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Winning defense verdicts in wage-and-hour class actions: Trial strategies for defeating class-wide proofs

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Although there has been a surge in class actions, especially in the area of wage-and-hour claims, they rarely go to trial because defendants often settle to avoid risky jury trials.

The U.S. Supreme Court's decision in *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), raised the stakes further by allowing plaintiffs to use expert statistical testimony to prove class claims instead of calling class members as witnesses. But *Bouaphakeo* does not foreclose a defense victory at trial.

Two companion cases to *Bouaphakeo* — *Lopez et al. v. Tyson Foods Inc.*, No. 06-cv-459, *verdict returned* (D. Neb. May 26, 2011), and *Guyton v. Tyson Foods Inc.*, No. 07-cv-88, *verdict returned* (S.D. Iowa Apr. 25, 2012) — show how a defendant can prevail in a class-action trial even if the trial court permits plaintiffs to introduce statistical evidence as their purported class-wide proof.

Both trials involved the same defendant and same plaintiffs' expert as in *Bouaphakeo*, and both resulted in defense verdicts for Tyson Foods that were affirmed by the 8th U.S. Circuit Court of Appeals.[1]

These verdicts were the result of the defense's reliance on certain universal trial maxims, such as keeping themes simple. But they were also the result of other trial strategies that can be adapted to a class-action case to persuade the jury that the plaintiffs have failed to meet their class-wide burden of proof.

Most importantly, defense counsel must effectively undermine the testimony of the class witnesses and their experts, whose testimony is the foundation of the plaintiffs' assertion of a class-wide violation.

WHAT MUST BE PROVED?

To succeed in a class action, the plaintiffs must prove on a class-wide basis at trial the elements of the claims for which the class was certified. In *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court observed in dicta that, if the plaintiffs are required to prove an element of their claims to secure class certification, then it is "an issue they will surely have to prove again at trial in order to make out their case on the merits."

The high court has noted in other contexts that plaintiffs seeking certification must prove the same things again at trial to win their case (or else lose the claims of everyone in the class).[2]

More recently, the Supreme Court in *Bouaphakeo* opined on the issue of proof in a wage-and-hour class-action trial.

In that case, a class of employees in a meat packinghouse sought to be paid additional time for "donning and doffing" their sanitary clothing and protective equipment before shift, at lunch and after shift.

The employees wore different combinations of apparel in different departments, but pointed to the fact that they were all paid by the same method (production "line time") as the basis for class certification.

Defense counsel must effectively undermine the testimony of the class witnesses and their experts, whose testimony is the foundation of the plaintiffs' assertion of a class-wide violation.

The jury ruled for the plaintiffs on pre- and post-shift activities but not the meal period, and the 8th Circuit affirmed.[3] Reflecting the unsettled nature of what constitutes class-wide proof, one circuit court judge dissented, and five of the 8th Circuit's judges voted to grant rehearing en banc.[4]

On a petition for writ of certiorari, a divided Supreme Court affirmed the lower courts' rulings on class certification before trial and refusal to decertify after trial.[5]

The court made two observations pertinent to defending against a wage-and-hour case at trial.

First, it noted that, if the plaintiffs' statistical evidence has not been struck as a result of a *Daubert* challenge, it may be used at trial: "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 representative action — but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action."

Second, the court noted that, "Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. ... The district court could have denied class certification [post-trial] on this ground [i.e., whether the plaintiffs' expert's calculated "average time" was probative as to the time worked by each employee] only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing."

The lessons learned from *Bouaphakeo, Lopez and Guyton* can help future employer-defendants defeat class claims at trial.

In other words, absent a successful *Daubert* challenge, class-action plaintiffs can proffer statistical evidence as "representative proof" of a class claim, but the fact finder may still reject it as unpersuasive in establishing a class-wide violation.

Post-*Bouaphakeo* opinions have reiterated this principle. For example, one court allowed expert testimony despite employer complaints that the expert's estimates were inflated, and the same court in another case distinguished *Bouaphakeo* where the proffered expert testimony relied on survey evidence that was not representative.[6]

This expert analysis discusses the set of related cases that culminated in the Supreme Court's ruling in *Bouaphakeo*, and how, despite the plaintiffs' similar approach in those cases, including use of the same experts, Tyson Foods was able to prevail at trial (and on appeal) in the other cases.

The lessons learned from those trials can help future employer-defendants defeat class claims in future trials.

LITIGATION HISTORY AND ISSUES FOR TRIAL

Lopez, *Guyton* and *Bouaphakeo* are examples of the myriad lawsuits spawned by the Supreme Court's decision in *IBP Inc. v. Alvarez*, 546 U.S. 21 (2005), a Fair Labor Standards Act case holding that walking time after the first compensable workday activity and before the last compensable workday activity is compensable because it is part of the "continuous workday."

The Supreme Court did not, however, address which pre- and post-shift clothes-changing activities are compensable under the FLSA. Indeed, it recently noted that whether donning and doffing of clothing and protective gear is compensable work is a triable issue in these cases.[7]

Almost immediately after the Supreme Court's *Alvarez* decision, plaintiffs across the country began filing class-action lawsuits under the FLSA and, in many cases, included supplemental state-law claims.

Typically, these plaintiffs claim that, under *Alvarez,* all time between donning the first clothing item before shift and doffing of the last item after shift is compensable (minus time during which they are relieved during a bona fide meal period).

Typically, these suits also claim that donning and doffing at both ends of the meal period are likewise compensable as part of the continuous workday.

Thus, at issue are:

- Whether activities such as donning and doffing are "work" within the meaning of the FLSA/state law.
- Which items are "integral and indispensable" such that they start and end the continuous workday.
- Whether the employer's compensation system adequately pays for any such compensable activities.
- Whether, to the extent a jury determines the employees have not been fully paid for compensable work, the uncompensated time at issue is nonetheless de minimis such that the employer is not liable.

Like *Bouaphakeo*, in *Lopez* and *Guyton* the basis for certification as a collective action under the FLSA and a Rule 23 class action for the state-law claims was Tyson's practice of paying hourly production employees by "gang time" (also known as "line time").

This is an old industry practice whereby all production workers are paid for the length of the production process. Because it is a measurement of production time, gang time does not include much of the time spent on donning and doffing activities.

However, throughout the limitations period, Tyson had paid hourly production workers additional time for certain pre- and post-shift clothes-changing activities, as well as additional compensation for other non-production time.

All three trials were complicated by the fact that these "additional" payments had changed over time.

Not only did the amount of pay change over time based on the requirements of each job (as dictated by the clothing worn and the distances walked), but Tyson also restructured

the workday in early 2010. It did so in response to the various lawsuits, but also used that opportunity to explicitly inform the employees how they were already being compensated for the activities at issue.

At each trial, then, the main issue for the jury was whether the activities were compensable and, if so, whether Tyson already had paid adequate compensation for them.

The *Lopez* defense verdict concluded a class-action lawsuit by current and former employees of Tyson's beef-processing plant in Lexington, Nebraska, under both the FLSA and the Nebraska Wage Payment Collection Law.

Following a nine-day trial, an Omaha jury took only two hours to return a unanimous verdict that Tyson had not failed to pay a class of employees for their compensable clothes-changing activities.

Lopez and *Guyton* illustrate how defense counsel can convince the jury, based on the testimony of class members and their experts, that there is too much variation among the individual employees' situations for the jury to return a class-wide verdict in the plaintiffs' favor.

In *Guyton*, current and former employees of Tyson's pork-processing plant in Columbus Junction, Iowa, brought their claims under both the FLSA and the Iowa Wage Payment Collection Act.

The court granted Tyson summary judgment on the plaintiffs' meal period clothes-changing claims.

After an 11-day trial, the jury returned a unanimous verdict that the activities at issue were not compensable on a class-wide basis and that Tyson had acted in good faith as to how it paid its employees.

Lopez and *Guyton* illustrate how defense counsel can convince the jury, based on the testimony of class members and their experts, that there is too much variation among the individual situations of the employees for the jury to return a class-wide verdict in favor of the plaintiffs.

THE 4 PILLARS OF A SUCCESSFUL DEFENSE

In trying the *Lopez* and *Guyton* cases, Tyson's defense team focused on four pillars for attacking the plaintiffs' case while simultaneously presenting a defense case that focused on dissimilarities among the members of the employee classes.

All three cases involved the same plaintiffs' time-study expert, and all involved claims that were certified for class treatment and proceeded to trial on a class-wide basis. These cases were tried after the trial in *Bouaphakeo* but before the Supreme Court ruled in that case.

The trial strategies discussed below remain viable in light of the Supreme Court's discussion of representative evidence and class-wide proof in *Bouaphakeo*.

1. Keep it simple

Class actions are complex litigation, but at trial defense themes should be kept as simple as possible. Trial practice guides frequently tout simplicity as essential to ensuring that a jury understands the issues and a party's position and remains engaged during lengthy trials.

For a defendant in a class-action trial, simplicity is also key to persuading the jury that there is "no 'there' there" in the plaintiffs' case.

This means that nuanced arguments that a defendant may have emphasized in class certification briefing to demonstrate the individualized nature of employees' claims may not be appropriate for trial. Complicated facts and arguments may give the jury the impression that the plaintiffs' claims must have some merit.

Resisting the urge to elicit numerous factual distinctions, policy exceptions and details may seem counterintuitive given the goal of persuading the jury that the plaintiffs have failed to prove their claims on a class-wide basis. But a simplified, streamlined defense strategy can by its very architecture help persuade the jury that the plaintiffs' claims have no merit on a class-wide basis.

This approach works best when the defendant's key points in cross-examination and the lawyers' interactions with the jury (voir dire, opening statement, closing argument) illustrate defense trial themes as opposed to merely disproving points made by plaintiffs.

In *Lopez* and *Guyton*, for example, a main point of contention in class certification briefing was whether gang time constituted a "common policy or practice" challengeable under the FLSA and state law as failing to pay employees for all compensable pre- and post-shift and meal period activities.

Tyson's opposition focused on three main arguments:

- In its application gang time pay often included some of the donning and doffing activities for which the plaintiffs were seeking additional compensation.
- Tyson had an affirmative policy to pay employees additional time for certain clothes-changing activities and other nonproductive time.

- Individual employees differed in the types and amount of clothing worn and in the amount of additional compensation received.

At the trials, Tyson's defense team proved the first point by forcing admissions from the plaintiffs' time-study expert and damages expert.

Time and again, during cross-examination by defense counsel, the plaintiffs' time-study expert was shown his own videotapes of employees performing the activities he was measuring during gang time, which implied that they were happening on paid time.

This was combined with the cross-examination of plaintiffs' damages expert, who admitted that it would be inappropriate to include in the time-study averages any activities that had occurred on paid time because that would be "double counting."

The point was simple enough for the jury to intuitively understand, and it was shown through simple videotapes that were taken by the plaintiffs' own expert. This avoided the need to prove the point through defense witnesses, which inevitably would have invited cross-examination by plaintiffs' counsel.

Tyson's defense team also proved the second and third points through cross-examinations of the plaintiffs' experts.

The plaintiffs' time-study expert's videotapes showed that employees wore various combinations of clothing that, while appearing similar, clearly varied from job to job, and sometimes even differed among individuals holding the same job title.

In addition, the company had produced the class members' time-and-attendance records during discovery, and the plaintiffs' damages expert had examined them. Thus, she knew that Tyson had already paid extra minutes each day for the activities in issue, and that those extra minutes varied by job position.

By securing concessions from the plaintiffs' experts on these points, defense counsel was able to keep the proofs simple. There was no disputing the fact that Tyson already paid for some of the time, showing that it was a fair employer.

These concessions by the plaintiffs' experts also cast doubt on the plaintiffs' class-wide proofs because any class member who performed the daily activities in the same or less time than Tyson was paying for them had no viable claim.

The essential question for the jury was which class members, if any, reasonably took more time than Tyson was already paying them for the activities.

By establishing these points on cross-examination, defense counsel was able to prove definitively that not all of the time the plaintiffs were suing over was unpaid, and it also raised significant doubts about how the plaintiffs could prove which class members' activities had already been fully compensated and which had not.

As such, Tyson was able to streamline its trial presentation by avoiding the need to call numerous supervisors, who would have been the primary witnesses on the defense side to make these same points.

2. Be forthcoming and explain employer actions

Defendants in class actions are often cast in the role of a company that has something to hide. In contrast, plaintiffs may portray themselves as shedding light on corporate misdeeds, frequently using the defendant's documents produced in discovery to "illuminate" for the jury how company policies and practices have caused the alleged harm.

> The strategic use of video and photographs in both trials also avoided the need to call numerous supervisors in Tyson's case-in-chief to rebut various assertions by employee witnesses as to plant practices.

When the challenged practices occur in a private setting with which the jury is not familiar, such as a meat processing plant, it becomes critical for the defendant to appear forthcoming in explaining its policies and the reasons why it adopted them.

Presenting corporate witnesses who are honest and credible is an obvious first step, but there are additional strategic measures that a defendant can take to mount a successful defense.

First, the defendant is well served by explaining why it adopted the policies and practices at issue. While the reason for engaging in a challenged behavior is often not an element of the claims or defenses, it is usually a question in the jury's mind.

Absent a credible explanation, the jury may infer the wrong motives by the defendant and thereby assume that plaintiffs' claims must have merit. In contrast, explaining the reasons for certain policies and decisions can bolster a defendant's credibility and reinforce defense themes such as fairness and compliance with the law as it evolves.

In *Lopez*, Tyson's reason for changing how it paid for clothes-changing activities and restructuring its workday was not

strictly at issue because the plaintiffs dropped their allegation of willfulness on the eve of trial.[8]

Tyson nonetheless explained through a corporate witness that the company increased the amount of paid time for pre- and post-shift clothes-changing activities (i.e., the walking time component) in response to the Supreme Court's decision in *Alvarez*.

Willfulness also was not an issue in Tyson's case-in-chief in *Guyton*, as the court dismissed the plaintiffs' willfulness claim at the close of their case-in-chief for failure to adduce sufficient evidence. However, unlike in *Lopez,* the company asserted at trial a good-faith defense to liability under U.S. labor code, 29 U.S.C.A. § 259.

In Tyson's case-in-chief, a corporate witness explained the reasons behind the increasing payments over time for the activities at issue. In 2010, Tyson lengthened the daily break and meal periods.

At the same time, 15 minutes of time previously paid as a break were added to the additional minutes already used for clothes changing and walking, and were specifically designated to cover those activities at four points in the workday: pre-shift, at the first break, lunch and post-shift.

The corporate witness explained that these changes were made to discourage litigation similar to the suit at hand by assuring employees that they were being paid additional time for their clothes-changing activities even though the company did not believe that the FLSA required that much additional compensation.

He also explained the litigation history against the company, including adverse court rulings that influenced it to make these employee-friendly changes even though they were not legally required.

In addition to providing the jury with the company's rationale for various pay changes, this testimony also emphasized the company's concern with fairness and legal compliance in making operational decisions.

The company explained the reason for the changes up front in direct examination, rather than waiting for the plaintiffs to raise the issue — in which case the explanation might appear reluctant.

As a result, rather than looking like a concession that litigation had forced the company to change its workday, the explanation bolstered the company's credibility and emphasized the time and resources it had devoted to finding a fair and compliant way to address compensation for donning and doffing time.

Tyson also used numerous demonstrative video clips and still photographs taken inside the plant to show the jury examples of what employees wear, their pre- and post-shift and (in *Lopez*) meal period routines, and what the plants looked like.

In addition, Tyson co-opted numerous clips of video footage taken in the plants by the plaintiffs' time-study expert as part of his time study in each plant, likewise using the footage as examples of how employees engaged in diverse donning and doffing activities.

Given that the public does not have access to meat-processing plants, these video clips and photographs helped dispel any misconceptions in jurors' minds as to the conditions in the plant and showed that the company was not trying to hide information about how employees clock in and out or how they don and doff.

The fact that many of the clips were recorded by the plaintiffs' own expert reinforced the impression that the company had nothing to hide; indeed, the fact that the plaintiffs chose to show little of their own expert's video tapes suggested that the footage collected on their behalf did not support their position at trial.

The strategic use of video and photographs in both trials also avoided the need to call numerous supervisors in Tyson's case-in-chief to rebut various assertions by employee witnesses as to plant practices.

At the same time, it allowed Tyson to focus cross-examination of class-member witnesses on their estimates for donning and doffing various items and whether certain apparel items met the test for compensability under the FLSA, rather than having to devote significant portions of cross-examination to challenging their various factual assertions about plant practices.

Instead, the company devoted much of its direct examination of the plant human resources manager to sponsoring numerous demonstrative clips and photographs, many of which visually rebutted specific assertions made by employee witnesses and plaintiffs' counsel.

For example, in *Lopez*, the plaintiffs argued that employees were discouraged from using the restroom during production time, were expected to clock in only after donning, and could not wear items such as mesh into the cafeteria.

With one witness and visual evidence that he explained, Tyson disproved each of these assertions, while at the same time avoiding looking too antagonistic toward testifying employees.

3. Gently cross-examine employee witnesses

One of the most important pretrial strategic moves that Tyson made in the *Lopez* and *Guyton* cases was negotiating the right to depose any previously undeposed witnesses after the exchange of trial witness lists. While this strategy may require a defendant to conduct numerous depositions in an abbreviated time shortly before trial, it can yield many fruitful results.

First, it pressures plaintiffs to pare down their witness list to those individuals likely to be called, as opposed to listing scores of employee witnesses and waiting until trial to decide who will actually be called.

It further provides an opportunity to confirm whether trial witnesses are appropriately within the class definition, allowing time to move to dismiss them if they are not, which occurred during the *Guyton* trial.

Finally, it gives the defendant the opportunity to explore in advance of trial all lines of inquiry that might be helpful to its case. This can be done with the hindsight of summary judgment briefing and even the pretrial order, by which time the true trial issues have been fleshed out.

With the depositions in hand, the defendant can then focus cross-examination at trial on a few key concessions made by the employees, such as low time estimates for donning and doffing certain items such as a frock and hairnet.

Employing this strategy means that trial cross-examinations will likely be short. As a result, rather than a lengthy cross-examination that covers every salient point for each element of the claims and tests every unhelpful assertion made during direct examination, the cross-examination will highlight the key points that build the defendant's case.

Additionally, the abbreviated length of the examination will help jurors remember those key points.

At the same time, the defendant will avoid the risks of eliciting unfavorable testimony, burying important concessions in the midst of lengthy testimony, and appearing to attack or argue with the plaintiffs.

Such shorter cross-examinations of plaintiffs are particularly effective when the defendant focuses on what the plaintiffs do not know. Their lack of knowledge, or unwillingness to share their knowledge, can emphasize to the jury their unsuitability as representatives for the rest of the class.

For example, in *Lopez*, none of the three plaintiffs who testified would estimate how long it took them to put on and take off various items, such as a hairnet and hard hat. Not only did this testimony appear disingenuous, but it also undermined the plaintiffs' attempt at class-wide proof by showing employee testimony to be unreliable.

Using video clips, photographs and other demonstrative aids to rebut unhelpful assertions can also help keep the cross-examinations short and focused. As explained above, the defendant may elect to show such exhibits to a defense witness who can sponsor multiple examples as a kind of show-and-tell for the jury.

Alternatively, the defendant can use selected demonstrative exhibits with plaintiff witnesses to challenge specific testimony. Rather than going through a series of questions probing the accuracy of particular assertions, the defendant can simply show the witness a photograph or other exhibit that visually contradicts the witness's testimony.

Even if the witness refuses to concede the point or attempts to distinguish the exhibit, the jury will have seen powerful visual confirmation of the defendant's position.

For example, one plaintiff in *Lopez* insisted that he could not wear his hard hat in the cafeteria and was unaware if any of his co-workers wore them during meal periods. This testimony was rebutted by video clips and photographs showing several employees wearing hard hats in the cafeteria during lunch. It only takes a few such visual pieces of evidence to demonstrate that the plaintiffs' assertions are not credible.

4. Mount a vigorous assault on the plaintiffs' experts

Plaintiffs in class actions often rely heavily on expert witnesses presenting statistical analyses to try to prove their claims on a representative basis. An initial consideration in countering the such testimony is whether to mount a *Daubert* challenge.

In *Bouaphakeo*, the Supreme Court noted that the defendant could have challenged the plaintiffs' time-study expert through a *Daubert* motion. But there may be situations where, as in *Lopez* and *Guyton*, forgoing a *Daubert* challenge makes sense.

One reason to forgo such a challenge may be the anticipated cost of briefing the *Daubert* issue. In addition, defense counsel may prefer to leave the plaintiffs' expert in the case so that the expert will be forced to concede on cross-examination points that show the plaintiffs' failure to prove their claims on a class-wide basis.

This strategy also reduces the need for harshly cross-examine class members or call many management-side witnesses, since the key points can be made by obtaining concessions from the plaintiffs' expert.

Often, plaintiffs rely on expert testimony as the primary basis of supposed class-wide proof. Absent such testimony, plaintiffs must either make class-wide points through hostile company witnesses who may explain away or soften the points that plaintiffs want to make, or must call a variety of named plaintiffs and/or class members who have varied experiences and may not be able to speak to the experiences of everyone in the class.

This latter vulnerability was on display in *Lopez* and *Guyton*, where the plaintiffs presented only three and four employee witnesses, respectively, all with limited exposure to production areas and jobs other than their own.

Rather than depending on these individuals for class-wide proof, the plaintiffs relied heavily on their time-study expert, who had developed average donning, doffing and walking times for each production area based on videotape and measurements made at each plant.

In fact, the plaintiffs explained their failure to call more employee witnesses by asserting that the expert's testimony was sufficient class-wide proof. Thus, co-opting the plaintiffs' expert to make defense points was a paramount goal of Tyson's trial strategy.

Cross-examination of the plaintiffs' expert should be approached very differently from a *Daubert* motion, where the focus is often on attacking the expert's methodology. Not only does a *Daubert*-like approach risk transforming cross-examination into a lofty scientific debate that the jury will not be able to follow, but it also may not appeal to the jury's common sense.

Accordingly, challenges to methodology should be kept as simple and broadly brushed as possible. For example, Tyson confronted the plaintiffs' time-study expert with a visual display on a library cart of all textbooks detailing how time studies should be performed and got him to admit that the approach he had used in the case could not be found in any of the books.

A more intuitive approach to attacking an expert in a class-action trial is to focus on three things:

- Obvious mistakes in measurements and mathematic operations.
- Measurements by the expert that differ from the class definition or legal issue to be decided by the jury.
- Wide variances among class members, including examples of very short measurements that support the defendant's position and the inclusion of "outliers" (e.g., abnormally high measurements) that unfairly skew the results in the plaintiffs' favor.

In *Lopez*, for example, defense counsel confronted the plaintiffs' expert with the fact that he had been forced to amend his time-study calculations multiple times, including during his deposition and before trial. He admitted that he made the corrections because defense counsel pointed out his mistakes to him.

As another example, in both *Lopez* and *Guyton*, defense counsel showed the jury a chart that compared the smallest and largest measurements made by the plaintiffs' time-study expert for each activity, forcing him to concede the wide variances.

Tyson also showed video footage of employees performing pre-shift clothes-changing activities on paid production time, highlighting the fact that the plaintiffs' expert had erroneously included such paid activities in his time-study measurements.

While the expert witness may try to explain away such mistakes by claiming that they did not affect the study or its ultimate results, the cross-examination nonetheless can have a powerful effect on the jurors, who can use their common sense to conclude that such mistakes undermine the credibility of the results being offered by the plaintiffs as the basis for class-wide proof.

Similarly, showing that the plaintiffs' expert did not study or measure what is at issue can deal a lethal blow to the plaintiffs' reliance on expert testimony for class-wide proof.

In *Lopez*, the plaintiffs claimed that employees should be paid "continuously" from the "first touch" of a compensable clothing item before shift until the "last touch" after shift, including time not spent on actual clothes-changing activities, such as socializing or engaging in other personal pursuits.

The plaintiffs' expert conceded, however, that he did not follow and measure specific individuals for the continuous duration of their pre- or post-shift activities, but rather measured some individuals and activities in the locker room and other individuals and activities on the production floor.

Through the use of video clips, defense counsel also forced the expert to concede that he was measuring significant but unmeasured passages of time that involved employees talking to friends or whiling away the time pre-shift, which may have caused the jury to conclude that the plaintiffs were overreaching in their claims to be paid overtime for such non-work activities.

In such ways, Tyson thus demonstrated that the expert had not studied the time that the plaintiffs contended was at issue. As a result, the jury had no basis for evaluating whether the extra minutes paid to employees for their donning and doffing activities were insufficient, which was the death knell for the plaintiffs' class-wide proofs.

CONCLUSION

The defense tactics used in *Lopez* and *Guyton* can be considered the four pillars of a successful defense against a wage-and-hour class action.

They are fully consistent with the Supreme Court's ruling on class-wide proofs in *Bouaphakeo*. Thus, the defense verdicts

in those cases provide useful lessons for future defendants who take their cases to trial.

These lessons apply not only in wage-and-hour cases. Instead, they can also have utility in other types of class actions that are submitted to a jury. Focusing on showing the weaknesses in the plaintiffs' class-wide proofs, and converting the plaintiffs' experts, will help the defendant overcome the presumption that a complicated class-action case must by its nature have merit.

It also will help streamline the defense presentation and allow the jury to easily reach the conclusion that the class representatives have not proved the elements of their claims on a class-wide basis.

NOTES

[1] *Lopez v. Tyson Foods Inc.*, 690 F.3d 869 (2012); *Guyton v. Tyson Foods Inc.*, 767 F.3d 754 (2014).

[2] *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013) (materiality element in securities claim); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (damages model).

[3] *Bouaphakeo v. Tyson Foods Inc.*, 765 F.3d 791 (8th Cir. 2014).

[4] *See* 593 Fed. Appx. 578 (8th Cir. 2014).

[5] *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

[6] Compare *Villalpando v. Exel Direct Inc.*, Nos. 12-cv-4137 and 13-3091, 2016 WL 1598663 (N.D. Cal. Apr. 21, 2016) (denying *Daubert* motion where challenge to assumptions regarding expert's estimates went to weight, not admissibility), with *Senne v. Kansas City Royals Baseball Corp.*, 315 F.R.D. 523 (N.D. Cal. 2016) (granting *Daubert* motion and decertifying class where survey evidence "attempt[ed] to paper over significant material variations that make application of the survey results to the class as a whole improper").

[7] *See Bouaphakeo*; see also *Sandifer v. U.S Steel Corp.*, 134 S. Ct. 870 (2014) (announcing standard for compensability of clothes-changing time in unionized workplaces).

[8] *See* 29 U.S.C.A. § 255(a) (proof of willfulness lengthens the limitations period to three years from the ordinary two years).

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