Civil Procedure — Representative Evidence — Tyson Foods, Inc. v. Bouaphakeo

Slaughtering hogs can get messy. Employment litigation can too. Last Term, in *Tyson Foods, Inc. v. Bouaphakeo*,[1] the Supreme Court held that statistical evidence was admissible to prove liability and damages across a class, thereby allowing it to support class action certification.[2] The Court reached a sensible rule for admitting representative studies. Its application of that rule to *Tyson Foods*, however, offers little help to trial judges confronted with such evidence in the future. In particular, the Court did not fully consider how statistical evidence might at times compel split proceedings in a class action suit. And though *Tyson Foods* improves judicial economy, the Court need not have stepped on Tyson's individual defenses to do so. Indeed, several unresolved controversies present similar opportunities to streamline wage-and-hour litigation without the same due process risks.

At the Tyson Foods factory in Storm Lake, Iowa, employees turn hogs into pork.[3] Protecting them from workplace hazards requires a substantial ensemble, including boots, gloves, hard hats, "frocks, belly guards, aprons, . . . arm guards," and sanitary apparel.[4] Tyson credited at least some employees with extra work time to compensate them for donning and doffing this equipment, as well as sanitizing knives and other tools.[5] Unsatisfied with that arrangement, however, the employees sued for unpaid overtime wages under state and federal law.[6]

The Fair Labor Standards Act of 1938[7] (FLSA) generally requires employers to pay premium wages to employees working overtime.[8] When an employer fails to do so, employees have a private right of action to recover their due.[9] Because employers often compensate multiple employees under a common system, "similarly situated" employees can join their FLSA claims in a single action.[10] These lawsuits, dubbed "*collective* actions,"[11] require each employee to "opt in" to the

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1 136 S. Ct. 1036 (2016).

2 *See id.* at 1045–47.

3 Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 878 (N.D. Iowa 2008).

4 *Id.* at 879.

5 *Id.*

6 *Id.* at 877.

7 Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

8 The statute defines overtime as time worked in excess of forty hours per week and requires employers to pay for such labor at one-and-a-half times the employee's regular hourly rate. *See* 29 U.S.C. § 207(a)(1) (2012).

9 *Id.* § 216(b).

10 *Id.*

11 *E.g.*, Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1527 (2013) (emphasis added).

litigation.[12] In Iowa, employees can also compel payment under the Iowa Wage Payment Collection Law[13] (IWPCL). That statute requires employers to "pay all wages due [their] employees" at certain times and in specified ways.[14] The "wages due" include all pay guaranteed by federal law.[15] So the Tyson employees pursued both state and federal claims under the same theory: Tyson's payment practices violated the FLSA. They asked the district court to certify their federal claims as a collective action and their state-law claims as a class action.[16]

Tyson challenged this maneuver early on, arguing both that the FLSA preempted the state-law claims and that the court could not combine the two multiparty procedures.[17] The district court rejected both contentions and moved the case ahead.[18] While discovery was underway in *Tyson Foods*, the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*.[19] *Wal-Mart* held that where individual store managers had substantial discretion, representative evidence could not prove institutional sex discrimination against all female employees.[20] In light of that result, Tyson renewed its motion to decertify the class.[21] It now argued that *Wal-Mart* foreclosed the employees' attempt to use a statistical study of average donning and doffing times to support class certification.[22] The district court denied Tyson's motion, considering *Wal-Mart* "largely inapplicable" or at least "distinguishable."[23] *Tyson Foods* went to trial, where the employees prevailed with help from their statistical study.[24] Without explanation, however, the jury awarded just $2.9 million to the class — a substantially smaller figure than the study supported.[25] Tyson appealed.

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12 *See* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party . . . .").

13 IOWA CODE § 91A.3 (2016).

14 *Id.* § 91A.3(1).

15 Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 883 (N.D. Iowa 2008) ("[T]he FLSA may be used to establish an employee's right to a certain amount of wages under the IWPCL and an employer's violation of the IWPCL for not paying 'all wages due its employees.'" (quoting IOWA CODE § 91A.3(1))).

16 *Id.* at 879–80.

17 *Id.* at 880.

18 *See id.* at 910.

19 564 U.S. 338 (2011).

20 *See id.* at 353–56.

21 *See* Bouaphakeo v. Tyson Foods, Inc., No. 5:07-CV-04009-JAJ, 2011 WL 3793962, at *1 (N.D. Iowa Aug. 25, 2011).

22 *Id.* The Tyson employees had to support class certification under Rule 23(b)(3) by showing that "questions . . . common to class members predominate[d] over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

23 *Tyson Foods*, 2011 WL 3793962, at *1.

24 Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 796 (8th Cir. 2014).

25 *See Tyson Foods*, 136 S. Ct. at 1044 ("[Dr. Liesl] Fox's calculations supported an aggregate award of approximately $6.7 million in unpaid wages.").

The Eighth Circuit affirmed.[26] Writing for the panel, Judge Benton[27] found that statistical evidence could help prove that Tyson's policy had injured every class member, thereby showing a predominance of common issues and supporting class certification.[28] The circuit court also backed the trial court's conclusion that *Wal-Mart* had no bearing on this case[29] and further approved the employees' use of average donning and doffing times to prove classwide damages.[30] The fact that some employees could not rely on the averages to prove they had worked overtime did not doom the suit in the circuit court's view.[31] Judge Beam dissented.[32] He opposed certification of both the class action and the collective action.[33] Moreover, Judge Beam argued that the two mechanisms were incompatible and thus the trial court should not have combined them.[34] Having been "slaughtered, trimmed, and prepared for shipment"[35] by the lower courts, Tyson sought certiorari.

The Supreme Court affirmed. Writing for the Court, Justice Kennedy[36] considered two issues regarding representative evidence in class litigation. First, the Court refused to establish a "categorical exclusion" for representative studies.[37] It reasoned that admitting evidence depends not on procedural devices but on probative value relative to cost.[38] Observing that representative samples are often probative and sometimes indispensible, the Court concluded that procedural rules alone could not bar their use.[39] On the contrary, the Court reasoned that if an individual could bring a statistical study as evidence, then the class action device could not dissolve that right.[40]

Applying this reasoning, the Court held that FLSA precedent permitted the employees' study. The employees resorted to the average times only because Tyson had not kept records of donning and doffing.[41] The Court therefore compared the case to *Anderson v. Mt.*

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[26] *Tyson Foods*, 765 F.3d at 794.

[27] Judge Benton was joined by Judge Smith.

[28] *See Tyson Foods*, 765 F.3d at 797–800.

[29] *Id.* at 797.

[30] *See id.* at 799–800.

[31] *See id.*

[32] *See id.* at 800 (Beam, J., dissenting).

[33] *See id.*

[34] *Id.*

[35] *Tyson Foods*, 136 S. Ct. at 1042.

[36] Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[37] *Tyson Foods*, 136 S. Ct. at 1046.

[38] *Id.*

[39] *See id.* (citing Brief of Amicus Curiae Complex Litigation Law Professors in Support of Respondents at 5–9, *Tyson Foods*, 136 S. Ct. 1036 (No. 14-1146)).

[40] *Id.* at 1046–47.

[41] *Id.* at 1043.

Clemens Pottery Co.[42] Because the *Mt. Clemens* Court had allowed employees to use representative evidence to create a "just and reasonable inference" that they had performed uncompensated work when their employer had not kept records of it, the *Tyson Foods* Court could do the same.[43]

On the second issue, the Court observed that Tyson had abandoned its argument that the presence of uninjured class members — a side effect of using averages — doomed class certification.[44] Instead, the Court addressed Tyson's "new argument": that it should not have to pay the class until the employees demonstrated that uninjured class members were not factored into, and could not collect from, the class award.[45] The Court did not think that issue ripe for review, and invited Tyson to raise it with the trial court.[46] The Court did, however, note that Tyson may have helped create the problem by opposing separate proceedings for liability and damages.[47]

Chief Justice Roberts concurred[48] to express particular worry over the challenges the trial court now faced in distributing the class award.[49] He observed that the jury had not accepted the average donning and doffing times from the statistical survey;[50] doing so would have required a much larger damage award.[51] But the jury also did not specify *how* it had reached its final figure. The trial court was thus left to wonder which employees took what amount of time to don and doff.[52] Without that information, the court had no way of knowing which employees actually worked overtime,[53] and therefore who shared in the damages.[54] The Chief Justice rejected the majority's speculation that the court below could assume a standard — though reduced — total donning and doffing time for each employee, arguing that the testimony of the employees' expert witness undermined that

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[42] 328 U.S. 680 (1946).

[43] *Tyson Foods*, 136 S. Ct. at 1047 (quoting *Mt. Clemens*, 328 U.S. at 687).

[44] *See id.* at 1049.

[45] *See id.*

[46] *See id.* at 1050.

[47] *See id.*

[48] Chief Justice Roberts was joined by Justice Alito as to Part II of his concurrence, discussing the damages distribution.

[49] *See Tyson Foods*, 136 S. Ct. at 1050 (Roberts, C.J., concurring).

[50] *See id.* at 1051; *see also id.* at 1044 (majority opinion) (observing the discrepancy between the employees' evidence and the jury award).

[51] *Id.* at 1052 (Roberts, C.J., concurring).

[52] *Id.*

[53] The expert's averages indicated that 212 employees had not worked overtime, *id.* at 1044 (majority opinion), but because the damages figure did not fully credit the expert's estimates, the number of employees that the jury deemed not to have worked overtime could have been much larger.

[54] *Id.* at 1052 (Roberts, C.J., concurring) ("We just don't know . . . .").

approach.[55] According to Chief Justice Roberts, because the courts lacked the power to provide a remedy without a wrong, Tyson's contribution to the error would not matter.[56]

Justice Thomas dissented.[57] Recognizing the "exception[al]" nature of class action litigation, he stressed a judge's duties in certifying and maintaining a valid class.[58] He called the overtime threshold a "clearly individualized" element of the employees' claims, which required the trial court to seriously question whether class issues predominated.[59] Instead that court had focused on the compensation *system*, ignoring the essential inquiry and improperly certifying the class.[60] The trial court then compounded its error by not revisiting the question after evidence showed wide variation in donning and doffing times.[61] As a result, the case went through trial with uninjured class members in tow.[62] Justice Thomas also argued that the majority's predominance inquiry conflicted with *Comcast Corp. v. Behrend*,[63] which held that "individual[ized] damage calculations will inevitably overwhelm" class issues.[64] He pointed out that the majority's own standard for admitting statistical samples — allowing them if the class members could have introduced them individually — "doom[ed]" the class here.[65] This was because individual employees had testified to donning and doffing times that "diverged markedly" from the averages.[66]

Though the Court reached a sound conclusion on the admissibility question, it failed to guide trial judges on how to handle representative studies going forward. Statistical evidence might enable class certification, but it might also indicate a need for separate proceedings on individual issues. Further, the outcome in *Tyson Foods* promotes judicial economy but at too great a cost. By resolving two other open debates first, the Court could have streamlined wage-and-hour litigation without threatening employers' right to mount individual defenses.

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[55] *See id.*

[56] *See id.* at 1053.

[57] Justice Thomas was joined by Justice Alito.

[58] *See Tyson Foods*, 136 S. Ct. at 1053 (Thomas, J., dissenting) (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013)).

[59] *Id.* at 1054.

[60] *Id.* at 1054–55.

[61] *Id.* at 1055–56.

[62] *Id.*

[63] 133 S. Ct. 1426.

[64] *Tyson Foods*, 136 S. Ct. at 1056 (Thomas, J., dissenting) (quoting *Comcast*, 133 S. Ct. at 1433).

[65] *Id.* at 1057.

[66] *Id.*

Whether consistent with *Comcast* or not,[67] the Court's decision to allow class certification in *Tyson Foods* enables class litigation despite the availability of individual defenses.[68] That result follows from the Court's broader holding regarding statistical evidence, namely that its admissibility depends on its "purpose" and "the elements of the underlying cause of action."[69] In *Tyson Foods*, the employees' claims required them to show that they were not paid for compensable work and to set up a "just and reasonable inference" regarding "the amount and extent" of that work.[70] As a result, both liability and damages turned on the same quantitative fact: how much time each employee took to don and doff. The expert's study can indeed support a reasonable inference that each employee took an average amount of time. But that's only half of the inquiry, because the employer has the opportunity to show "the precise amount of work performed" or else "negative the reasonableness of the inference" that each employee set up.[71] The Court reasoned that Tyson could have done this by showing that the study was "unrepresentative or inaccurate" — a common defense.[72] But each inference connected the average donning and doffing times to an individual employee. Tyson thus could also have fought each inference by questioning just how "average" each employee really was — a plethora of individual defenses.

This situation did not bother the Court because it thought that using the statistical average was the *only* way any of the employees could have shown hours worked.[73] Not so. In fact, the underlying data supporting the study gave individualized evidence of donning and doffing times. With respect to any of the employees that appeared among the study's 744 videotaped observations, the tape itself would evince that particular employee's donning and doffing times.[74] Those individual times might not jibe with the average. So too, the Court did not consider the difference between proving damages for the below-average employees and the above-average employees. Those

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[67] *See Comcast*, 133 S. Ct. at 1433 ("[U]nder the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.").

[68] *Tyson Foods*, 136 S. Ct. at 1045 (citing 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. 2005)); *see also* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:54 (5th ed. 2012); 4 *id.* § 11:6 (explaining similar principles).

[69] *Tyson Foods*, 136 S. Ct. at 1046 (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011)).

[70] *Id.* at 1047 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)).

[71] *Id.* (quoting *Mt. Clemens*, 328 U.S. at 687); *id.* (quoting *Mt. Clemens*, 328 U.S. at 688).

[72] *Id.*

[73] *Id.*

[74] *See* Joint Appendix at 392, *Tyson Foods*, 136 S. Ct. 1036 (No. 14-1146).

employees that took *more* time than average to don and doff would not have used the average in an individual proceeding; doing so would have reduced their damages. On the contrary, Tyson could have used the study under such circumstances to "negative the reasonableness" of any inference that those employees did set up.

None of these points cut against the use of statistical evidence. Rather, they illustrate the potential for statistical evidence to show variation among individual claims as much as it shows similarity. Nevertheless, the Court concluded that the jury could decide how persuasive an admissible study actually was.[75] According to the Court, decertification was proper "only if [the trial court] concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing."[76] That might be true, but it fails to capture the situation in *Tyson Foods*. In a case where classwide proof of liability and damages depended on a quantitative element, the jury *had* to find that the employees took roughly the same amount of time to don and doff to reach a classwide verdict. Maybe it did, maybe it didn't. But if the jury found that at least some of the employees had dissimilar donning and doffing times, then Tyson was robbed of its individual defenses as to those employees.

In this way, the majority's opinion missed an opportunity to remind trial judges of their responsibility to manage class actions. Though a statistical study can support predominance, it can also demonstrate the need for individual proceedings. Where a data set shows "material variances" on a quantitative element of the claims,[77] courts should recognize it as evidence *against* common adjudication of that element. The trial court in *Tyson Foods*, for instance, could have asked the jury to specify whether it believed that the employees indeed took roughly the same time to don and doff. Such a finding would have justified a single proceeding. But had the jury found dissimilarity, individual hearings would have been appropriate to determine how much time each employee actually took. This problem of disparate work time typifies FLSA overtime claims,[78] and judges often see it as a reason to decertify a class or collective action.[79] And indeed, the trial

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[75] *Tyson Foods*, 136 S. Ct. at 1049.

[76] *Id.*

[77] *Id.* at 1055 (Thomas, J., dissenting).

[78] *See* Barry v. United States, 117 Fed. Cl. 518, 521 (2014) ("Individualized damages determinations must be made in virtually every FLSA case involving multiple plaintiffs . . . .").

[79] *See, e.g.*, Rindfleisch v. Gentiva Health Servs., Inc., 22 F. Supp. 3d 1295, 1303–04 (N.D. Ga. 2014); Reich v. Homier Distrib. Co., 362 F. Supp. 2d 1009, 1013–14 (N.D. Ind. 2005). *But see* Indergit v. Rite Aid Corp., 52 F. Supp. 3d 522, 525 (S.D.N.Y. 2014) ("[T]he fact that Plaintiffs failed to show that individualized proof of damages will not predominate other common issues — as required under Rule 23 — does not mean that the collective action must be decertified as to damages."); Bradford v. Bed Bath & Beyond, Inc., 184 F. Supp. 2d 1342, 1351 (N.D. Ga. 2002)

court in *Tyson Foods* will reap what it has sown with respect to the unexplained, lump-sum jury award.

But if holding 3344 individual hearings sounds inane, that's because it is.[80] Moreover, the appropriateness of multiparty litigation in the wage-and-hour context is baked into the FLSA. So as a matter of judicial economy, the Court's ruling in *Tyson Foods* makes sense. But the Court did not need to decide *Tyson Foods* in this way to promote efficient wage-and-hour litigation. Resolving two other longstanding issues with FLSA litigation could have obviated the need to run roughshod over the employer's individual defenses. *First*, the Tyson employees could have been limited to bringing a collective action only, thus substantially reducing the scope of the litigation. *Second*, and perhaps more importantly, the trial court could have adopted a more sensible measure of damages to facilitate common adjudication.

Certifying a class action inevitably raises the stakes and complexity of litigation because "few people actually take the effort to opt out."[81] In *Tyson Foods*, 444 employees joined their federal claims, but the class numbered over 3300.[82] *Tyson Foods* thus exemplifies a prevalent strategy of the plaintiffs' bar: creating "[h]ybrid suits" by combining state employment law claims with FLSA claims.[83] As the district court acknowledged, the circuits stand divided on whether the FLSA preempts state statutes that enable hybrid suits.[84] Despite the "plethora of cases" reaching the opposite conclusion,[85] however, the trial court allowed *Tyson Foods* to move forward as a hybrid.

The FLSA's evolution cuts the other way. When Congress first enacted the FLSA, it enabled employees bringing claims to represent other employees absent from the litigation — similar to the modern class action.[86] But finding that this practice contributed to "wholly unexpected liabilities, immense in amount and retroactive in operation," Congress changed its mind.[87] To prevent the FLSA from "bring[ing] about [the] financial ruin of many employers and seriously impair[ing] the capital resources of many others,"[88] Congress passed the Portal-to-

("At worst, if Plaintiffs are classified as nonexempt employees, some individual damages hearings may be required.").

80 *Cf.* Joint Appendix, *supra* note 74, at 267 (reporting one witness's testimony regarding the amount of time it takes to put on a hard hat).

81 DANIEL B. ABRAHAMS ET AL., EMPLOYER'S GUIDE TO THE FAIR LABOR STANDARDS ACT ¶ 920 (2016), Westlaw FLSAGUIDE.

82 *Tyson Foods*, 136 S. Ct. at 1043.

83 ABRAHAMS ET AL., *supra* note 81, at ¶ 927.

84 *See* Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 881–83 (N.D. Iowa 2008).

85 *Id.* at 885.

86 *See* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b) (2012)).

87 29 U.S.C. § 251(a).

88 *Id.*

Portal Act of 1947.[89] That law created the modern collective action by requiring written consent from all employees joined in a wage-and-hour dispute.[90] Though the Supreme Court has never addressed the issue, the lower federal courts have widely agreed that employees may not directly pursue FLSA claims as class actions.[91]

This blanket prohibition has several justifications. First, courts have viewed the opt-in and opt-out mechanisms as creating a "fundamental, irreconcilable difference" between the two procedures.[92] Simply put, a court cannot enforce an employee's statutory obligation to *join* a lawsuit by written consent while certifying a class to litigate the same employee's claims by default. In addition, a Rule 23(b)(3) class action should only proceed if it is "superior" to any other means of fair, efficient adjudication.[93] Similarly, courts must deem joinder "impracticable" before certifying a class,[94] and the collective action is a joinder procedure.[95] Thus, to certify a class for FLSA litigation, a court must override Congress's preferred procedure as not only inferior but also impracticable. And if the above leaves any doubt, the Advisory Committee that created the opt-out class action also noted its intent to leave the collective action device unaltered.[96]

The trial court relied heavily on the FLSA's "savings clause" to reject Tyson's preemption argument, thereby permitting state law to accomplish the same banned result.[97] When Congress explicitly authorizes state legislation, it typically allays preemption concerns. But the district court paid little heed to exactly *what* state legislation Congress authorized. The FLSA savings clause specifies only that the statute should not obstruct state and local efforts to *raise the minimum wage* or *shorten the maximum workweek*.[98] It does not mention states altering FLSA enforcement. That question should command attention where state laws allow an otherwise-banned procedure to augment liability severalfold. So too, the preemption issue implicates congressional intent,[99] and states may not "interfere[] with the *methods* by

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89 Pub. L. No. 80-49, 61 Stat. 84 (codified as amended in scattered sections of 29 U.S.C.).

90 *See* 29 U.S.C. § 216(b).

91 *See, e.g.*, Lusardi v. Lechner, 855 F.2d 1062, 1068 n.8 (3d Cir. 1988); *see also* ABRAHAMS ET AL., *supra* note 81, at ¶ 920; William C. Jhaveri-Weeks & Austin Webbert, *Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, 23 GEO. J. ON POVERTY L. & POL'Y 233, 241 (2016).

92 LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975).

93 FED. R. CIV. P. 23(b)(3).

94 *Id.* at 23(a)(1).

95 Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1527 n.1 (2013).

96 *See* FED. R. CIV. P. 23(b) advisory committee's note to 1966 amendment.

97 *See* Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 881, 885–86 (N.D. Iowa 2008).

98 29 U.S.C. § 218(a) (2012).

99 *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).

which [a] federal statute was designed to reach [its] goal."[100] Thus, to hold against preemption, the district court must have found that Congress intended to allow the states to undo its own procedural fine-tuning.

But the trial court had an even easier way to simplify this suit. In resurrecting *Mt. Clemens* to haunt Tyson on the evidence issue, the Supreme Court ignored the standard *Mt. Clemens* gave for measuring damages in comparable cases. Faced with a similar issue of compensable, unrecorded labor, the *Mt. Clemens* Court directed the trial court to determine only "the minimum time necessarily spent" on the task at issue.[101] The Court called it "unfair and impractical" to pay employees retroactively for time wasted while presumably off the clock.[102] In addition to being fair,[103] this rule would allow courts to adjudicate the quantitative issue for all employees in common. Lower courts agree that this language is relevant to whether an activity is so insignificant as to render it noncompensable.[104] The circuits split, however, over how the same language bears on damages generally.[105] The Supreme Court's concerns for practicality in *Tyson Foods*, as well as its willingness to apply *Mt. Clemens*, might tip the scale in favor of a minimum-time standard.

The Court in *Tyson Foods* thus announced a sensible rule of evidence without fully accounting for how it should apply to wage-and-hour disputes — like *Tyson Foods*. Trial judges would have benefited from some discussion of managing statistical evidence when it is admissible. Moreover, this case exemplifies just how far some lower courts have wandered from the procedure Congress and the Supreme Court once provided for multiparty wage-and-hour disputes. Those issues linger for now. In the meantime, *Tyson Foods* will add to the procedural slop that wage-and-hour claims inevitably produce.

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100 Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (emphasis added).

101 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946).

102 *Id.*

103 *Cf. Tyson Foods*, 136 S. Ct. at 1059 (Thomas, J., dissenting) ("The majority thus puts employers to an untenable choice. They must either track any time that might be the subject of an innovative lawsuit, or they must defend class actions against representative evidence that unfairly homogenizes an individual issue.").

104 *See, e.g.*, Lesane v. Winter, 866 F. Supp. 2d. 1, 7 (D.D.C. 2011); Musticchi v. City of Little Rock, 734 F. Supp. 2d. 621, 632 (E.D. Ark. 2010).

105 *See* Lopez v. Tyson Foods, Inc., 690 F.3d 869, 878 (8th Cir. 2012) (citing Alvarez v. IBP Inc., 339 F.3d 894, 919 (9th Cir. 2003); Reich v. IBP, Inc., 38 F.3d 1123, 1127 (10th Cir. 1994); Brock v. City of Cincinnati, 236 F.3d 793, 803 (6th Cir. 2001); Holzapfel v. Town of Newburgh, 145 F.3d 516, 528 (2d Cir. 1998)).