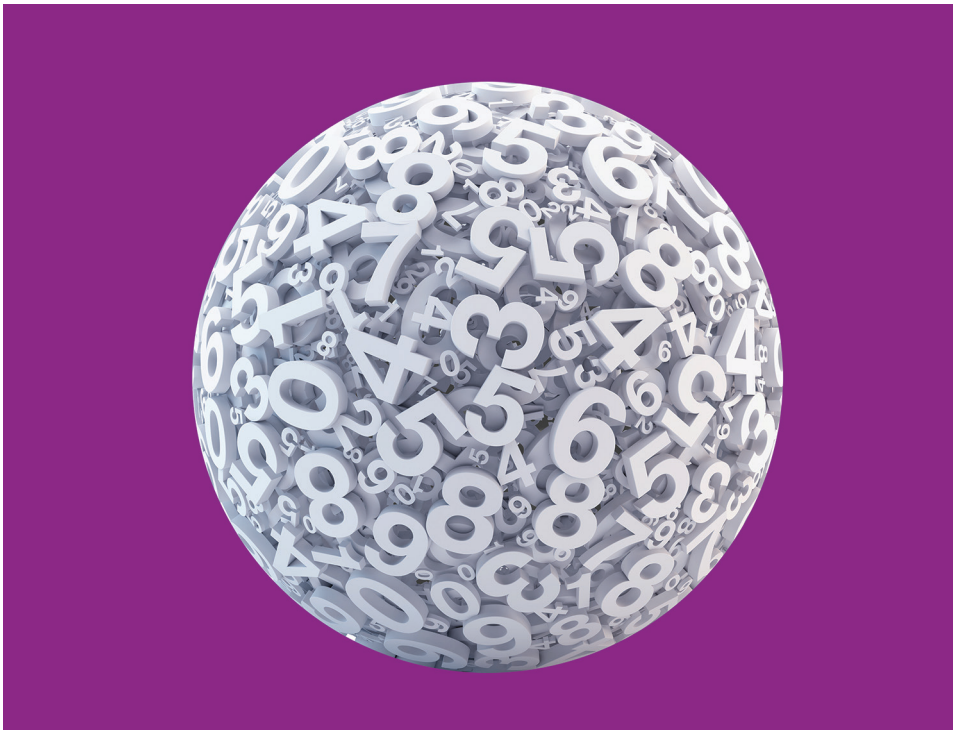
An Aberration in the Use of Statistical Sampling in Class Actions

Corporate Counsel Roundtable



Ernest Rutherford, the father of nuclear physics, once said: "If your experiment needs statistics, you ought to have done a better experiment." Imperfect by nature, statistics is the science of drawing inferences from data—data that is typically incomplete. Shortcomings include sampling bias, overgeneralization, lack of causality, and misreporting. Nevertheless, class-action plaintiffs often see statistical sampling as a means to circumvent otherwise applicable requirements of individualized proof through extrapolation.

Luckily, our judiciary has long disfavored the use of statistical evidence in class actions, refusing to permit "trial by formula" and rejecting damages models that fail to measure recovery on a class-wide basis accurately. Last term, the Supreme Court again weighed in on the use of statistical sampling in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). There, a class of employees sought to recover wages for time spent donning and doffing protective gear under the Fair Labor Standards Act. The Court opened the door for statistical evidence, but ever so slightly, allowing employees to rely on "representative evidence" of hours worked where their employer had failed to maintain time records as required under the FLSA.

Wishful thinking class-action plaintiffs may view *Tyson Foods* as broadly endorsing the use of statistical sampling as an evidentiary short-cut for class-wide proof. But close scrutiny exposes the decision for what it really is: an aberration likely limited to wage-and-hour disputes involving an evidentiary gap of the defendant's own doing. Of benefit to defendants, the decision offers a road-map for challenging the use of statistical sampling in class actions and leaves undisturbed many other viable defenses.

Historical Disfavor of Statistical Sampling

The class action is a powerful procedural device, allowing claims that are otherwise impractical to litigate separately to be brought in the aggregate where class members have suffered essentially identical harm resulting from mass production, mass marketing, or standardized corporate practice, for example. But because the

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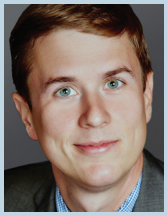

mechanism is merely procedural, it cannot be used to abridge substantive rights, such as a defendant's ability to defend individual claims. In all but narrow circumstances, extrapolation of statistical sampling threatens this due process guarantee. And, like any evidence, statistical sampling must overcome challenges to reliability and relevance.

***Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011)**

The *Dukes* case involved three women who alleged that their supervisors had discriminated against them with respect to pay and promotions in violation of Title VII, and sought to represent an expansive class comprised of about 1.5 million current and former female Wal-Mart employees. In essence, the women alleged that a uniform corporate culture led supervisors to exercise their discretion in pay and promotions in a way that disproportionately favored men.

To obtain class certification under Federal Rule of Civil Procedure 23, the plaintiffs needed to demonstrate, among other criteria, that their case involved questions of law or fact common to all class members, known as the "commonality" requirement. To this end, the plaintiffs relied on (1) statistical evidence of pay and promotion disparities between men and women; (2) anecdotal reports of discrimination by female employees; and (3) testimony from a sociologist who concluded that the company was vulnerable to sex discrimination based on a "social framework analysis." The district court denied Wal-Mart's motion to strike this evidence and certified the class. A divided Ninth Circuit Court of Appeals, sitting en banc, affirmed.

The Supreme Court reversed, finding commonality lacking. The statistical evidence was prepared by a labor economist who, having compared the number of women promoted into management positions with the number of women in the pool of hourly workers, concluded that the disparities could only be explained by sex discrimination. The labor economist also considered the workforce data of other retailers to conclude that Wal-Mart promotes a lower percentage of women than its competitors. This evidence fell short of showing commonality, the Court explained, because discretionary pay and promotion decisions are, by definition, not uniform. Surely, supervisors would argue that they consider a multitude of sex-neutral, performance-based factors when making pay and promotion decisions and would complain that the statistical evidence fails to account for whether women are qualified or interested in a promotion, for example. In other words, statistics told only half the necessary story: they showed a disparity, but failed to explain *why* the disparity reflected systematic discrimination.

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The Court found the anecdotal evidence equally problematic. This evidence consisted of 120 affidavits reporting instances of discrimination, which amounted to just 1 report of discrimination for every 12,500 class members. The reports related to only 235 of Wal-Mart's 3,400 stores and did not fairly represent all states. According to the Court, even accepting the reported accounts as true, the evidence did not establish a nation-wide policy of discrimination.

Lastly, the Court found no value in the sociologist's testimony. The sociologist conceded that he could not calculate the percentage of employment decisions at Wal-Mart that might be the product of stereotyped thinking and, consequently, could not answer the critical commonality question.

As for damages, the Court agreed with Wal-Mart that eligibility for backpay would entail individualized determinations. Under Title VII's remedial scheme, in claims alleging a pattern or practice of discrimination, an employer who establishes that it took adverse action against an employee for any reason other than discrimination cannot be ordered to pay backpay. The Court criticized the Ninth Circuit for endorsing "trial by formula," whereby a sample of class members would be selected, backpay for those individuals would be determined, and the numbers would be extrapolated to arrive at a lump sum recovery for the entire class. The approach was akin to a compulsory bellwether settlement. Such a novel project, the Court held, would run afoul of the Rules Enabling Act, 28 U.S.C. § 2072(b), which forbids using the class-action device to "abridge, enlarge or modify any substantive right"—in Wal-Mart's case, its substantive right to defend each adverse employment action as non-discriminatory.

***Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)**

In *Comcast*, cable-television subscribers filed a class-action antitrust lawsuit, alleging that the cable company had entered into unlawful swap agreements in an effort to monopolize services using clusters and to charge customers above competitive levels. For Rule 23 purposes, the plaintiffs had to prove that the alleged individual injuries were capable of proof through common evidence and that resulting damages were measurable on a class-wide basis. Critically, although the plaintiffs had proposed four theories of injury, the trial court accepted only one. As for damages, the plaintiffs relied on their expert's regression model, comparing actual cable prices with hypothetical prices that allegedly would have applied but for the anticompetitive activity. The problem, however, was that the regression model did not isolate damages resulting from any one theory of injury, but rather assumed that all four theories of injury were in play. Nonetheless, the district court certified the class, and a divided panel of the Third Circuit Court of Appeals affirmed.

The Supreme Court reversed. Citing the unremarkable premise that damages must correspond to the applicable theory of injury, the Court observed that the regression model did not even attempt to satisfy this basic threshold. The methodology might have been sound, the Court suggested, had all four theories of injury

remained in play. But that was not so, and the expert had conceded that his model did not attribute damages to any one theory of injury. Because the regression model did not accurately represent the applicable class-based injuries based on an improper assumption, the evidence was neither reliable nor relevant.

Tyson Foods Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016)

Most recently, in *Tyson Foods*, employees at a pig-slaughtering facility filed a class action, alleging that their employer's policy of not compensating employees for time spent donning and doffing mandatory protective gear violated the FLSA's overtime provisions. The district court certified the class, and the case proceeded to trial.

Because the employees sought only unpaid overtime, each employee had to show work in excess of 40 hours per week, inclusive of time spent donning and doffing protective gear. But because the employer failed to keep time records for donning and doffing activity, the employees had no choice but to rely on "representative evidence." This evidence consisted of 744 video recordings of donning and doffing activity along with a study by an industrial relations expert, in which he analyzed the recordings to arrive at average changing times for employees in different departments. Relying on the expert's testimony, the jury awarded $2.9 million in unpaid overtime. The district court denied Tyson Foods' motion to set aside the verdict, and a divided panel of the Eight Circuit Court of Appeals affirmed.

When the Supreme Court granted *certiorari*, the defense bar hoped for a categorical bar on the use of statistical sampling in class actions. But a divided Court dashed these hopes. Whether representative evidence is permissible, the Court reasoned, turns not on the form of the proceedings but, like any other evidence, on its reliability and relevance. Stated differently, representative evidence can be reliably used in a class action only if it could be used to prove each class member's claim in an individual action.

To answer this question, the Court turned to *Anderson v. Mt. Clements Pottery Co.*, 328 U.S. 680 (1946), another collective action brought by employees seeking to recover unpaid time. Given the remedial nature of the FLSA, the *Mt. Clements* Court held that, where an employer failed to maintain adequate time records, an employee could meet his or her burden of showing hours worked through "reasonable inference," and the employer could negate such inference only with evidence of precise hours worked.

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The workers in *Tyson Foods*, in the same fashion, sought to rely on statistical sampling to fill an evidentiary gap created by their employer's inadequate records, and the representative evidence would have been permitted in an individual lawsuit. In defense, albeit without a *Daubert* challenge or any testimony from a rebuttal expert, Tyson Foods argued that the sample study was unrepresentative and inaccurate—an issue common to all class members. As such, permitting the plaintiffs to rely on the representative evidence would *not* abridge any substantive right in violation of the Rules Enabling Act. And, unlike in *Dukes*, where the employees could not point to a common policy leading to company-wide discrimination, the employees in *Tyson Foods* had identified a common practice leading to undercompensation.

Although we should expect parties to bend and twist *Tyson Foods* to suit their particular interests, the holding, at its core, is quite limited. In wage-and-hour disputes where an employer has created an evidentiary gap contrary to a statutory obligation to maintain records (and possibly in analogous contexts), a plaintiff may rely on representative evidence if it is shown to be reliable and relevant and will not abridge any substantive right that would otherwise exist in an individual action.

Best Practices After *Tyson Foods*

Revisit Record Retention Policies

In both *Mt. Clemens* and *Tyson Foods*, the Court's primary basis for permitting proof through "reasonable inference" was the defendant's own failure to maintain records, much like a discovery sanction. Although unwilling to lay down any bright-line rules, the Court implied that representative evidence is more likely to be appropriate when the defendant has caused the evidentiary gap that gives rise to the need for the representative evidence in the first place. As another consequence, poor recordkeeping will typically prevent a defendant from pursing individual defenses (as no records means no proof), effectively negating any Rules Enabling Act violation that might otherwise serve as a viable challenge to class certification.

One key lesson from *Tyson Foods*, then, is to maintain records required by law, as well as any other records that would be needed to defend lawsuits that may logically occur given the nature of the defendant's business, giving consideration to applicable statutes of limitation to determine adequate retention periods. Employers of non-exempt workers in particular would be wise to revisit their timekeeping and payroll practices to ensure that they maintain adequate records to defend FLSA overtime disputes on an individualized basis. And all employers would be prudent to retain records on hiring, firing, and promotions of the sort that might be challenged in discrimination suits. But record retention may be equally important in other contexts. The Telephone Consumer Protection Act, as one example, requires telemarketers to maintain consent-to-call records for four years, and consent can serve as a defense to individual TCPA claims. For another, mortgage lenders are responsible for retaining certain records in connection with their lending practices. Putting aside the liability that might arise from lenders' fail-

ure to retain records, lenders might need those records to defend suits under the Fair Housing Act.

Without such records, defendants may invite use of statistical sampling and risk waiving an otherwise applicable Rules Enabling Act challenge to certification, as occurred in *Tyson Foods*. The difficulty lies, of course, in weighing these risks against the added expense of retention and the potential that the retained records will ultimately become evidence for plaintiffs. Answering that difficult question will involve industry-specific, and likely company-specific, considerations.

Distinguish *Tyson Foods*: No Duty to Maintain

The Court in *Tyson Foods* permitted representative evidence in large part to avoid penalizing employees for missing evidence that the employer should have kept in the ordinary course of business. The Court seems to have been animated by the same interests that drive spoliation sanctions; if a defendant deliberately destroyed relevant information, then one might rightfully surmise that the information would disadvantage the defendant. But what if plaintiffs seek to rely on representative evidence in situations where the defendant would have no reason, by statute or otherwise, to maintain the information that the plaintiffs need? A fair reading of *Tyson Foods* would suggest that permitting representative evidence under those circumstances would be less appropriate, and defendants should seize on this distinction where applicable.

In a construction-defect class action, for example, homeowners might seek to prove class-wide damages by sampling allegedly defective homes and extrapolating the average diminution-in-value from the sample study to the entire class. But, unlike in *Tyson Foods*, the homeowners would not be "forced" to resort to sampling because of the builder's failure to maintain records, and assuming that a homeowner could isolate the diminution-in-value from the alleged defect, it would be theoretically possible (albeit time-consuming) to determine the diminution-in-value of each affected home. To extend *Tyson Foods* to situations of this kind, where the defendant had no duty to maintain records, would improperly transform a holding grounded in necessity and wrongdoing by the defendant into one grounded in mere convenience to plaintiffs. Such extension would shift the burden of proof, effectively requiring defendants to dis-prove liability.

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Confine *Tyson Foods* to Wage-and-Hour Cases

Wage-and-hour disputes are unique, even within the employment law realm, and are often more conducive to aggregate adjudication by their nature. These claims typically assert an across-the-board compensation policy that is alleged to violate the law, such as failure to pay minimum wage or failure to pay overtime. The potential for individualized issues is lower than in other contexts, especially where, as in *Tyson*, the class of employees is entitled to a common evidentiary presumption. But be on the lookout for wage-and-hour cases that don't fit this mold.

Beyond wage-and-hour disputes, the variability between class members is potentially infinite. As explained in *Dukes*, whether someone has been subjected to discrimination, for instance, turns on individual experiences and circumstances that are not probative of the experiences of others who may (or may not) have been subjected to unlawful conduct themselves. Without commonality, sampling cannot reliably establish liability or damages on a class-wide basis.

Whenever possible, defendants should analogize their case to *Dukes* and point out elements of claims and defenses that necessarily turn on individual perceptions and injuries. For example, among other elements required to establish a hostile work environment, the individual plaintiff must subjectively perceive the work environment to be abusive. And in cases alleging personal injury, perhaps because of a defective product, defendants should point out variances in injury, causation, and damages (wage loss, medical expenses, pain and suffering, etc.). In all cases where liability and damages can be defended on individualized grounds, defendants should challenge statistical sampling and class certification as violating the Rules Enabling Act.

In re: Autozone, Inc., 2016 WL 4208200 (N.D. Cal. 2016), offers a recent success story. There, Autozone failed to maintain rest-break records, and the plaintiffs sought to fill this evidentiary gap with a survey in which respondents were asked to provide their recollection of events from years earlier. Of respondents who worked "short shifts," 25 percent reported that they were not permitted rest breaks, 58 percent reported that they were, and 16 percent could not remember. Of respondents who worked "mid-length shifts," 29 percent reported that they were not permitted rest breaks, 53 percent reported that they were, and 17 percent could not remember. And of respondents who worked "long shifts," 38 percent reported that they were not permitted rest breaks, 25 percent reported that they were, and 38 percent could not remember. Given this variation, the survey was more like the representative evidence in *Dukes* than the representative evidence in *Tyson Foods*; the rest-break survey, if probative of anything, showed the absence of a uniform policy. Much like in *Dukes*, "an Autozone employee in an individual action would not be able to point to other employees' varied experiences . . . to establish her own claim for missed rest breaks." Thus, the court held that allowing the survey in a class action would improperly enlarge the rights of employees and deprive Autozone of its right to litigate individual issues, contrary to the Rules Enabling Act.

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Pursue *Daubert* Challenges and Retain Rebuttal Experts

Critically, in *Tyson Foods*, the employer did not challenge the expert's study under *Daubert* and did not offer testimony from a rebuttal expert. As such, the Court found "no basis in the record to conclude it was legal error to admit that evidence." A prudent defendant will therefore pursue both avenues of attack. Rebuttal testimony should also do more than simply shoot holes in the models offered by plaintiffs; in some cases, the expert would be well advised to offer an alternative model that produces a more accurate result.

After all, the Court in *Tyson Foods* was careful to note that not all inferences drawn from representative evidence in FLSA cases will be reasonable, and defendants may challenge such evidence as statistically inadequate or as relying on improper assumptions. In *Comcast*, for example, the statistical evidence improperly assumed that four theories of liability were in play, when, in the end, the court accepted only one theory as viable.

Factors such as sample size will bear on reliability. In *Dukes*, for example, the Court found 120 employee anecdotes of reported discrimination, a 1-to-12,500 ratio, inadequate. Other factors include the extent to which the sample meaningfully represents the entire class; the extent to which the sampling methodology is reliable (including whether favorable data is "cherry picked"); and the purpose for which the sample is being offered. Defendants should be prepared to explain why statistical deficiencies like these go to admissibility and not simply weight.

Autozone again offers useful insight, as the survey there was excluded as unreliable under *Daubert*, in large part based on the declaration of Autozone's expert, a qualified labor economist and statistician. The court noted several scientific deficiencies. First, the survey had a remarkably low response rate, which suggested "nonresponse bias." That is, where responders to a survey are systematically different from non-responders, the survey cannot be reliably used to draw conclusions about the entire class. Second, because the survey sought information "as part of a class action lawsuit," recipients understood themselves as potential beneficiaries of the lawsuit, undermining the objectivity of their responses, a phenomenon called "self-interest bias." Third, the survey unrealistically depended on perfect memory. Surely, respondents could not be expected to recall whether a shift eleven years ago was 3 hours 35 minutes in length or 3 hours 25 minutes in length, and yet the survey called for this distinction. Some survey responses made no sense, and several respondents provided answers at deposition that were different from their survey responses. Lastly, the survey lacked sufficient precision because it swept in at least one statutorily exempt manager and did not address the fact that many responders had voluntarily not taken rest breaks. Having excluded the representative evidence as unreliable, the court found the case unmanageable as a class action and granted the defendant's motion to decertify.

As *Autozone* demonstrates, challenges to statistical evidence are alive and well after *Tyson Foods*. Defendants who anticipate efforts to rely on sample surveys would be wise to retain qualified experts to uncover the various pitfalls that plague statistical models of class-wide proof and should be sure to raise *Daubert* challenges. The time to raise those attacks may be at the class certification stage. If plaintiffs aim to establish commonality and predominance through statistical proof, then they should be compelled to show that their method is not "junk science."

Conclusion

In sum, *Tyson Foods* is likely to go down in history as a hollow—or at least narrow—victory for class-action plaintiffs, unlikely to offer much value outside wage-and-hour disputes involving evidentiary gaps created by the defendant's failure to maintain records as required by law. The above best practices and defense strategies can be employed to defeat efforts to extend *Tyson Foods* beyond its limited reach and ensure that the use of statistical proof remains the rare exception.