Under Rule 23 of the Federal Rules of Civil Procedure, a court may not certify a damages lawsuit as a class action unless "there are questions of law or fact common to the class" that "predominate over any questions affecting only individual members." The Fair Labor Standards Act (FLSA) imposes similar certification requirements on collective actions. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court held that, in order to satisfy these commonality and predominance requirements, plaintiffs must "demonstrate that the class members 'have suffered the same injury'" by proving that their claims "depend upon a common contention" that is "capable of classwide resolution … in one stroke." The Court also disapproved of "trials by formula," in which liability is determined for a "sample set" of class members and then "applied to the entire remaining class."

Today, in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, the Supreme Court granted certiorari to decide two questions about when a class may be certified under Rule 23 (and a collective action certified under the FLSA): (1) whether differences among individual class members may be ignored, and a class certified, when plaintiffs use statistical techniques that presume that all class members are identical; and (2) whether a class may be certified that contains hundreds of members who were not injured and have no legal right to damages.

Respondents in *Tyson* are hourly workers at a pork-processing facility who allege that Tyson failed to compensate them fully for time spent donning and doffing personal protective equipment and walking to and from their work stations. The district court certified the class based on the existence of common questions about whether these activities were compensable "work," even though there were differences in the amount of time that individual employees actually spent on these activities and hundreds of employees spent no uncompensated time on these tasks at all. At trial, the court allowed the plaintiffs to prove liability and damages to the class with statistical evidence that presumed that all class members are identical to an "average" employee. The jury returned a verdict for the class, and the district court entered a $5.8 million judgment for the plaintiffs.

On appeal, a divided panel of the Eighth Circuit affirmed. The majority recognized that individual plaintiffs varied in their donning and doffing routines but held that the class was properly certified because Tyson had a specific compensation policy for donning and doffing, and the class members worked at the same plant and used similar equipment. Judge Beam dissented on the grounds that individualized differences among class members prevented plaintiffs from proving their class claims in one stroke and that class certification was inappropriate because there were hundreds of uninjured employees. Tyson sought rehearing *en banc*, which the Eighth Circuit narrowly denied by a 6-to-5 vote.

As we explained last week on Mayer Brown's Class Defense Blog, *Tyson* is one of four cases in which the Court has been asked to resolve whether a class may be certified by use of statistics when there are individualized differences among class members and when many class members have not been injured. The Supreme Court took no action today in one of those cases, *Wal-Mart Stores v. Braun*, Nos. 14-1123 & 14-1124, in which a $150 million verdict was entered on behalf of a 187,000-strong class of Wal-Mart employees alleging that they had not been paid for rest breaks and off-the-clock work. The *Wal-Mart* petition now presumably will be held until the Court issues its decision in *Tyson*. The Supreme Court will consider for the first time at its June 11 conference whether to grant a petition for certiorari by Dow Chemical arising from a $1.1 billion judgment in an antitrust class action alleging coordinated price announcements, where prices were individually negotiated and many buyers did not pay overcharges. The Court will also consider whether to grant a petition by Allstate Insurance challenging certification of an "issues class" in another case about unpaid overtime. A grant in *Dow* in particular would provide the Court with an opportunity to address important class-certification issues on a full trial record and more broadly than in the employment context.

The Supreme Court's decision in *Tyson* should be of keen interest to all businesses that are facing, or that may face, a putative class action or collective action. Businesses are frequent targets of such suits, and the lower courts often have permitted plaintiffs to gloss over differences among putative class members to obtain class certification, despite the Supreme Court's admonition that the "stringent requirements for certification" should "in practice exclude most claims." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). In an area in which the Supreme Court and the lower courts appear out of step, the decision in *Tyson* may reinforce the demanding standards for obtaining class certification, making it more difficult for plaintiffs to obtain the settlement leverage that comes with certification and potentially discouraging plaintiffs from filing new class actions and collective actions in the future.

Absent extensions, which are likely, amicus briefs in support of the petitioner will be due on July 30, 2015, and amicus briefs in support of the respondents will be due on August 31, 2015. Any questions about this case should be directed to Tim Bishop (+1 312 701 7829) in our Chicago office, or Archis A. Parasharami (+1 202 263 3328) in our Washington office.

The Supreme Court also granted certiorari today in *Shapiro v. Mack*, No. 14-990, which asks under what circumstances an ordinary, single-judge district court may dismiss certain kinds of particularly important cases that otherwise would be referred to a special three-judge district court. Any inquiries should be directed to Michael Kimberly (+1 202 263 3127) in our Washington office, who is counsel of record for the petitioner.

Last week, the Supreme Court also invited the Solicitor General to file a brief expressing the views of the United States in the following case of interest to the business community:

Smith v. Aegon Cos. Pension Plan, No. 14-1168: The question presented is whether ERISA's special venue provision, 29 U.S.C. § 1132(e)(2), and a plaintiff's choice of venue under that provision may be abrogated by a more restrictive venue-selection clause in an ERISA plan.