

The Role of Financial Litigation Consultants in Class Certification

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This article explores the role of financial litigation consultants in class certification. From analyses to large data management, the authors aim to add to the reader's body of knowledge as to how litigation consultants participate in the early stages of class action lawsuits. The authors are not attorneys and are not providing legal opinions, interpreting statutes or cases, or otherwise offering legal advice or recommendations.

Class action litigation is a legal procedure in which a group of individuals who have suffered similar harm or who have similar claims against a defendant can collectively bring a lawsuit as a group or "class." One or more plaintiffs, known as the "class representative," represent the entire class throughout the litigation. This mechanism is intended to allow for a more efficient resolution of claims than if each plaintiff filed individual complaints.

The attorneys who represent the class in a class action lawsuit are referred to as "class counsel." These attorneys generally specialize in class action litigation and work on behalf of the class representative and the entire class of

plaintiffs. Class counsel is responsible for presenting the case and representing the interests of the class members.

Not surprisingly, class counsel can and do use consulting and/or testifying experts. Accordingly, there are many opportunities for financial litigation consultants to provide forensic accounting, business valuations, damages determinations, and other litigation services to the class and class counsel. These consultants are often hired prior to the time a class is certified, while the class is still a "putative class."

Putative Class

A putative class action is a lawsuit brought by one or more named plaintiffs on behalf of a potential group of similarly situated individuals who allegedly suffered a common injury. The term "putative" in the context of a class action lawsuit refers to a proposed or potential class that has not yet been certified by the court. Generally, the court will have a class certification hearing, possibly including expert testimony, preceded by expert reports, expert affidavits, expert depositions, or other forms of expert disclosures.

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Class Certification

The procedural step of “class certification” determines whether a case can proceed as a representative action. Financial litigation consultants are often at the heart of this process and their expertise often plays a crucial role in determining if the class will be certified. The involvement of financial litigation consultants can become a critical factor in the success or failure of a class action, especially in cases involving complex financial details, sophisticated econometric models, or voluminous amounts of data.

Class certification, as governed by Federal Rules of Civil Procedure (FRCP) Rule 23, hinges on four criteria: commonality, numerosity, typicality, and adequacy of representation.¹ Financial litigation consultants need to be aware of these criteria, especially commonality, numerosity, and typicality. The consultant’s role usually requires both a basic understanding of legal principles and a mastery of financial analysis, statistical modeling, or database management techniques. The consultant’s insights may help the attorneys demonstrate whether the four requirements for class certification are met, often through a detailed analysis of complex financial data.

The significance of financial litigation consultants is further accentuated in an era where financial markets are increasingly globalized and financial products are becoming more intricate. Advanced analytical skills are indispensable when attempting to dissect market trends, evaluate economic damages, make numerous calculations, and scrutinize financial practices. Articulate financial litigation consultants can translate highly technical financial data into coherent and legally relevant analyses that can withstand the scrutiny of the court and assist factfinders in reaching decisions.

The Scope of Financial Litigation Consulting

Financial litigation consultants are experts who bridge the gap between complex financial concepts and the legal context in which they are applied.² Their role involves dissecting, analyzing, or aggregating financial data, providing expert testimony, and assisting class counsel or defense counsel.³

One of the tasks usually associated with the role of a financial litigation consultant is to provide the factfinder with analyses of financial data and trends, and summaries thereof, that would be too complex or burdensome for the factfinder to calculate. In the class action area, this involves assessing financial transactions, making common calculations, determining economic damages, and interpreting market behaviors. The expertise of financial litigation consultants is especially important where class counsel intends to prove (and defense counsel intends to disprove) that certain financial conditions or actions similarly affect a group of individuals (or entities), such that commonality, numerosity, and typicality are present.

Financial litigation consultants typically possess a blend of advanced financial knowledge, a keen understanding of legal processes, and an understanding of key case specific facts or assumptions. They often hold degrees in finance, economics, or accounting, and likely possess additional certifications demonstrating study of the body of knowledge necessary for their expert analysis. It is important for the financial litigation consultant to have analytical skills, the ability to interpret complex datasets (and turn them into comprehensible insights), strong communication skills, and the ability to explain complex financial concepts in a manner that is understandable to judges or juries.⁴

1 Roman L. Weil, Daniel G. Lentz, and Elizabeth A. Evans, *Litigation Services Handbook: The Role of the Financial Expert*, 6th ed. (Hoboken, NJ: John Wiley & Sons, Inc., 2017).

2 According to the American Institute of Certified Public Accountants (AICPA), forensic accounting services, including dispute resolution, “utilize the practitioner’s specialized accounting, auditing, economic, tax, and other skills to perform a number of consulting activities. The provision of forensic accounting services often requires the practitioner to serve as an expert or fact witness, depending on the assignment.” AICPA Practice Aid 10-1, *Serving as an Expert Witness or Consultant* (New York: American Institute of Certified Public Accountants, 2010), 6.

3 According to the AICPA, the role of the financial accounting services practitioner can include serving as an expert or fact witness, consultant, trier of fact, special master, court-appointed expert, referee, arbitrator, mediator, or similar. *Ibid.*, 6–7.

4 Andreas Creutzmann, *Soft Skills for the Professional Services Industry: Principles, Tasks, and Tools for Success*, 1st ed. (Hoboken, NJ: John Wiley & Sons, Inc., 2022).

Federal courts are provided with broad discretion to determine the appropriateness of class certification. This discretion includes the ability to revise the class definition as the case develops, especially if it becomes apparent that the criteria of FRCP Rule 23 will not be met if the action proceeds as a class. If, during the litigation, it is found that the claims of class representatives are not typical of the class, that the class representative or chosen counsel are inadequate, or that the action will be administratively unmanageable, the court has the authority to decertify the class or require it to proceed only as an individual action. An appellate court will typically only reverse the district court's decision on class certification if there is a strong indication that the decision was a clear abuse of discretion.¹²

Damages Database

The damages database (usually maintained using Microsoft Excel®, Microsoft Access®, or equivalent spreadsheet or database software) captures and records all relevant details of the class, with specificity regarding date, state, persons, transactions, and similar data as necessary for the particular class. The financial litigation consultant/testifying expert will need to be able to respond to changes in the class definition directed by class counsel or the court by making changes to the relevant fields in the damages database. The damages database will therefore need to be sortable (for our hypothetical class) by state, dates hired/fired, earnings

levels, etc. Often, an important issue in the class certification stage is whether or not damages can even be measured on a class-wide basis. This may require expert testimony.

The expert for the class may opine that his or her review of materials considered to date allows an expert opinion to be rendered, to a reasonable degree of certainty, that damages could be calculated on a class-wide basis using common evidence based on the assumptions and methodology for calculating class-wide damages set forth in the expert report, and that the expert could build a database from such evidence that would be available for calculating damages.

The expert for the defendant may submit an opinion that the expert for the class has not (at that stage of the litigation process) actually gathered any data, created any database, implemented any methodologies, nor performed any actual calculations that would indicate the presence of a class. Rebuttal expert testimony from the defendant may continue by asserting that damages cannot be calculated class-wide and that there is no proof that all putative class members were injured; or injured in the same way. Defendant's rebuttal expert may opine that a "file-by-file" review is needed to properly determine the different economic damages suffered by each individual class member, and that the variety of evidence is inconsistent with claims of class-wide damages.



¹² Timothy E. Eble, "Pleading, Certification, Notice and Tolling," chap. 6 in *The Federal Class Action Practice Manual* (1999), <https://classactionlitigation.com/fcapmanual/chapter6.html>.

Selected Cases

Discussed below are some of the more significant cases that financial litigation consultants should be aware of when engaged by the class (or by the defendant) in class action lawsuits.



Tyson Foods, Inc. v. Bouaphakeo (2016)

This landmark decision¹³ addressed the use of statistical techniques in class action lawsuits.

The plaintiffs in this case were employees of Tyson Foods who worked at the company's pork processing facility in Iowa. The plaintiffs filed a class action lawsuit against the company, alleging violations of the Fair Labor Standards Act (FLSA) and the Iowa Wage Payment Collection Law. The issue at hand was the unpaid time employees spent "donning and doffing" protective gear and walking to and from their workstations.¹⁴

One key legal issue in the case was whether the lawsuit could be certified as a class action given the variability in the types of gear each worker wore and the time taken by each employee in donning and doffing their protective gear. Another important issue was whether it was permissible to use statistical techniques to determine the average time spent on these activities and apply it to the entire class for the purpose of calculating damages.

In a 6-2 decision, the Supreme Court ruled in favor of the class. The court held that representative evidence, such as statistical sampling, could be used to establish liability and damages in class action cases (especially because Tyson failed to keep proper records of the employees' time, as required by the FLSA). The court emphasized that this method was acceptable in this particular case because each employee could have relied on that evidence in an individual lawsuit.¹⁵

This decision is significant for its affirmation of the use of statistical methods in class action litigation. It provides guidance on how courts should handle cases where the specifics of each class member's experience are not identical but are similar enough to be treated collectively.

Wal-Mart Stores, Inc. v. Dukes (2011)

The *Wal-Mart* case¹⁶ is arguably one of the more notable cases addressing class certification issues, specifically, commonality among plaintiffs.

The case was initiated by Betty Dukes and other plaintiffs who filed a class action lawsuit against Wal-Mart, the world's largest retailer. They alleged that the company engaged in gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The plaintiffs claimed that Wal-Mart's nationwide policies resulted in women being paid less than men in comparable positions and receiving fewer promotions.

The central issue in the case was whether the lawsuit could proceed as a class action. For a case to be certified as a class action, it must meet several requirements, including commonality—the idea that there are questions of law or fact common to the class.¹⁷

The U.S. Supreme Court, in a 5-4 decision, ruled that the plaintiffs did not establish the necessary commonality for class action certification. The court found that the plaintiffs' evidence, including statistical data and anecdotal accounts, did not demonstrate that Wal-Mart operated under a general policy of discrimination. Thus, the claims of the individual employees were too diverse to be considered as a single class.¹⁸

The decision is significant for its impact on future class action lawsuits, particularly those dealing with employment discrimination. It raises the bar for establishing commonality in class action suits, requiring plaintiffs to demonstrate a more concrete and specific link between company policies and alleged discriminatory practices.

¹³ *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016).

¹⁴ "Donning and Doffing: Supreme Court Decides *Tyson Foods, Inc. v. Bouaphakeo*," Faegre Drinker, March 24, 2016, <https://www.faegredrinker.com/en/insights/publications/2016/3/donning-and-doffing-supreme-court-decides-tyson-foods-inc-v-bouaphakeo>.

¹⁵ *Ibid.*

¹⁶ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Note: Wal-Mart changed its name to Walmart in 2018.

¹⁷ Natanya DeWeese and James Rumpf, "Wal-Mart Stores, Inc. v. Dukes," Legal Information Institute, LII Supreme Court Bulletin, accessed January 9, 2024, <https://www.law.cornell.edu/supct/cert/10-277>.

¹⁸ *Wal-Mart Stores, Inc. v. Dukes*, at 358–359.

