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Labor

'Aggressive' Challenges to Plaintiffs' Experts May Spike After *Tyson Foods*

A March U.S. Supreme Court ruling will likely spur additional expert reliability challenges to statistical and other representative evidence in a broad range of class certification disputes, many attorneys and academics tell Bloomberg BNA.

The top court, in *Tyson Foods v. Bouaphakeo* (17 CLASS 307, 3/25/16) , upheld 6-2 the plaintiff's use of representational proof to support class status for a group of workers in a labor dispute.

Representative evidence, often in the form of statistical proof, is commonly used in class actions to show that prospective class members are situated similarly to the named class representatives—a requirement under the federal rules of civil procedure.

The Supreme Court didn't issue any broad ruling concerning the use of *Daubert* to restrict plaintiffs' representative evidence in *Tyson Foods Inc. v. Bouaphakeo*, 2016 BL 87179, U.S., No. 14-1146, *decided* 3/22/16.

But it is ''most likely that defendants will raise *Daubert* and other evidentiary challenges to plaintiffs' offers of expert testimony on statistical proof in the future,'' Professor Linda S. Mullenix of the University of Texas School of Law in Austin told Bloomberg BNA.

In *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), the Supreme Court set forth the test for courts to apply in evaluating the reliability of expert evidence, including statistical-based representative proof.

Mullenix said that an ''object lesson'' derived from *Tyson Foods* is that the defendant's failure to raise the *Daubert* challenge in the underlying proceedings led the top court to conclude that defendant Tyson Foods couldn't ''subsequently object after introduction of this evidence at trial.''

Justice Clarence Thomas' dissent emphasized this point. In Thomas's view, the defendant's failure to raise a *Daubert* challenge at an earlier stage in the employment law case shouldn't have constituted a waiver of the defendant's objection to methodically questionable expert evidence, she said.

Two Out of Three Defense Attorneys Agree. Two defendants' attorneys—Jason M. Halper with Orrick, Herrington & Sutcliffe in New York and Gerald L. Maatman with Seyfarth Shaw in Chicago—agreed with Mullenix.

Halper told Bloomberg BNA that *Tyson Foods* ''almost certainly will lead defendants to mount such challenges more frequently given the outcome in the case and the court's comments on Tyson's decision to forego those challenges.''

In light of the result in *Tyson Foods*, defendants ''would have to think long and hard before deciding not to offer a rebuttal expert and/or challenging plaintiff's expert evidence via a *Daubert* motion.''

Asked if *Tyson Foods* will stimulate additional *Daubert* challenges, Maatman told Bloomberg BNA that the ''short answer is yes.''

''That being said, in high stakes, complex litigation, it is rare for a defendant to not make a *Daubert* challenge as to plaintiffs' expert opinions offered in support of a motion for class certification and/or on merits issues,'' he said. ''That is what makes *Tyson* so rare and unusual.'' he said.

Plaintiffs' attorney Jason L. Lichtman, with Lieff, Cabraser, Heimann & Bernstein in New York, was more circumspect.

Tyson Foods will bring about an increase in *Daubert* challenges to representative evidence in class certification disputes but ''only at the margins,'' he told Bloomberg BNA.

Since *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011) (12 CLASS 519, 6/24/11), the defense bar has already tended to attack class certification ''very aggressively,'' he said.

This means it's already unusual for defendants in high stakes litigation to ''hold back'' on evidentiary motions, he said.

The Supreme Court said in *Wal-Mart* that a proposed class of over a million female Wal-Mart workers alleging pay and promotion discrimination couldn't be certified because they failed to establish enough of a common thread in the case to tie their claims together.

''Now, obviously, there are some strategic reasons defendants may not want to attack an expert during class certification, and *Tyson Foods* may impact that calculus to the extent that defendants may be hesitant to waive the argument that an expert's testimony is legally insufficient,'' Lichtman said.

Attorney Sees No Hike in *Daubert* Challenges. But defendants' attorney Andrew J. McGuiness, who operates a class action boutique practice in Ann Arbor, Mich., disagreed that *Tyson Foods* will encourage future *Daubert* challenges.

McGuiness, a co-chair of the ABA Class Action Committee Antitrust Subcommittee, told Bloomberg BNA that *Tyson Foods* won't substantially change *Daubert* practice in class actions.

He said many court observers misread *Tyson Foods* as suggesting a timely *Daubert* challenge would have led to a different result.

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''The *Tyson Foods* Court mentioned, almost as an aside, that the defendant had not filed a *Daubert* motion,'' McGuiness said.

''This was simply reciting a procedural fact in the case—equivalent to saying 'defendant did not challenge the admissibility of the expert's testimony.' Had the analysis/testimony not been sufficiently reliable—had the expert relied on 'junk science' or methodologies—then of course the defendant would have been better off challenging its admissibility,'' he said.

''However, there is no suggestion that the expert's work [in *Tyson Foods*] was based on junk science or methodologies. Accordingly, defendant would have gained nothing from filing a *Daubert* motion in that case, which instead would likely have been a waste of the client's money and served only to underscore the validity of the expert's methods,'' he said.

Looking ahead, McGuiness said it is possible that *Tyson Foods* could have ''the unintended consequence of leading to either (a) more Rule 23(f) appeals (seeking discretionary intermediate appeal of a certification order), or (b) more renewed *Daubert* motions (after class certification but before trial).''

This is because language in the opinion underscores the role of the jury in evaluating admissible but disputed evidence, and the deference of appellate courts to a jury's resolution of such a dispute, he said.

''Defendants may be motivated to try even harder to avoid that deference being used against them in a possible post-trial appeal in a class case,'' he said.

''But since relatively few class cases go to trial, Rule 23(f) petitions are already frequently filed where cases are certified, and a renewed *Daubert* motion absent some good intervening basis is not likely to be successful, *Tyson Foods* should not substantially change *Daubert* practice in class actions,'' he said.

How Will Challenges to Representative Evidence Fare? Mullenix said the Supreme Court in *Tyson Foods* was ''very careful'' to limit its opinion on the use of statistical evidence, and not to issue a categorical rule supporting or discrediting the use of statistical proof.

Instead, the court stated that ''whether statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action,'' she said.

Consequently, both defendants and plaintiffs will continue to raise challenges to the introduction of expert witness testimony on statistical proof under *Daubert*, she said.

Whether these challenges will be successful will depend on each court's careful scrutiny ''of the purpose for which the evidence is introduced and the elements of the underlying cause of action,'' she said, quoting from the opinion.

According to Mullenix, the court in *Tyson Foods* suggested that the relevant question for a court to ask is: ''Can the sample at issue have been used to establish liability in an individual action?''

If the answer is ''yes,'' as the court concluded in *Tyson Foods*, then the court should allow use of the expert testimony.

If not, as in *Wal-Mart v. Dukes*, then the court should disallow use of the testimony, she said.

Because this test will have different applications for the varying elements in employment, product liability, antitrust, and other substantive cases, ''courts have been instructed to take a nuanced approach to evaluating whether use of statistical expert testimony is appropriate in the specific context of the underlying cause of action,'' she said.

Effect in High Stakes Litigation. Lichtman, the plaintiffs' attorney, said ''strong evidentiary challenges are going to be successful as they always have been.''

Because defendants tended to make strong evidentiary challenges before *Tyson Foods* was issued, he doesn't foresee a ''massive uptick in the number of successful challenges'' in light of *Tyson Foods*.

''In other words, I think the new evidentiary challenges will frequently be more marginal than the ones that were being made prior to *Tyson Foods,*'' Lichtman said.

Like Mullenix, Lichtman also didn't see distinctions in success rate depending on the subject matter of the case.

''Only in the sense that there are certain practice areas such as antitrust and high dollar consumer litigation where it was already vanishingly rare for defendants not to file evidentiary motions in connection with opposition to class certification,'' he said.

Halper also said that whether a challenge to plaintiffs' representative evidence will be successful is a very case-specific inquiry.

''The outcome will depend on, among other things, the specific opinions offered, the expert's qualifications and the quality of his or her analysis, the applicability of the analysis to the plaintiff's claims, the strength of the defendants' rebuttal experts, and similar case-specific issues,'' he said.

''As a general matter, however, the *Tyson Foods* decision makes clear that representative evidence, whether offered by plaintiffs or defendants, is at least in theory admissible at the class certification stage, subject to the admissibility requirements of the Federal Rules of Evidence and related case law,'' Halper said.

McGuiness, who didn't foresee an increase in *Daubert* challenges in light of *Tyson Foods*, also said there is no reason to think that *Daubert* challenges will be more or less successful in class actions because of *Tyson Foods*.

''Comparing class cases with other commercial litigation, the fact that many class actions have greater amounts at stake should lead each side, plaintiffs and defendants, to devote more care and resources to expert testimony, and this should yield higher quality reports and reduce the likelihood of successful *Daubert* challenges in class cases,'' he said.

Asked if the success rate with *Daubert* challenges in class action proceedings might depend on the subject matter of the case, McGuiness said it might, but ''only in the sense that some cases have more dollars at stake than others.''

The higher the stakes, the ''more experienced counsel and resources are attracted to the case, leading to higher-quality expert reports and testimony, and more sophisticated treatment of the issues presented,'' he said.

''*Tyson Foods* is somewhat remarkable in this respect, in that plaintiffs' counsel appear to have done an excellent job of retaining qualified experts and giving them the budget to do a thorough job on the time and

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motion studies and other analyses in what was a relatively modest case,'' he said.

Factors Driving Success in *Daubert* Challenges. Maatman dove deeper into the case-by-case factors that might impact a party's success in using *Daubert* in putative class actions:

Considerations include:

- the district court's views on the role of experts and the gate-keeping function under *Daubert*;
- the relative strength or weakness of the expert's opinion;
- the syncing (or lack thereof) and/or ''fit'' of the expert's opinion and the plaintiffs' theory of the case for class certification purposes; and,
- circuit law on certification standards.

''Not all circuits are the same,'' Maatman said. ''Location—like with real estate—is key,'' he said.

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