

Inside the Courts An Update From Skadden Securities Litigators

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Supreme Court Upholds Class Certification in *Tyson Foods*

The U.S. Supreme Court on March 22, 2016, addressing a challenge to the use of representative evidence to establish that common issues of fact or law predominate over individual issues in a proposed class action, declined to adopt a general rule either allowing or rejecting the use of such evidence at the class certification stage. Instead, the Court held that whether and when statistical evidence can be used to show classwide issues of fact or law is a case-specific inquiry that depends on the purpose for which the evidence is being used and the elements of the underlying cause of action.

In *Tyson Foods, Inc. v. Bouaphakeo*,¹ the plaintiffs asserted claims under the Fair Labor Standards Act (FLSA) and a state wage law based on allegations that the defendant failed to pay overtime compensation to employees for time spent putting on and taking off required clothing and protective gear. To prove both injury (uncompensated work) and quantum of damages (amount of unpaid overtime wages), the plaintiffs relied on statistical models to aggregate and average the time employees spent donning and doffing protective equipment. This figure was then used to extrapolate the amount of overtime compensation due to the class, which the plaintiffs' expert calculated to be \$6.7 million. The parties agreed that at least some members of the class did not perform any uncompensated work and were not owed any unpaid overtime wages. The case was tried to a jury, which awarded the class \$2.9 million in damages.

Addressing first the question of whether the plaintiff class could properly apply a statistical study of the average time employees spent donning and doffing protective gear to establish classwide proof, the Court declined to adopt a broad rule either permitting or precluding the use of representative evidence in class actions. Instead, the Court observed that representative or statistical samples, like all evidence, are a means parties may rely on in appropriate cases to establish a fact. This is true, the Court stated, regardless of whether the case is an individual or class action. The question, therefore, is the "degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." The Court further explained that when making this determination, the relevant inquiry is whether "the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action" and is otherwise admissible into evidence. Applying these principles, the Court focused on the employer's failure to keep records of the actual time employees spent donning and doffing gear, as required by the FLSA. In the absence of such records, even individual plaintiffs could have relied on the same type of statistical evidence

¹ Skadden filed an *amicus* brief in the case.

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used by the class to establish liability and damages. Noting that the employer did not raise a Daubert challenge to the methodology used to collect or evaluate the statistical evidence, the Court concluded that the evidence was admissible and the persuasiveness of the study was a matter for the jury.

Finally, the Court held that the possibility that uninjured class members might recover was not yet fairly presented to the Court

because the damages award had not yet been disbursed to the class. The Court left open the employer's ability to raise future challenges on this issue once the district court identifies the methodology it will use to calculate payments to individual class members.

The 6-2 ruling affirms the judgment of the U.S. Court of Appeals for the Eighth Circuit, which had denied a post-trial motion to decertify the class.

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