COMPLEX LITIGATION

SECOND EDITION

2017 Summer Supplement

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Chapter 1

TERRITORIAL (PERSONAL) JURISDICTION

A. INTRODUCTION

2. Specific Jurisdiction/Stream of Commerce

***At Text page 15, add as Note 4*:**

For a court to exercise jurisdiction in a lawsuit, the court must have personal jurisdiction over the defendant. If the defendant is "essentially at home" in the forum, then the court may exercise "general" jurisdiction over the defendant on any cause of action. In contrast, if the defendant is not "essentially at home" in the forum, then the court may exercise "specific" personal jurisdiction over the defendant on a cause of action that arises out of defendant's relevant contact with the forum when the exercise of jurisdiction comports with fair play and substantial justice.

The Supreme Court ruled again on the scope of specific personal jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). In that case, non-residents of California sued Bristol-Myers Squibb (BMS) in state court in California. They alleged that the BMS drug Plavix caused personal injuries to them. BMS maintained certain research and laboratory facilities, certain sales representatives, and a state-government advocacy office in California. BMS also sold Plavix in the state (almost 187 million pills generating more than 900 million dollars between 2006 and 2012).

But BMS "did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Id.* at 1778. None of the non-residents were prescribed Plavix in California. None purchased Plavix there. None ingested Plavix there. And none were injured there.

BMS moved for dismissal on personal jurisdiction grounds. The California state courts denied the motion, but the Supreme Court reversed, holding that, "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum state.' When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781.

Justice Sotomayor dissented. Her view is that, "[T]here is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and non- residents alike." *Id.* at 1784. (Sotomayor, J., dissenting). In other words, "[the nonresidents'] claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. . . . All of

the plaintiffs – residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that." *Id.* at 1786. (Sotomayor, J., dissenting).

Do you agree? Would this be a form of "general" jurisdiction, i.e. if a company is engaged in nationwide commerce it can be sued in any State where its business injured at least one resident plaintiff? What would the due process limit be on the exercise of this kind of jurisdiction?

3. General Jurisdiction

***At Text page 24, add as Note 3*:**

In *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), plaintiff Nelson sued BNSF under the Federal Employers' Liability Act for alleged knee injuries sustained as an employee of the railroad. Plaintiff Tyrrell's estate sued BNSF under the FELA for Tyrrell's death from alleged exposure to carcinogens as a BNSF worker. Neither plaintiff ever worked for BNSF in Montana.

BNSF is "incorporated in Delaware and has its principal place of business in Texas." *Id.* at 1554. It has "2061 miles of railroad track in Montana (about 6% of its total track mileage of 32,500), employs some 2100 workers there (less than 5% of its total work force of 43,300), generates less than 10% of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4%)." *Id.*

The Montana Supreme Court in relevant part ruled that Montana courts could exercise personal jurisdiction over BNSF because the company "does business" and can "be found in" Montana. The U.S. Supreme Court reversed. First, the Court ruled that there could not be specific personal jurisdiction over BNSF because neither of the plaintiffs alleged that his injuries were from working in Montana. Second, the Court ruled that there could not be general personal jurisdiction over BNSF in Montana because BNSF is not incorporated there, does not maintain its principal place of business there, and is not so active there as to "render [it] essentially at home." Third, the Court declined to reach the question whether BNSF had consented to personal jurisdiction because the Montana Supreme Court had not ruled on that point.

Justice Sotomayor concurred in part and dissented in part, expressing the following concern: "The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation." *Id.* at 1560. Do you agree with her conclusion? Suppose you do. Is the bottom line truly a "windfall" to defendants? How would a court know when a multistate corporation is doing enough business in a given State that the corporation should be susceptible to suit there on *any* cause of action regardless of the corporation's principal place of business or State of incorporation?

D. INTERNATIONAL PERSONAL JURISDICTION

1. Same Tests, Similar Application

***At Text page 45, add to Note 3*:**

The Supreme Court has resolved the question presented by this Note 3. The Court ruled in *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017) that the Hague Service Convention does not bar service of a summons and complaint by mail. Article 10(a), referring to "the freedom to send judicial documents, by postal channels, directly to persons abroad" permits the sending of judicial documents for the purposes of service of process so long as two conditions are met: "first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." *Id.* at 1513.

Chapter 3

JOINDER OF PARTIES AND CLAIMS

B. JOINDER OF PARTIES AND CLAIMS

1. Joinder Basics

***At Text, page 158, insert the following text*:**

The issue in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017) was whether an intervenor of right under Fed. R. Civ. P. 24(a) must have independent standing under Article III of the Constitution to proceed with a claim. Plaintiff land developer Sherman paid the town of Chester for land for a housing subdivision and sought approval for the development plan. Later Sherman sued the town, alleging that the town had obstructed the development in such a way as to constitute an unconstitutional regulatory taking. Subsequently, Laroe Estates (Laroe), a different land developer, sought to intervene. Laroe claimed that it had paid Sherman substantial money in connection with the project, that it had an equitable interest in the property, and that Sherman would not adequately represent Laroe's interest in the litigation. Laroe's intervention complaint alleged a takings claim that was substantially identical to Sherman's. Laroe's request for money damages was ambiguous, however. It was unclear whether Laroe sought damages from the town in Laroe's own name, separate from Sherman's damages request, or whether Laroe was seeking the same damages as Sherman, to be allocated later between those two parties.

The Supreme Court held that, "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." Id. at 1651. So, the Court concluded, "If Laroe wants only a money judgment of its own running directly against the Town, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene." *Id.* at 1652.

C. CLASS LITIGATION

2. Class Actions under Federal Rule 23

b. The Rule 23(b) "Categories" of Class Actions

iii. Rule 23(b)(3)

At Text, page 224, insert the following text at the end of Note 4:

The Court upheld a classwide demonstration of damages in a 23(b)(3) class in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047-48 (2016). In that case, a group of employees at a meat-packing plant sued to recover compensation for time spent donning and doffing protective gear. Their claims related to overtime, which required each to show that she had worked more than 40 hours per week, including time spent donning and doffing. The class relied upon representative evidence based on an expert's videotaped observations, from which he extrapolated average times spent donning and doffing by various groups of employees.

For those wishing to use *Tyson Foods* as a principal case, the Appendix to this Supplement is an edited version of the case. For others, this quotation from the opinion, distinguishing *Wal-Mart*, may suffice:

> Petitioner's reliance on *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011), is misplaced. *Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.
>
> * * *
>
> The plaintiffs in *Wal-Mart* did not provide significant proof of a common policy of discrimination to which each employee was subject. "The only corporate policy that the plaintiffs' evidence convincingly establishe[d was] Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters"; and even then, the plaintiffs could not identify "a common mode of exercising discretion that pervade[d] the entire company."
>
> The plaintiffs in *Wal-Mart* proposed to use representative evidence as a means of overcoming this absence of a common policy. Under their proposed methodology, a "sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master." Id., at 367. The aggregate damages award was to be derived by taking the "percentage of claims determined to be valid" from this sample and applying it to the rest of the class, and then multiplying the "number of (presumptively) valid claims" by "the average backpay award in the sample set." Ibid. The Court held that this "Trial By Formula" was contrary to the Rules Enabling Act because it "'enlarge[d]'" the class members' "'substantive right[s]'" and deprived defendants of their right to litigate statutory defenses to individual claims. Ibid.
>
> The Court's holding in the instant case is in accord with *Wal-Mart*. The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their managers. * * *

g. Appeals

***At Text, page 268, insert the following text*:**

A recurring issue in class litigation has been whether a plaintiff whose class certification motion has been denied can voluntarily dismiss its claims with prejudice, thereby making an appeal possible under 28 U.S.C. § 1291 (the final judgment rule) with respect to the denial of certification. The tactic has been for plaintiff to stipulate with the defendant to accept a judgment of dismissal, but to reserve the right to reinstate plaintiff's claims in the event that the denial of class certification is reversed on appeal. The tactic has been used when plaintiff has unsuccessfully first sought permission to appeal the denial immediately under Fed. R. Civ. P. 23(f), and considers the case not worth litigating in the absence of a class.

The Supreme Court foreclosed that tactic in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). The Court held that Rule 23(f) was the product of "careful calibration." *Id.* at 1714. The Court rejected the idea that a plaintiff through a stipulation reserving a right to reinstate claims could convert an interlocutory class certification denial into a final judgment under 28 U.S.C. § 1291. *Id.* at 1714-15. This idea, said the Court, would have the effect of allowing plaintiffs to end-run Rule 23(f) and subvert the integrity of the final-judgment principle.

Chapter 4

COORDINATION AND CONSOLIDATION OF OVERLAPPING LITIGATION

B. OVERLAPPING FEDERAL CASES

2. Transfer of Cases under §§ 1404(a) or 1406(a) (and a Refresher on Venue)

***At Text, page 351, insert the following text*:**

One of the special venue statutes is the Patent Venue Statute, 28 U.S.C. § 1400(b). In *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), the question before the Supreme Court was whether Congress de facto amended § 1400(b) in 1988 and in 2011 when Congress amended the general venue statute, 28 U.S.C. § 1391(c). The Court said no. The Court concluded there was no indication that Congress intended to amend § 1400(b) in either 1988 or in 2011. Therefore, when § 1400(b) says in part that, "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides . . .," it means as to domestic corporations what it has meant ever since its interpretation by the Court in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957): "In *Fourco*, this Court definitively and unambiguously held that the word 'reside[nce]' in § 1400(b) has a particular meaning as applied to domestic corporations: It refers only to the State of incorporation." 137 S. Ct. at 1520.

Chapter 6

JUDICIAL MANAGEMENT AND CONTROL OF PRETRIAL PROCEDURE

E. JUDICIAL CONTROL THROUGH SANCTIONS

3. Inherent Authority

***At Text, page 526, insert the following text*:**

Although federal courts have inherent authority to sanction litigants for bad faith conduct, the sanction "is limited to the fees the innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1184 (2017). In *Goodyear*, the lawyer for the Haegers discovered post-settlement that Goodyear had failed to disclose requested test data revealing that the relevant tire model involved in an accident "got unusually hot at speeds of between 55 and 65 miles per hour." *Id.* The district court concluded that Goodyear had acted in bad faith, but, because the lawsuit had settled, the court was limited to assessing a sanction under its inherent powers to control proceedings before it. The court then ordered Goodyear to pay 2.7 million dollars to the Haegers – the entire amount of their legal fees and costs "since the moment early in the litigation, when Goodyear made its first dishonest discovery response." *Id.* at 1185. The Supreme Court stressed, however, that an inherent authority sanction imposed pursuant to civil procedures "must be compensatory rather than punitive in nature." *Id.* at 1186. And only in exceptional cases will such a sanction include all of an innocent party's fees and costs. *Id.* at 1187-88. The Court remanded the sanction order for reconsideration in light of the correct standard (and a possible Goodyear waiver of any objection to 2 million dollars of the sanction under the correct standard). *Id.* at 1190.

Chapter 8

DISCOVERY

B. THE DISCOVERY PROCESS IN COMPLEX LITIGATION

1. Discovery Plans

At Text, page 603, insert the following after number paragraph 2:

3. Amendments to the Federal Rules of Civil Procedure went into effect on December 1, 2016. Rule 6(d), which provides for an additional three day response time after certain kinds of service was modified to exclude electronic service under Rule 5(b)(2)(E). According to the Advisory Committee, "[t]here were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission." Fed. R. Civ. P. 6(d), advisory committee's note to 2016 amendment. Previously, if a party was served an electronic request for discovery, they would have an additional three days to respond to that request. However, with a common understanding that improvements in technology have made electronic service more reliable, the amendment to Rule 6(d) has now eliminated this three day provision.

3. Document Retention Policies

At Text, page 608, insert the following after number paragraph 3:

4. The United States Court of Appeals for the Eighth Circuit recently had the opportunity to hear a case regarding a failure to preserve electronic discovery in the criminal context. In *United States v. Olivares,* 843 F.3d 752 (8th Cir. 2016), the defendant argued on appeal that the "government improperly selectively preserved evidence by saving only inculpatory material." *Id.* at 757. Further, the defendant claimed that law enforcement acted in bad faith when they failed to preserve exculpatory evidence, which was a violation of his due process rights. The Eight Circuit held that although some of this destroyed evidence could have contained material that would be beneficial to the defendant's defense, the defendant was unable to produce the necessary evidence to show that law enforcement acted in bad faith.

6. Electronic Discovery

At Text, page 631, insert after note 4:

In practice, it is helpful to put a plan into place when creating proportional preservation. By understanding the issues of the case, cooperating with the opposing party, having awareness of where data can be found, and knowing the difference

between data that needs to be preserved and data that needs to be compiled will make the process of creating proportional preservation more efficient and help avoid the possibility of sanctions. Michael Hamilton, *Proportionality in Preservation,* 85 U.S.L.W 1139 (Feb. 23, 2017).

E. DISCOVERY SANCTIONS

At Text, page 709, insert after note:

In *Applebaum v. Target C01p.,* 831 F.3d. 740 (6th Cir. 2016), the United States Court of Appeals for the Sixth Circuit reiterated that due to the 2015 amendment to Rule 37(e)(2) of the Federal Rules of Civil Procedure, in order to prevail on a claim for spoliation sanctions, the claimant must prove that there was intent to prevent the disclosure of the electronic information. *Id.* at 745. The court further noted that "[a] showing of negligence or even gross negligence will not do the trick." *Id; See also* Matthew Scully, *Electronically Stored Information Spoliation Sanctions: A New Test, Escaping Liability for Bad Faith Destruction and a $3 Million Fine,* 85 U.S.L.W. 840 (Dec. 22, 2016) (noting that intent is necessary for a court to impose severe sanctions for ESI spoliation). Prior to the amendment to Rule 37, there was significant variance in how a court interpreted the preconditions necessary to impose sanctions, and the court's ability and authority to impose "measures". Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment.

In *Helget v. City of Hays,* 844 F.3d 1216 (10th Cir. 2017), the United States Court of Appeals for the Tenth Circuit reviewed sanctions for the spoliation of evidence. In discussing their standard of review, the court noted, "[w]e generally review a district court's ruling on a motion for spoliation sanctions for an abuse of discretion." *Id.* at 1225. The court reasoned that district courts are well equipped to determine appropriate sanctions in these instances, and they are able to develop a plan for relief that serves to punish the spoliation that occurred and prevent future instances of evidence destruction.

Chapter 9

DISPOSITION WITHOUT TRIAL

E. OTHER ALTERNATIVES TO LITIGATION

2. Arbitration Under the Federal Arbitration Act

***At Text, page 801, insert the following text*:**

The U.S. Supreme Court in recent years has issued multiple opinions protecting the process of arbitration under the Federal Arbitration Act (FAA). In *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Court did so once again.

The plaintiff estates in the case sued a nursing facility for substandard care causing the deaths of the decedents. The nursing facility moved to dismiss, arguing that arbitration agreements barred court action. The plaintiffs argued that the arbitration agreements signed by representatives holding powers of attorney for the decedents were invalid. The argument was that the Kentucky Constitution "declares the rights of access to the courts and trial by jury to be 'sacred' and 'inviolate.'" *Id.* at 1426. Therefore, no arbitration agreement could be valid unless the relevant powers of attorney expressly gave the representatives power to waive constitutional rights. These powers of attorney did not expressly grant such power.

The Supreme Court concluded that this Kentucky rule singled out arbitration agreements for unequal treatment. "No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees." *Id.* at 1427. The FAA commands that arbitration agreements be "on an equal footing with all other contracts." *Id.* at 1429. By impeding the ability of attorneys-in-fact to enter into arbitration agreements, the Kentucky rule violated the Act. Moreover, said the Court, it does not matter whether the Kentucky rule dealt with contract formation or contract enforcement; in either event, the rule discriminated impermissibly against arbitration. *Id.* at 1428.

APPENDIX

TYSON FOODS, INC. v. BOUAPHAKEO

577 U.S. ___, 136 S. Ct. 1036 (2016)

JUSTICE KENNEDY delivered the opinion of the Court.

Following a jury trial, a class of employees recovered $2.9 million in compensatory damages from their employer for a violation of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 et seq. The employees' primary grievance was that they did not receive statutorily mandated overtime pay for time spent donning and doffing protective equipment.

The employer seeks to reverse the judgment. It makes two arguments. Both relate to whether it was proper to permit the employees to pursue their claims as a class. First, the employer argues the class should not have been certified because the primary method of proving injury assumed each employee spent the same time donning and doffing protective gear, even though differences in the composition of that gear may have meant that, in fact, employees took different amounts of time to don and doff. Second, the employer argues certification was improper because the damages awarded to the class may be distributed to some persons who did not work any uncompensated overtime.

The Court of Appeals for the Eighth Circuit concluded there was no error in the District Court's decision to certify and maintain the class. This Court granted certiorari.

I

Respondents are employees at petitioner Tyson Foods' pork processing plant in Storm Lake, Iowa. * * * Grueling and dangerous, the work requires employees to wear certain protective gear. The exact composition of the gear depends on the tasks a worker performs on a given day.

* * *

In their complaint, respondents alleged that donning and doffing protective gear were integral and indispensable to their hazardous work and that petitioner's policy not to pay for those activities denied them overtime compensation required by the FLSA. Respondents also raised a claim under the Iowa Wage Payment Collection Law. This statute provides for recovery under state law when an employer fails to pay its employees "all wages due," which includes FLSA-mandated overtime. Iowa Code §91A.3 (2013).

Respondents sought certification of their Iowa law claims as a class action under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 permits one or more individuals to sue as "representative parties on behalf of all members" of a class if certain preconditions are met. Fed. Rule Civ. Proc. 23(a). Respondents also sought certification of their federal claims as a "collective action" under 29 U. S. C. §216. Section 216 is a

provision of the FLSA that permits employees to sue on behalf of "themselves and other employees similarly situated." §216(b).

Tyson objected to the certification of both classes on the same ground. It contended that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The District Court rejected that position. * * * As a result, the District Court certified the following classes:

> "All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004 [in the case of the FLSA collective action and February 7, 2005, in the case of the state-law class action], to the present, and who are or were paid under a 'gang time' compensation system in the Kill, Cut, or Retrim departments." Id., at 901.

The only difference in definition between the classes was the date at which the class period began. The size of the class certified under Rule 23, however, was larger than that certified under §216. This is because, while a class under Rule 23 includes all unnamed members who fall within the class definition, the "sole consequence of conditional certification [under §216] is the sending of court-approved written notice to employees . . . who in turn become parties to a collective action only by filing written consent with the court." Genesis HealthCare Corp. v. Symczyk, 569 U. S. ___, ___ (2013). A total of 444 employees joined the collective action, while the Rule 23 class contained 3,344 members.

The case proceeded to trial before a jury. The parties stipulated that the employees were entitled to be paid for donning and doffing of certain equipment worn to protect from knife cuts. The jury was left to determine whether the time spent donning and doffing other protective equipment was compensable; whether Tyson was required to pay for donning and doffing during meal breaks; and the total amount of time spent on work that was not compensated under Tyson's gang-time system.

Since the employees' claims relate only to overtime, each employee had to show he or she worked more than 40 hours a week, inclusive of time spent donning and doffing, in order to recover. As a result of Tyson's failure to keep records of donning and doffing time, however, the employees were forced to rely on what the parties describe as "representative evidence." This evidence included employee testimony, video recordings of donning and doffing at the plant, and, most important, a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mericle conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department.

* * * [The plaintiffs' other expert,] Dr. Liesl Fox, was able to estimate the amount of uncompensated work each employee did by adding Mericle's estimated average donning and doffing time to the [records that Tyson did keep]. * * *

Using this methodology, Fox stated that 212 employees did not meet the 40-hour threshold and could not recover. The remaining class members, Fox maintained, had potentially been undercompensated to some degree.

* * *

Fox's calculations supported an aggregate award of approximately $6.7 million in unpaid wages. The jury returned a special verdict finding that time spent in donning and doffing protective gear at the beginning and end of the day was compensable work but that time during meal breaks was not. The jury more than halved the damages recommended by Fox. It awarded the class about $2.9 million in unpaid wages. That damages award has not yet been disbursed to the individual employees.

Tyson moved to set aside the jury verdict, arguing, among other things, that, in light of the variation in donning and doffing time, the classes should not have been certified. The District Court denied Tyson's motion, and the Court of Appeals for the Eighth Circuit affirmed the judgment and the award.

The Court of Appeals recognized that a verdict for the employees "require[d] inference" from their representative proof, but it held that "this inference is allowable under Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 686– 688 (1946)." 765 F. 3d 791, 797 (2014). * * *

For the reasons that follow, this Court now affirms.

II

* * *

A

Federal Rule of Civil Procedure 23(b)(3) requires that, before a class is certified under that subsection, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." * * *

Here, the parties do not dispute that there are important questions common to all class members, the most significant of which is whether time spent donning and doffing the required protective gear is compensable work under the FLSA. * * * To be entitled to recovery, however, each employee must prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week. Petitioner argues that these necessarily person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper.

Respondents counter that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample. Whether this inference is permissible becomes the central dispute in this case. Petitioner contends that Mericle's study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide

resolution. Reliance on a representative sample, petitioner argues, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.

Calling this unfair, petitioner and various of its amici maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702.

It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class action cases. * * *

In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation §11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff 's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. * * *

One way for respondents to show, then, that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. * * *

In this suit, * * * respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.

Reliance on Mericle's study did not deprive petitioner of its ability to litigate individual defenses. Since there were no alternative means for the employees to establish their hours worked, petitioner's primary defense was to show that Mericle's study was unrepresentative or inaccurate. That defense is itself common to the claims made by all class members. Respondents' "failure of proof on th[is] common question" likely would have ended "the litigation and thus [would not have] cause[d] individual questions . . . to overwhelm questions common to the class." Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 568 U. S. ___ (2013). * * *

Petitioner's reliance on *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011), is misplaced. *Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.

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The plaintiffs in *Wal-Mart* did not provide significant proof of a common policy of discrimination to which each employee was subject. "The only corporate policy that the plaintiffs' evidence convincingly establishe[d was] Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters"; and even then, the plaintiffs could not identify "a common mode of exercising discretion that pervade[d] the entire company."

The plaintiffs in *Wal-Mart* proposed to use representative evidence as a means of overcoming this absence of a common policy. Under their proposed methodology, a "sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master." Id., at 367. The aggregate damages award was to be derived by taking the "percentage of claims determined to be valid" from this sample and applying it to the rest of the class, and then multiplying the "number of (presumptively) valid claims" by "the average backpay award in the sample set." Ibid. The Court held that this "Trial By Formula" was contrary to the Rules Enabling Act because it "'enlarge[d]'" the class members' "'substantive right[s]'" and deprived defendants of their right to litigate statutory defenses to individual claims. Ibid.

The Court's holding in the instant case is in accord with *Wal-Mart*. The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their managers. * * *

In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in Wal-Mart bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. * * * [U]nder these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.

This is not to say that all inferences drawn from representative evidence in an FLSA case are "just and reasonable." Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence.

Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time Mericle calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing. The District Court made no such finding, and the record here provides no basis for this Court to second-guess that conclusion.

B

In its petition for certiorari petitioner framed its second question presented as whether a class may be certified if it contains "members who were not injured and have no legal right to any damages." In its merits brief, however, petitioner reframes its argument. It now concedes that "[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." In light of petitioner's abandonment of its argument from the petition, the Court need not, and does not, address it.

Petitioner's new argument is that, "where class plaintiffs cannot offer" proof that all class members are injured, "they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." Ibid. Petitioner contends that respondents have not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here.

Petitioner's new argument is predicated on the assumption that the damages award cannot be apportioned so that only those class members who suffered an FLSA violation recover. According to petitioner, because Fox's mechanism for determining who had worked over 40 hours depended on Mericle's estimate of donning and doffing time, and because the jury must have rejected Mericle's estimate when it reduced the damages award by more than half, it will not be possible to know which workers are entitled to share in the award.

As petitioner and its amici stress, the question whether uninjured class members may recover is one of great importance. See, e.g., Brief for Consumer Data Industry Association as Amicus Curiae. It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.

Respondents allege there remain ways of distributing the award to only those individuals who worked more than 40 hours. For example, by working backwards from the damages award, and assuming each employee donned and doffed for an identical amount of time (an assumption that follows from the jury's finding that the employees suffered equivalent harm under the policy), it may be possible to calculate the average donning and doffing time the jury necessarily must have found, and then apply this figure to each employee's known gang-time hours to determine which employees worked more than 40 hours.

Whether that or some other methodology will be successful in identifying uninjured class members is * * * premature. Petitioner may raise a challenge to the proposed method of allocation when the case returns to the District Court for disbursal of the award.

Finally, it bears emphasis that this problem appears to be one of petitioner's own making. Respondents proposed bifurcating between the liability and damages phases of

this proceeding for the precise reason that it may be difficult to remove uninjured individuals from the class after an award is rendered. It was petitioner who argued against that option and now seeks to profit from the difficulty it caused. Whether, in light of the foregoing, any error should be deemed invited, is a question for the District Court to address in the first instance. * * *

The judgment of the Court of Appeals for the Eighth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered.