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Class Action Monitor

Supreme Court Set to Adopt Limits on Statistics and Averages in Certifying Class Actions

By Edward Soto and Edward McCarthy

On June 8, 2015, the Supreme Court of the United States granted certiorari in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, 2015 WL 1278593, to resolve Tyson's challenge to a multimillion-dollar judgment awarded to a class of meat-processing employees who claimed insufficient pay. The decision, expected in late 2015 or early 2016, will address a court's ability to certify a class based on what has been described as a "trial by formula" – essentially limiting the need to produce evidence on a class-wide basis, and instead allowing extrapolated proof from a sample of class members. Without question, the case presents important issues on the difficult risk-versus-reward decisions that class action lawyers and their clients face on a regular basis. In fact, as much as any decision in the last few years, the case could help clarify a defendant's ability to move to strike class allegations, bifurcate class and merits discovery, and generally dispute class certification – all common albeit sometimes expensive weapons in class action defendants' arsenals.

The parties' arguments and case background provide an interesting backdrop for the expected decision.

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The Arguments Before the Court

According to Tyson's briefs, the Eighth Circuit's decision intensifies two circuit splits and conflicts with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), which limited a plaintiff's ability to establish classwide liability and damages. *See* Brief for Petitioner at 2-4, 2015 WL 1285369 (No. 14-1146). Specifically, Tyson raised the following two questions in its March petition for a writ of certiorari:

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act (FLSA), where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; and

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages.

Regarding the first question, Tyson argued that the "Second, Fourth, Fifth, Seventh, and Ninth Circuits have properly held that no class may be certified where plaintiffs seek to obtain an aggregate damages award for the class by

extrapolating from a fictional 'average' class member" while the Eighth and Tenth Circuits "recently affirmed class certification where plaintiffs obtained an aggregate damages award by extrapolating from a sample of class members who had varying degrees of injuries." *Id* at 3. On the second question, Tyson argued that the Second, Ninth, and D.C. Circuits have "held that to obtain class certification, plaintiffs must be able to show injury to all class members." *Id*. In contrast, like the Eighth Circuit in its decision below, the Third, Seventh, and Tenth Circuits allow plaintiffs to "bring damages claims on behalf of individuals who were not injured and thus would have no viable individual claim for damages." *Id* at 3-4.

In response, lawyers for Peg Bouaphakeo and her fellow named plaintiffs argued that without creating any circuit split, courts have successfully implemented representative proof and certified classes that contain potentially uninjured members, and that Tyson waived the right to appeal these issues. *See* Brief for Respondent at 2-4, 2015 WL 1951858 (No. 14-1146). The Plaintiffs also highlighted that "most of the cases cited [by Tyson] did not concern wage/hour claims at all [and] all of the cases on which Tyson relies involved much greater variation – both in degree and in kind – among claims of class members than is present here." *Id*. at 11. Finally, on reply, Tyson highlighted the seven amicus briefs filed in support of its position and reiterated the "lack of clarity in the law that has permitted plaintiffs to obtain certification of classes with uninjured members and to use extrapolation and averaging to elide significant differences among class members." Reply at 2, 2015 WL 2251177 (No. 14-1146).

The Case Background and Decisions the Court Will Consider

The named plaintiffs represent a class of employees at a Tyson meat-processing facility in Iowa. Claiming Tyson failed to pay overtime for donning (putting on) and doffing (taking off) protective equipment and clothing, they sued in 2007 under the FLSA and parallel state law. Notably, Tyson did not record the actual time it took any employees to perform these tasks, and the equipment and clothing used, and the time it takes to put on, take off, and transport the items, varies by individual employees depending on their role.

Following the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, Tyson moved to decertify the class. The plaintiffs opposed, arguing that they could establish their case using expert testimony based on the average donning and doffing time for a relatively small sample of several hundred of the defendant's employees. The district court denied the motion to decertify, notwithstanding notable variation – and perhaps a lack of quality control with respect to the selection process – of the sample of employees, who spent various amounts of time performing the allegedly uncompensated activities. During a nine-day trial, the district court then allowed plaintiffs to prove liability and damages, in part, by using expert evidence that allegedly demonstrated the amount of time an "average employee" was uncompensated. The jury returned a verdict for the class, with a final judgment totaling over $5 million.

On appeal, a divided panel of the Eighth Circuit affirmed the trial court's decision, holding that the plaintiffs could use statistical inference to prove liability and damages, and that individualized damages did not preclude class certification. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014). The dissent emphasized the substantial factual differences among individual employees, "including significant numbers of the putative classes suffering no injury and members of the entire classes suffering wide variations in damages." *Id* at 805.

Closing Thoughts

While the anticipated decision is difficult to predict with any certainty, there is hope that this case will provide practitioners and their clients with clarity on whether, when, and how to defeat class certification where a plaintiffs' counsel attempts to extrapolate evidence from one subset of plaintiffs and apply it to the class as a whole. Even assuming the decision provides an advantage for defendants or discourages the filing of certain class actions, however, only time will tell how far the decision will reach. The Supreme Court may limit the ruling to the facts of the case, which are unique in that the class allegedly contains hundreds of members who, absent the class certification, were not injured and without a right to damages. In any event, the case deserves the attention it has received, especially from any defendant in high-stakes litigation, where the assessment of risk and crafting of strategy for challenges to class certification are as recurring as they are critical.

Supreme Court to Decide Whether Plaintiffs Have Standing to Bring Class Action Lawsuits Without Proof of Actual Injury

By David Lender, Eric Hochstadt, Gregory Silbert and Kristen Murphy

The Supreme Court is poised next Term to clarify the reach of the constitutional Article III standing requirement limiting the jurisdiction of federal courts to actual "cases or controversies." The standing requirement comes up frequently in consumer protection and privacy class action cases where there is no claimed actual injury and plaintiff is suing on behalf of putative classes of thousands, if not millions, of consumers. These lawsuits are frequently brought based solely on an alleged violation of a federal law giving rise to statutory injury and, if proven, enable named plaintiffs to seek minimum statutory damages remedies on a class-wide basis, leading to large potential exposure.

Background of *Spokeo v. Robins*

On April 27, 2015, the Court granted certiorari in *Spokeo, Inc. v. Robins,* No. 13-1339. In *Spokeo*, plaintiff alleged that Spokeo, "a website that provides users with information about other individuals," violated the Fair Credit Reporting Act (FCRA). *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014). Plaintiff further alleged he was harmed when Spokeo published false information about him, including that he was married, more educated, wealthier and older than he actually was. *Id.* at 411. According to Plaintiff, "he [was] concerned that the inaccuracies in his [Spokeo] report will affect his ability to obtain credit, employment, insurance, and the like." *Id.*

The district court rejected plaintiff's argument that the potential reliance of future employers on this information could cause actual harm and held that a violation of the FCRA itself is insufficient to satisfy Article III standing requirements. The Ninth Circuit reversed the decision and held that "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," the violation of which "is usually a sufficient injury in fact to confer standing." *Id.* at 412. Defendant petitioned for a writ of certiorari.

Upon reviewing the petition, the Supreme Court requested input from the Solicitor General on whether it should hear the case. The Solicitor General argued that the Supreme Court should decline to do so, reasoning that the Ninth Circuit ruling should stand because publication of allegedly inaccurate information could cause "concrete harm," even if plaintiff cannot prove actual damages. Brief for the U.S. as Amicus Curiae at 7, *Spokeo*, __ U.S. __ (No. 13-1339). In contrast to the Solicitor General, a number of amici weighed in requesting that the Supreme Court grant certiorari to curb the wave of class action lawsuits that consume extensive amounts of time and money where consumers have not suffered any actual harm.

Circuit Split on Article III Standing in No Actual Injury Cases?

The Supreme Court seemingly elected to hear the case to resolve the perceived growing circuit split as to whether the availability of statutory damages alone is sufficient to confer Article III standing. Spokeo argued that, on the one side are the Sixth and Ninth Circuits, which held that a plaintiff can bring an FCRA action without showing actual harm (Petition for a Writ of Certiorari at 9, *Spokeo*, __ U.S. __ (No. 13-1339) (citing *Beaudry v. TeleCheck Svs., Inc.*, 579 F.3d 702 (6th Cir. 2009))); the Seventh Circuit, which upheld the availability of statutory damages in an FCRA suit where plaintiff could not prove injury (*id.* (citing *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006))); and the Eighth Circuit, which held that a plaintiff had standing to bring an action under a different federal law, the Electronic Funds Transfer Act, for statutory damages without demonstrating actual injury (*id.* at 12 (citing *Charvat v. Mutual First Credit Union*, 725 F.3d 819 (8th Cir. 2013))). On the other side, according to Spokeo, are the Second and Fourth Circuits, which held that plaintiffs do not have standing to bring Employee Retirement Income Security Act (ERISA) actions – that, like FCRA actions, allow for statutory damages – in the absence of a showing of actual injury. *Id.* at 10 (citing *David v. Alphin*, 704 F.3d 327 (4th Cir. 2009) and *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112 (2nd Cir. 2009))), along with the Third Circuit, where Justice Alito held that a plaintiff lacked standing to bring an action under the Lanham Act in the absence of actual injury (*id.* at 11 (citing *Joint Stock Soc'y v. UDV N.A., Inc.*, 266 F.3d 164 (3d Cir. 2001))).[1]

Spokeo Could Have a Major Impact on Consumer Protection and Privacy Class Action Lawsuits

The Supreme Court's resolution of this issue could affect the ability of plaintiffs to bring putative class actions beyond the FCRA where there is no claimed actual injury in order to seek statutory damages simply for a claimed violation of federal law. A number of federal laws could be affected, including the Truth in Lending Act, Fair Debt Collection Practices Act, Telephone Consumer Protection Act, ERISA, and the Real Estate Settlement Procedures Act. Petition for a Writ of Certiorari at 6-18, *Spokeo* , __ U.S. __ (No. 13-1339).

If the Supreme Court holds that a statutory injury, standing alone without any claimed actual injury, is sufficient to satisfy Article III's standing requirements, companies will continue to face a growing number of consumer protection and privacy class action lawsuits with large potential exposure for alleged technical violations of federal law. If the Supreme Court holds that a statutory injury based solely on an alleged violation of federal law, in and of itself, is not sufficient to satisfy Article III's standing requirements, the ruling would meaningfully curtail these types of lawsuits. The case will be heard next Term, and a decision will likely be issued by June, 2016. Given the wide-ranging implications of the Supreme Court's decision, numerous companies and interest groups will likely submit amicus curiae briefs.

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1. By contrast to the Ninth Circuit's Spokeo decision, in *Green v. eBay, Inc.*, the District Court for the Eastern District of Louisiana recently dismissed a putative class action alleging that eBay violated, among other statutes, the FCRA when its system was allegedly hacked by a third party. No. 14-1688, 2015 WL 2066531, at *1, 3 (E.D. La. May 4, 2015). Plaintiffs argued that "the increased risk of future identity theft or identity fraud posed by a data security breach confers Article III standing on individuals whose information has been compromised by the breach but whose information has not yet been misused." Id. at 1. The district court held it did not and dismissed the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Id.

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