TYSON FOODS, INC. V. BOUAPHAKEO: A MURKY FUTURE FOR REPRESENTATIVE EVIDENCE IN RULE 23(b)(3) CLASS ACTIONS AND FLSA COLLECTIVE ACTIONS

I. Introduction

Courts have long grappled with the question of whether plaintiffs in a class action may prove liability, damages, or predominance of common questions of law or fact by the use of representative or statistical evidence.\(^1\) Opponents of the use of representative evidence in class actions have argued that it allows courts to gloss over individual questions, transforming the class action “from a species of joinder [into] a kind of jurisprudential alchemy” that creates claims where none would otherwise exist.\(^2\) Proponents of allowing representative evidence in class actions have noted that such evidence would be allowed in individual actions where the evidence has probative value and that the use of such evidence does not displace judicial decision-making.\(^3\) In *Tyson Foods, Inc. v. Bouaphakeo*, the United States Supreme Court held that plaintiffs may use representative evidence to prove classwide liability in a claim stemming from the Fair Labor Standards Act (“FLSA”),\(^4\) at least where individual plaintiffs could have relied on such evidence to establish liability in an individual action.\(^5\) Such evidence may therefore support a finding of predominance necessary for certification of a Rule 23(b)(3) class.\(^6\)

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1. See generally Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009). Statistical evidence allows inferences to be drawn about a population based on a representative sample with statistical analysis or modeling. Representative evidence more broadly also includes non-statistical evidence concerning individual class members, such as representative testimony, that may be extrapolated to the entire class without formal statistical inference.


6. Id.
II. State of the Law

Prior to Tyson Foods, the landmark decision in the Court’s recent jurisprudence on the use of statistical evidence to support class certification was Wal-Mart Stores, Inc. v. Dukes. In Wal-Mart, the Court held that a putative class of female employees at Wal-Mart stores across the nation had failed to establish sufficient commonality for class certification required under Federal Rule of Civil Procedure 23(a)(2) by use of statistical evidence that showed disparities in advancement between female and male employees. The Court thus cast doubt on whether representative evidence could ever be used to support class certification. Even though the plaintiffs’ expert in Wal-Mart testified that the disparities in promotion “[could] be explained only by gender discrimination,” statistical evidence could not substitute for the lack of a common policy to which all employees were subjected.

In its subsequent decision in Comcast Corp. v. Behrend, the Supreme Court held that even once commonality is established, statistical evidence may be insufficient to show that common questions of law or fact predominate over individual questions. The decision in Comcast made clear that the reluctance to allow statistical evidence to support class certification expressed in Wal-Mart extended beyond cases where there was no specific common policy linking class members. The Court also suggested that if the amount of damages suffered by each class member were not amenable to common proof, certification under Rule 23(b)(3) might necessarily be inappropriate. In Comcast, plaintiffs advanced four theories of antitrust liability, of which only one was the basis for certification of a Rule 23(b)(3) class. Plaintiffs’ expert conducted a regression analysis to determine what price levels would have prevailed in the absence of anticompetitive

8. See id. at 356-57.
9. See id. at 355-56. While the Court in Wal-Mart stated that local managerial discretion at stores across the country was a “corporate policy,” albeit one which did not entail sufficiently uniform practices to support a finding of commonality, the Court in Tyson Foods characterized the plaintiffs’ use of statistical evidence in that case as substituting for a common policy. See id.; Tyson Foods, 136 S. Ct. at 1048.
11. See id. at 1432-33. This result should not have been surprising; Justice Ginsburg’s opinion in Wal-Mart observed that the majority essentially imposed 23(b)(3) predominance analysis at the 23(a)(2) step of class certification. Wal-Mart, 564 U.S. at 376-77 (Ginsburg, J., concurring in part and dissenting in part).
13. See id. In his dissent in Tyson Foods, Justice Thomas expressed the view that Comcast stands for the proposition that the necessity of individualized damages calculations will always defeat predominance. Tyson Foods, 136 S. Ct. at 1056 (Thomas, J., dissenting).
behavior. The Court rejected use of the model to establish classwide liability since it reflected factors that may not have been common to all class members, including potential effects of anticompetitive behavior that did not form the basis for class certification. The Court held that the class was improperly certified because the model did not provide a mechanism for calculating damages for all class members, and that therefore “individual damage calculations will inevitably overwhelm questions common to the class.” Since the statistical evidence did not establish classwide liability and damages, it did not justify a finding of predominance.

Wal-Mart and Comcast set a high bar for the use of statistical evidence to support class certification. Tyson Foods demonstrates that this bar is not absolute, and that, at least for claims stemming from a violation of the FLSA, statistical evidence may be used to establish that liability and damages are amenable to classwide proof. Delivered shortly after Justice Scalia’s death, the decision in Tyson Foods may mark a departure from Wal-Mart and Comcast, in which the Justice wrote opinions highly critical of the use of statistical evidence in class actions for a 5-4 majority. Whether the Court’s opinion in Tyson Foods should be read as distancing itself from an expansive reading of its jurisprudence on the use of representative evidence to establish predominance of common questions in Wal-Mart and Comcast, or only as the exception that proves the rule, remains unclear.

III. Facts and Procedural History

In 2007, employees at the Tyson Foods, Inc. meat processing facilities in Denison, Iowa, and Storm Lake, Iowa, brought claims against Tyson under the FLSA and related state law causes of action, and sought certification as a class action under Rule 23 and as a collective action under 29 U.S.C. § 216(b). Employees at the facility were paid under a system of “gang-time,” where they were paid only for time at their workstations and additional, standardized “K-code” time for donning and doffing safety gear. Plaintiffs alleged they did not receive required overtime payments for the actual

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14. Comcast, 133 S. Ct. at 1432-34.
15. Id.
16. Id.
17. See id.
19. See Wal-Mart, 564 U.S. at 367-68; Comcast, 133 S. Ct. at 1435-36. While the Wal-Mart Court agreed unanimously that the putative class in that case was improperly certified under Rule 23(b)(2), the Court split 5-4 on whether the evidence may have supported a finding of commonality.
amount of time spent on donning and doffing, a violation of the FLSA. The District Court for the Northern District of Iowa certified classes under Rule 23(b)(3) and 29 U.S.C. § 216(b) consisting of employees at the Storm Lake facility who were paid under a “gang-time” compensation system in the Kill, Cut, or Retrim departments. Since Tyson did not keep records of the time spent doffing and donning by individual employees, plaintiffs relied on testimony by an industrial relations expert who analyzed videotaped observations and estimated the average time spent donning and doffing by employees in the Cut and Retrim departments. Plaintiffs’ experts concluded that all but 212 of the 3,344 members of the Rule 23 class had worked at least some uncompensated overtime. A jury awarded plaintiffs $2.9 million in compensatory damages. After the district court denied Tyson’s motions for judgment as a matter of law, to decertify the class, and for a new trial, the Court of Appeals for the Eighth Circuit affirmed, and the Supreme Court granted certiorari.

IV. The Court’s Holding

In an opinion by Justice Kennedy, the Supreme Court affirmed the judgment of the Eighth Circuit. The Court declined to “establish general rules governing the use of statistical evidence . . . in all class-action cases.” The Court concluded that in this case the use of statistical evidence to establish classwide liability and damages was permissible because the evidence would have been admissible to show liability in an individual action by an employee, and that such evidence may therefore support a finding that common questions predominate. The Court relied on its 1946 decision in Anderson v. Mt. Clemens Pottery Co., which held that when an employer fails to keep required records of employee work time, an employee may rely on representative evidence which shows the amount of improperly compensated work “as a matter of just and reasonable inference” to support a claim under the FLSA. Excluding evidence in a class action that would be relevant to an individual plaintiff’s claim would violate the instruction of the Rules

22. Id.
25. Id.
26. Id. at 1041.
27. Id.
28. Id. at 1050. Justice Thomas filed a dissenting opinion, in which Justice Alito joined. The Chief Justice filed a concurring opinion.
29. Id. at 1046.
30. Id.
Enabling Act\textsuperscript{32} that use of a representative action should not “abridge . . . any substantive right.”\textsuperscript{33}

The Court distinguished \textit{Tyson Foods} from \textit{Wal-Mart}, clarifying that “\textit{Wal-Mart} does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.”\textsuperscript{34} While \textit{Wal-Mart} disallowed statistical evidence “as a means of overcoming [the] absence of a common policy,” once commonality has been established, plaintiffs may use statistical evidence to show that a particular question of fact is amenable to classwide resolution.\textsuperscript{35} \textit{Wal-Mart}’s repudiation of the notion of “Trial by Formula” does not prohibit the use of representative evidence when employees “worked in the same facility, did similar work, and [were] paid under the same policy,” so that data from a sample of similarly situated employees “can be probative as to the experience of all of them.”\textsuperscript{36}

The Court further held that the question of whether the expert’s study showed the amount of donning and doffing time of individual employees as a matter of just and reasonable inference was properly reserved to the jury.\textsuperscript{37} While Tyson could have challenged the admissibility of the study under \textit{Daubert},\textsuperscript{38} \textit{Wal-Mart} does not mandate the result that any representative evidence is per se inadmissible to establish classwide liability.\textsuperscript{39}

Under \textit{Tyson Foods}, common questions may predominate even when “other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.”\textsuperscript{40} Statistical evidence that establishes classwide liability may be sufficient to support a finding that common questions of law or fact predominate for similarly situated class members, even when an additional step—here, adding gang-time hours particular to each employee to the average donning and doffing time calculated by plaintiffs’ expert—is required to determine damages for each member of the class.\textsuperscript{41}

Apart from the issue of predominance of common questions of law or fact, the employer also argued that there was no “ mechanism to identify the

\textsuperscript{33} \textit{Tyson Foods}, 136 S. Ct. at 1046.
\textsuperscript{34} \textit{Id.} at 1048.
\textsuperscript{35} \textit{See id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 1049.
\textsuperscript{38} Tyson declined to challenge the admissibility of the expert’s testimony under \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 509 U.S. 579 (1993), which requires the trial judge to serve a gatekeeping function with respect to the relevance and reliability of expert testimony.
\textsuperscript{39} \textit{See Tyson Foods}, 136 S. Ct. at 1048-49. The Court suggested that a \textit{Daubert} motion would have been the proper place to argue that the study was insufficiently probative of the employees’ common experience.
\textsuperscript{40} \textit{Id.} at 1046.
\textsuperscript{41} \textit{See id.} at 1047.
uninjured class members,” and therefore that disbursement of the award would necessarily allow recovery by uninjured class members. 42 The Court found this argument to be unripe since the award had not yet been disbursed, and plaintiffs had argued that various methods were available in this case to ensure that recovery was limited to those who had actually been harmed. 43 While the Chief Justice expressed skepticism in his concurring opinion as to whether the jury’s award could be disbursed properly based on the evidence in the record, 44 the district court on remand evidently had no problem crafting a suitable mechanism to ensure that only injured class members could recover. 45 The Court left open the question of what should be done when the statistical evidence proffered does not provide a mechanism to ensure a jury verdict is only disbursed among injured class members. 46 And it did not provide a clear framework for lower courts to actually manage statistical evidence and appropriately disburse awards. 47

The Court did not decide the issue of whether requirements for class certification under Rule 23 and certification of a collective action under the FLSA are identical. 48 While the question of whether an FLSA collective action has the same requirements for certification as a Rule 23(b)(3) class (most importantly, the requirement of predominance) has emerged as a possible split between the circuit courts, 49 the Supreme Court in Tyson Foods

42. Id. at 1049. Federal courts may lack jurisdiction to award an aggregate sum that cannot be distributed in a manner that avoids compensating uninjured plaintiffs, which would pose an additional obstacle to damages classes certified on the basis of representative evidence. See id. at 1052-53 (Roberts, C.J.) (concurring).

43. Id. at 1050 (majority opinion).

44. Id. at 1052-53 (Roberts, C.J.) (concurring). In Part I of Chief Justice Roberts’s concurring opinion, he clarified that he believed principles couched by the majority in the Court’s FLSA jurisprudence reflected evidentiary rules that would apply in any case and did not rely on a “special, relaxed rule” for FLSA-based cases. In Part II of his opinion, in which Justice Alito joined, he observed the potential constitutional difficulties in disbursing an aggregate award without a determination by the jury of which particular class members were harmed.

45. See Bouaphakeo v. Tyson Foods, Inc., --- F. Supp. 3d ----, 2016 WL 5868081 (N.D. Iowa Oct. 6, 2016). The district court, with the agreement of the parties, limited recovery to class members who both worked at least 40 hours per week even without the addition of the average donning and doffing time calculated by the plaintiffs’ expert and had at least $50 in damages, and ordered disbursement of the jury’s aggregate award.


49. Compare Monroe v. FTS USA, LLC, 815 F.3d 1000 (6th Cir. 2016) (requiring only that class members in an FLSA collective action be “similarly situated”), vacated, 137 S. Ct. 590 (mem.) with Espenscheid v. DirectSat USA LLC, 705 F.3d 779 (7th Cir. 2013) (Posner, J.) (requiring class members in an FLSA collective action to meet Rule 23(b)(3) requirements for class certification). See also Supreme Court Says 6th Circuit Must Revisit FLSA Verdict After Tyson, 23 No. 12 WESTLAW JOURNAL CLASS ACTION 6 (2017).
reviewed the collective action and Rule 23(b)(3) class action under the same standard without deciding the issue.\textsuperscript{50}

Justice Thomas filed a dissenting opinion, which Justice Alito joined.\textsuperscript{51} Justice Thomas stated that the district court did not properly consider the individual variations in donning and doffing time, suggesting that if this individual question was not susceptible to classwide proof, class certification would not have been appropriate.\textsuperscript{52} Justice Thomas also espoused the view that Comcast stood for the proposition that the “lack of a common methodology for proving damages” would necessarily show that individual questions predominated and would defeat class certification, and that the Court’s holding in Tyson Foods therefore represented a departure from its prior characterization of the predominance inquiry.\textsuperscript{53}

V. Analysis

While the Court in Tyson Foods declared it was not establishing “general rules” for the use of representative evidence in class actions, its language appears broadly applicable beyond the bounds of an FLSA-based action in which an employer has failed to keep adequate records. Whether Tyson Foods should properly be understood as clarifying or transforming the standards in Wal-Mart and Comcast or only applying its FLSA jurisprudence within that framework will be a central question for the use of representative evidence in class actions going forward. Thus far, the Court has provided little guidance: its only reference to Tyson Foods since the decision has been its memorandum opinion in Monroe, vacating a Sixth Circuit judgment in an FLSA case in which damages were calculated based on representative testimony from a sample of class members.\textsuperscript{54} The Ninth Circuit, meanwhile, has read Tyson Foods expansively to allow certification of a Rule 23(b)(3) class based on representative evidence that leaves significant issues to individual proof,\textsuperscript{55} while the Third Circuit has held that representative

\textsuperscript{50} Tyson Foods, 136 S. Ct. at 1045.
\textsuperscript{51} Id. at 1053.
\textsuperscript{52} Id. at 1054 (Thomas, J., dissenting).
\textsuperscript{53} Id. at 1056-57.
\textsuperscript{54} Monroe, 137 S. Ct. 590. In supplemental briefing in Monroe on remand, the defendants-appellants argued that Tyson Foods permits proof by representative evidence in an FLSA collective action only when that evidence is statistically reliable, and generally requires expert testimony. The plaintiffs-appellees argued that such a reading of Tyson Foods would be inconsistent with Mt. Clemens. See Supplemental Brief for Appellants FTS USA, LLC and Unitek USA, LLC in Light of Supreme Court’s Order at 7-9, Monroe v. FTS USA, LLC, No. 14-6063 (6th Cir. Mar. 6, 2017), 2017 WL 913218; Supplemental Brief for Appellees at 7-8, No. 14-6063 (6th Cir. Mar. 6, 2017), 2017 WL 913217.
\textsuperscript{55} See Vaquero v. Ashley Furniture Industries, Inc., 824 F.3d 1150, 1155 (9th Cir. 2016) (interpreting Tyson Foods to be consistent with the Ninth Circuit’s narrow reading of Comcast and to allow certification of a class where damages would need to be calculated on an individual basis).
evidence must demonstrate that class-wide damage occurred to support a finding of predominance.\(^{56}\)

For a decision that could have broad implications for class action litigation, the Court relied heavily on *Mt. Clemens*, a 1946 case concerned with the standard of proof for unpaid work time in FLSA claims.\(^{57}\) It is unclear in light of the Court’s reliance on *Mt. Clemens* what sorts of representative evidence will be permissible to establish that common questions are amenable to classwide proof in Rule 23(b)(3) class actions outside of the FLSA context. The Court does not elaborate what exactly is the distinction between the *Mt. Clemens* rule that representative evidence will be admissible when it could show liability or damages “as a matter of just and reasonable inference” and the rules of evidence which would apply in any case. The Chief Justice, in his concurring opinion, observed that allowing statistical evidence to show that a question is susceptible to classwide proof when such evidence would be admissible in an individual action is a generally applicable principle, and that a special rule for FLSA cases was unnecessary to the Court’s decision.\(^{58}\)

Interestingly, the Court did not cite *Comcast* in its decision, and its characterization of the predominance inquiry appears to be substantially relaxed from the one articulated in that case.\(^{59}\) *Tyson Foods* may therefore provide further support to lower courts that have declined to read *Comcast* broadly.\(^{60}\) The representative evidence utilized by the plaintiffs in *Tyson Foods* did provide a common methodology for calculating damages of individual class members, unlike the study in *Comcast* which may have included price effects that did not affect all class members.\(^{61}\) But by declining to draw any clear boundary between the representative evidence at issue in

\(^{56}\) See Harnish v. Widener University School of Law, 833 F.3d 298, 304-06 (3d Cir. 2016) (holding that class certification was properly denied when predominance was based on statistical evidence of price inflation because it did not prove reliance of individual class members).

\(^{57}\) *Tyson Foods*, 136 S. Ct. at 1046-49. Justice Thomas pointed out that the Supreme Court has not otherwise relied on *Mt. Clemens* since it was superseded by the Portal-to-Portal Act. *Id.* at 1057 (Thomas, J., dissenting).

\(^{58}\) *Id.* at 1051 (Roberts, C.J., concurring). *But see id.* at 1057 n.3 (Thomas, J., dissenting) (suggesting that the statistical evidence in this case could not have sustained a jury finding in an individual action absent a special evidentiary rule).

\(^{59}\) *See id.* at 1056-57 (Thomas, J., dissenting). Justice Thomas’s view that *Comcast* does not permit class certification when individualized damages calculations would be required does not appear to be viable in light of *Tyson Foods*. See Bruce Kaufmann, Challenging Statistical Evidence After *Tyson Foods*, CLASS ACTION LITIGATION REPORT (June 10, 2016), https://www.bna.com/challenging-statistical-evidence-n57982073931/.

\(^{60}\) See, e.g., Levy v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013) (holding that *Comcast* did not bar certification when payroll records would allow the court to calculate individual damages with ease); In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litigation, 722 F.3d 838, 860-61 (6th Cir. 2013) (holding that *Comcast* had only limited application to class certification when liability and damages were bifurcated); Johnson v. Nextel Commc’ns Inc., 780 F.3d 128, 139 n.11 (2d Cir. 2015) (holding that *Comcast* did not alter the Second Circuit’s predominance inquiry generally).

\(^{61}\) *See Tyson Foods*, 136 S. Ct. at 1043-44; *Comcast*, 133 S. Ct. at 1432-33.
Tyson Foods and that in Comcast, the Court left open the question of just how similar damages must be – in type, scope, and proof – for certification under Rule 23(b)(3) to be appropriate.  

The Court could have reached its decision in Tyson Foods by clarifying that Comcast limited the use of representative evidence only where there was no clear nexus between the representative evidence provided and plaintiffs’ theory of damages. Tyson Foods is easily distinguishable since all employees spent some time donning and doffing, and the primary question was the extent to which the representative average calculated by plaintiffs’ expert was probative of the time spent by individual employees. Alternatively, the Court could have crafted a narrow exception for FLSA-based claims when the evidence related to time spent by employees on tasks common to all class members. By not positioning its holding within its prior jurisprudence on the use of representative evidence in class actions, the Court provided little guidance for determining when representative evidence may establish classwide liability and support a finding of predominance. In doing so, the Court created a near certainty that it will need to revisit the issue in light of divergent approaches of the lower courts.

VI. Conclusion

Tyson Foods held that there is no categorical rule against the use of representative evidence in class actions to establish classwide liability and damages or support a finding of predominance of common issues of law or fact. Beyond this principle, which was far from obvious in the wake of Wal-Mart and Comcast, the Court provided little guidance for lower courts to determine when representative evidence may be considered in a class action, whether the rules differ between FLSA-based actions and other Rule 23(b)(3) class actions, and just how amenable to common proof liability and damages must be to support a finding of predominance. If the Court ultimately hears Monroe after the Sixth Circuit reconsiders the case on remand in light of Tyson Foods, the breadth and significance of Tyson Foods may become less murky. Until the Court weighs in on this issue again, its recent decisions

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62. The Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017), would eliminate some uncertainty in this area, or at least reframe the question. The bill, which passed the House on March 9, 2017 and has been referred to the Senate Judiciary Committee, would require that members of a class seeking monetary relief demonstrate that each class member “suffered the same type and scope of injury.” Opponents of the bill have decried it as imposing “burdensome” and “unnecessary” restrictions on plaintiffs in class actions and multi-district litigation designed to favor corporate defendants. See H.R. REP. NO. 115-25, at 45-63 (2017).

63. Tyson Foods, 136 S. Ct. at 1049.

64. Id. at 1048.

65. See Supreme Court Says 6th Circuit Must Revisit FLSA Verdict After Tyson, supra note 48.
may offer support for a wide variety of approaches to deciding whether to certify classes on the basis of representative evidence.

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