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Wage and Hour Litigation: Effective Use of Expert Witnesses

Selecting an Appropriate Expert and Leveraging Expert Testimony During Class Certification, Motion Hearings and Trial

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Today's faculty features:

Valerie Brender, Attorney, **Rukin Hyland & Riggin**, San Francisco

Noel P. Tripp, Principal, **Jackson Lewis**, Melville, N.Y.

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Effective Use of Expert Witnesses in Wage Litigation

Noel P. Tripp

Jackson Lewis P.C. | Long Island

TrippN@jacksonlewis.com | 631-247-0404

#1. Selecting the appropriate expert witness

Selecting the Appropriate Expert Witness

- The "short, short" version: Have One!

▪"The Court of Appeals believed that it was possible to replace such [individualized] proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability … and the back pay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average back pay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. *We disapprove that novel project*."

▪*Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011) (emphasis added).

◆Petitioner did not move for a hearing regarding the statistical validity of respondents' studies under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), nor did it attempt to discredit the evidence with testimony from a rebuttal expert. Instead, as it had done in its opposition to class certification, petitioner argued to the jury that the varying amounts of time it took employees to don and doff different protective equipment made the lawsuit too speculative for classwide recovery. Petitioner also argued that Mericle's study overstated the average donning and doffing time. The jury was instructed that nontestifying members of the class could only recover if the evidence established they "suffered the same harm as a result of the same unlawful decision or policy."

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016).

Selecting the Appropriate Expert Witness

- Bouaphakeo, the long version:
- Plaintiffs may use representative statistical evidence to support class certification. The ruling came in an FLSA collective action and Rule 23 class action overtime suit brought by hourly workers at a pork processing plant who contended they should have beenpaid for time spent donning and doffing personal protective equipment. The district court had found common questions existed as to whether these donning and doffing activities were compensable "work," even though there were "differences in the amount of time individual employees actually spent on these activities" and "hundreds of employees worked no overtime at all." **The U.S. Court of Appeals for the Eighth Circuit, according to Tyson, had sanctioned the use of "seriously flawed procedures" in certifying the class, urging that allowing the plaintiffs to prove liability and damages with "common" statistical evidence "erroneously presumed all class members are identical to a fictional 'average' employee." But person-specific inquiries into individual work time were necessary, the employer argued; reliance on a representative sample absolves each employee of the responsibility to prove personal injury, and thus deprived it of any ability to litigate its defenses to individual claims. Because the employer failed to keep records of donning and doffing time, though, the employees were forced to rely on the representative evidence, derived from a study performed by an industrial relations expert in order to determine the average time engaged in donning and doffing activities.** Thus, because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class, the High Court majority held. Here, had the employees proceeded with individual lawsuits, each employee likely would have had to introduce the study to prove the hours he or she worked. **Therefore, the representative evidence was a permissible means of making that very showing. Further, reliance on the study did not deprive Tyson of its ability to litigate individual defenses, the Court found; rather, the employer's defense was to show that the study was unrepresentative or inaccurate (a defense that was itself common to the claims made by all class members).**

Initial Considerations:

- Size of putative group
- Case Complexity: procedural rules, number of sites, number and types of records
- Exposure

Phases of The Litigation:

- Conditional and Final Certification/Decertification of a Collective Action
- Rule 23 Class Certification (e.g. State Wage & Claims)
- ADR
- Dispositive Motions
- Trial

Types of Expert:

- Economic (most common in discrimination cases, e.g. labor economists)
- Statistical
- "Study" conducting experts: time & motion *(see, e.g., Mitchell v. JCG Indus.*, 745 F.3d 837 (7th Cir. 2014)), survey experts
- Government agency experts
- Industry experts (party expert witness or *amicus*)

General Considerations

- Scope of issues to be addressed
- Expert's credentials, including academic background and history testifying as to issue (and which side)
- Prior rulings related to expert's testimony
- Cost
- Likely jury presentation

Best Practices

- Define scope of work:
  - Avoid data bottlenecks
  - Understand results timely

- Identify weaknesses and assumptions – your expert is not a legal expert (probably)!

#2: Using experts during class certification phase

Standard Applicable to Expert at Class Stage

- FRE 702 and *Daubert* "apply when the merits of a case are weighed, and a court does not inquire into the merits at the class certification stage." *Beltran v. InterExchange, Inc.*, Civil Action No. 14-cv-03074-CMA-CBS, 2018 U.S. Dist. LEXIS 49925 (D. Colo. Mar. 27, 2018)(applying relaxed standard and declining to strike expert submitted in connection with class of au pairs' application for certification as to wage and antitrust claims).
- *Compare Pierce v. Wyndham Vacation Resorts, Inc.*, No. 3:13-CV-641-CCS Dkt. 368 (E.D. Tenn. Oct. 6, 2017)(striking Plaintiffs' proposed expert in misclassification case) *with Lassen v. Hoyt Livery, Inc.*, No. 13-cv-1529 (VAB), 2016 U.S. Dist. LEXIS 169506 (D. Conn. Dec. 8, 2016)(considering challenge to expert in conjunction with decertification of collective and finding that "insofar as Plaintiff presents Mr. DeCusati's proposed expert testimony to assist in calculating damages, his testimony is likely to be helpful to the jury. Although Defendants argue that "[a]ny layman with wifi internet access and a copy of Microsoft Excel" could have performed Mr. DeCusati's analysis . . . an expert's testimony may still be helpful to the jury by summarizing and synthesizing data").

Common Uses: Wage-and-Hour

#1 – Is the sample statistically sound?

- Random sample must really be random
- Sample must be a proper representation of group
- Sample size must provide sufficient confidence for extrapolations

#2 – Are offsets in favor of employer credited?

- Missed meals – exclude days off and days with breaks taken
- Overtime claims – ignore "gap time"
- Off-the-clock – exclude *de minimis* shortfalls
- Rounding claims – offset rounding in favor of employee

#3 – Are the calculations done correctly?

- Even "experts" make mistakes
- Roll-up your sleeves and check the math
- Are there alternative ways to interpret the data?
- *"Statistics will confess to anything, if you torture them long enough."*

Common Uses: Discrimination

- In adverse impact discrimination cases, statistical experts can be extremely useful in refuting a plaintiff's (or plaintiffs') claim.
- For example, a statistical expert can be used to show the employer did not single out a particular national origin or race when it selected individuals to be laid off as part of a company-wide reduction in force.

Thank You

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WAGE AND HOUR LITIGATION: EFFECTIVE USE OF EXPERT WITNESSES

Valerie Brender

Attorney

Rukin Hyland & Riggin LLP

vbrender@rukinhyland.com

MOTIONS AND FRE 1006 SUMMARY WITNESS

- FRE 1006: "The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court."
- Consider using a summary witness instead of an expert. *See Arias v. United States Serv. Indus.*, 80 F.3d 509, 512 (D.C. Cir. 1996) (holding that summary exhibit and testimony was "sufficient to establish an amount and extent of work and wages as a matter of just and reasonable inference as contemplated by *Mt. Clemens*.").
- Summary witnesses can be used at any stage: certification, summary judgment, or trial.

USES OF FRE 1006 SUMMARY WITNESS

- Analyze hours worked/unpaid overtime
  - Especially where on-the-clock unpaid overtime information is available for independent contractor misclassification or exempt status cases.
- Analyze certain state law claims
  - I.e. reviewing punch in/out records to establish meal and rest break violations, or reviewing voluminous wage statements to establish wage statement or unlawful deduction violations.
- Prove up liability
  - Reviewing payroll records to establish whether an employer meets a certain threshold for number of employees.

DOCUMENTS FOR EXPERT

- Time cards (punch in/out)
  - Handwritten
  - Computer stamps/data
- Payroll data
- Workweeks and work history data
- Job Descriptions and Titles
- Policy documents, survey/interviews, deposition testimony

DOCUMENTS FOR EXPERT (CON'T)

Electronic time-stamped data

- Emails/text messages
- Social media posts
- Phone calls/phone call records
- Security ID swipes
- GPS Data (especially in Driver cases)
- Credit card purchase records
- Video surveillance

MEDIATION

- Rough Estimate verses Refined Damage Calculations
  - Rough estimate (may not need an expert – depends on class size and complexity)
    - Conduct class member surveys re hours worked and other damages and extrapolate
      - Need workweek information and average hourly rate information
  - Precise/technical damages calculations (may want this for complex/large class size and geographic area)
    - Help you develop appropriate sample size (including location, position, and geography if applicable)
    - Can be used to defend a settlement approval motion.

EXPERTS AND FLSA DECERTIFICATION/FINAL CERTIFICATION

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946)

Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, . . . the solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records . . .; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the [FLSA]. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

HOW DO EXPERT WITNESSES HELP AT THE DECERTIFICATION STAGE?

- *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees. *McLaughlin v. Seto*, 850 F.2d 586 (9th Cir. 1988); *Reich v. Gateway Press*, 13 F.3d 685, 701 (3d Cir. 1994) (collecting cases from the Tenth, Eleventh, Fifth, and Ninth Circuits)
- Experts can help determine an adequate sample size. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (insufficient evidence (and no expert testimony) suggesting that 42 employees can represent 2341); *Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995) (representative testimony by 58 employees (1.6% of class) was insufficient to represent a class of 3,368 employees); *Secretary of Labor v. DeSisto*, 929 F.2d 789, 792-96 (1st Cir. 1991) (a single employee could not represent 244 employees at trial).
- Experts can also provide proof of liability and damages.
- Defense expert can provide an affidavit or report demonstrating that the claims are inherently individualized.

EXPERTS AND SUMMARY JUDGMENT MOTIONS

- Can be used to:
  - Provide basis for all or some portion of defendant's summary judgment motion e.g. *de minimus* defense.
- But be careful when using expert testimony to prove a claim or defense at summary judgment. Opposing counsel can:
  - Obtain a controverting expert opinion, thereby creating a genuine dispute of a material fact.
  - Show that the moving party's expert testimony fails to establish an essential element of the claim or defense.

RULE 26(B)(4)

- (4) *Trial Preparation: Experts.*
- (A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
- (B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

RULE 26(B)(4)(CON'T)

- (C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A)and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

RULE 26(B)(4)(CON'T)

- (D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

MAINTAINING EXPERT PRIVILEGES

- Can be helpful to retain experts early
  - Input on documents necessary to prove up liability and/or damages
  - Can begin working on reports or analysis involving large amounts of data
- Privilege concerns
  - If an expert serves as a consultant early on and then later as the testifying expert, this could create a potential risk of waiving work product protection that might otherwise shield his or her reports and opinions from discovery under FRCP 26(b)(3)
- Tips
  - Clearly label draft reports and attorney/client communications as such.
  - Consider retaining separate consulting and trial experts.

CHOOSING A TRIAL EXPERT

- Can the expert explain themselves in a way that layperson/jury can understand?
- Is the expert a professional witness (especially for only one side)?
- Can the expert handle hostile questioning?
- Does the expert present as both authoritative and likeable?
- Also remember that jurors will likely view themselves as experts on employment issues, so only select experts that are really necessary to prove a portion of the case (i.e. damages)

FRE 702

- Rule 702 of the Federal Rules of Evidence permits a party to offer the testimony of a "witness who is qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. This Rule requires that certain criteria be met before expert testimony is admissible:
- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

DAUBERT AND *TYSON FOODS*

- Remember to challenge the admissibility of evidence under *Daubert*. Once admitted, persuasiveness goes to fact-finder.
  - In *Tyson Foods*, the Supreme Court found that it could not rule on the legality of admitting the evidence because the petitioner "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." 136 S. Ct. 1036, 1048-49 (2016)
- "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." However, "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." *Id.*

POST-*TYSON* EXAMPLES RE *DAUBERT*

Villalpando v. Exel Direct Inc., No. 12-cv-04137-JCS, 2016 U.S. Dist. LEXIS 53773, at *62-81 (N.D. Cal. Apr. 21, 2016)

- In an independent contractor misclassification case, the expert made assumptions for hours worked based on recruiting documents stating that drivers typically worked five to six days per week and 10-12 hours a day. The Court found this methodology acceptable under *Tyson Foods* and *Mt. Clemens* and rejected a *Daubert* challenge:
  - " [The company's] position ignores the teaching of *Mt. Clemens* and *Tyson Foods* that representative data may be used where an employer does not keep adequate records of employee work time….Given that Plaintiffs are entitled to prove their time worked based on reasonable inference, the Court finds that the assumptions [the expert] has used to fill in the gaps are supported by sufficient evidence to render them non-speculative and potentially helpful to the jury, which is all that *Daubert* requires."

POST-*TYSON* EXAMPLES RE *DAUBERT*

In re Autozone, Inc., No. 3:10-md-02159-CRB, 2016 U.S. Dist. LEXIS 105746, at *3 (N.D. Cal. Aug. 10, 2016)

- Plaintiffs tried to use expert's survey to bridge the evidentiary gap created by the absence of rest break records under state law and help them establish liability. The Court found that "The survey fails Plaintiffs because it is not a proper use of representational evidence, and because its fundamental lack of scientific rigor makes it inadmissible." The Court found that evidence was more like that in *Dukes* than *Tyson* and excluded the survey under Rule 702 and *Daubert*.
- Problems with the survey:
  - "[W]oefully low response rate. Out of a random sample of 10,000 individuals, Plaintiffs' expert []obtained 343 usable responses, [] which is a response rate of 3.43%."
  - Expert did not account for non-response bias or self-interest bias.
  - Survey asked respondents to recall very specific events that occurred between three and a half and eleven years ago, such as distinguishing among specific shift lengths.

POST-*TYSON*: DO YOU NEED AN EXPERT?

Monroe v. FTS USA, LLC, 860 F.3d 389, 401 (6th Cir. 2017)

- Plaintiffs relied on testimony of 17 technicians, six managers and supervisors, and timesheets and payroll records to prove damages for their time shaving claim.
- According to the defendants, the failure of the plaintiffs to present a statistical expert and study was a failure that should have ended the litigation or prohibited the plaintiffs' reliance on the testimony of 17 technicians.
- The Court held that "*Tyson* does not impose such a requirement. The [Supreme Court's] statement [in *Tyson*] about statistical adequacy was made in the context of the admissibility of representative evidence…. [defendants] do not challenge the admissibility of the testimony of the 17 technicians, but rather the sufficiency of [plaintiffs'] representative evidence. And, significantly, *Tyson* did not discuss expert statistical studies because they are the *only* way a plaintiff may prove an FLSA claim, but because those plaintiffs offered such a study—along with employee testimony and video recordings. For our purposes when assessing the sufficiency of the evidence, 'the only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict.'" *Morgan*, 551 F.3d at 1280.