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Class Action Monitor

Tyson Foods: The Supreme Court Will Further Clarify What It Means By "No Trial By Formula" With Its Ruling Next Term

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Following its seminal decisions in *Wal-Mart Stores, Inc. v. Dukes* (2011) and *Comcast Corp. v. Behrend* (2013), the Supreme Court continues to select class certification rulings for review as it shapes the development of the law in this area. In *Dukes*, the Court focused on the issue of commonality, decertifying a nationwide class of employees alleging gender discrimination claims and holding that plaintiffs seeking to represent a class must "demonstrate that the class members 'have suffered the same injury'" and prove their claims are capable of class-wide determination "in one stroke."[1] In *Comcast*, the Court overturned a grant of class certification because it found that the plaintiffs' statistical model for calculating damages fell "far short of establishing that damages are capable of measurement on a class-wide basis."[2]

Both *Dukes* and *Comcast* touched on the use of expert testimony and examining the merits to the extent necessary for the determination of class certification. The Supreme Court will further explore the role played by expert testimony and statistical models in determining whether a plaintiff has met his burden of showing class certification is warranted and the degree to which such testimony and modeling is rigorously scrutinized in the upcoming Term in *Tyson Foods*. These class certification issues arise in a variety of contexts as diverse as employment discrimination and antitrust, evidencing that these rulings are not subject matter specific.[3]

On June 8, 2015, the U.S. Supreme Court granted certiorari in *Tyson Foods, Inc. v. Bouaphakeo*[4] to resolve Tyson Foods' challenge to a multi-million dollar jury verdict awarded to a class of meat-processing plant employees who claimed insufficient compensation. Specifically, respondent-employees are hourly workers in a food-processing facility who allege Tyson failed to compensate them for time spent donning and doffing protective equipment and walking to and from their work stations in violation of the Fair Labor Standards Act and a parallel state law. The district court allowed plaintiffs to prove liability and damages by employing statistical evidence that presumed all class members were identical to an "average" employee and spent equal time on the tasks at issue. In addition, the court certified a class containing members whom Plaintiffs' own expert conceded were not underpaid and thus not injured. After denying Tyson's motion to decertify, the case went to trial and resulted in a jury verdict in favor of the plaintiff class. The district court

then denied Tyson's motion for judgment as a matter of law, and Tyson appealed to the Eighth Circuit, which affirmed the district court's rulings.

In *Dukes*, the Supreme Court rejected the use of representative proof—sometimes called "trial by formula"—whereby plaintiffs offered a plan to try a sample set of class members' claims and, if the alleged sex discrimination at issue in the case was proved, to then multiply the average back-pay award to determine the class-wide recovery. The *Dukes* Court expressed its view that plaintiffs could not extrapolate evidence from one subset of plaintiffs and apply it to the class as a whole absent additional individualized proceedings.[5]

In *Tyson Foods*, the Eighth Circuit held in a 2-1 decision on appeal that (1) the "averaging" method in the instant case was distinguishable from the "trial-by-formula" method the Supreme Court rejected in *Dukes*, and (2) a class definition is permissible despite the definition including individuals who clearly incurred no damages.[6] The Eighth Circuit noted that, unlike in *Dukes*, Tyson had a specific company policy (i.e., the payment of time spent donning and doffing necessary equipment, and walking to and from work stations) that applied to all class members, whereas the sex-discrimination claims at issue in *Dukes* relied upon individual interactions of putative class members with their employers. Further, unlike in *Dukes,* all *Tyson Foods* class members worked at the same plant and used similar equipment.[7] Thus, the Eighth Circuit held that calculation of class-wide damages based on the average time class members spent donning and doffing equipment was permissible and not in violation of *Dukes*.[8]

Tyson raised the following two issues in its petition for a writ of certiorari:

1. Whether differences among individual class members may be ignored and a class certified under F.R.C.P. 23(b)(3) or as a collective action where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed sample; and
2. Whether a class action may be certified or maintained under Rule 23(b)(3) or as a collective action when the class contains hundreds of members who were not injured and have no legal right to any damages.[9]

Regarding the first issue, the Supreme Court in *Tyson Foods* is poised to resolve a current circuit split regarding the predominance requirement of F.R.C.P 23(b)(3) as it relates to the "averaging" approach to calculating damages on a class-wide basis. In its petition for certiorari, Tyson argued that the "Second, Fourth, Fifth, Seventh, and Ninth Circuits[10] 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[11] "recently affirmed class certification where plaintiffs obtained an aggregate damages award by extrapolating from a sample of class members who had varying degrees of injury."[12]

Regarding the second issue before the Court in *Tyson Foods*, the Supreme Court may resolve a second circuit split regarding the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) as it relates to injury. Tyson argued that the Second, Ninth, and D.C. Circuits[13] have "held that to obtain class certification, plaintiffs must be able to show injury to all class members" while the Third, Seventh, Tenth, and Eighth Circuits[14] (the latter in its decision below) have held that plaintiffs are allowed to "bring damages claims on behalf of individuals who were not injured and thus would have no viable individual claim for damages."[15]

In response, Bouaphakeo and fellow named plaintiffs argued that courts have successfully implemented representative proof requirements and certified classes that contain potentially uninjured members, and that Tyson waived the right to appeal these issues.[16] Plaintiffs also noted that most of the cases cited by Tyson did not involve wage and hour claims, and that all of the cases on which Tyson relied involved more variation among class members' claims than is present in the current case.[17] On reply, Tyson highlighted the numerous amicus briefs filed in

support of its position and emphasized the "lack of clarity in the law that has permitted plaintiffs to obtain certification of classes with uninjured class members and to use extrapolation and averaging to elide significant difference among class members."[18]

Many amicus briefs filed in support of petitioner Tyson Foods make the question of the uninjured plaintiffs the focal point of their submissions. For example, the U.S. Chamber of Commerce focused in large part on the gate-keeper issue that is Constitutional Article III standing.[19] The Chamber argued that the Eighth Circuit failed to rigorously apply the requirements of Rule 23, allowing the named plaintiffs to sue on behalf of uninjured class members, thus violating Article III's requirement of injury-in-fact before a plaintiff has standing to sue. "The courts below dispensed with these essential constitutional requirements by allowing the named plaintiffs to sue on behalf of a class that includes a significant number of uninjured individuals. The courts concluded that as long as one member of the class has a plausible claim of injury, standing requirements are satisfied. *See* Pet. App. 8a–10a, 29a–30a. That approach to class certification—which would exercise judicial power to grant a "remedy" to a plaintiff with no injury—cannot be reconciled with the constraints of Article III."[20] While this relates to the secondary issue on appeal, the defense community is highly invested in the outcome of this issue. If plaintiffs' lawyers are required to demonstrate at class certification that every class member was in fact injured, this would drastically undermine the class action as a litigation tool.

The Chamber also argued that the Eighth Circuit's decision harms businesses as well as absent class members. The Chamber maintained that "sweeping, poorly formed" class actions too often benefit no one but attorneys and their experts. "Certifying loosely connected classes is not only unfair to class-action defendants, but it also risks binding absent class members to class-wide dispositions that are substantially divorced from the merits of their individual claims. Those interests are particularly acute in cases, such as this one, involving a concocted average class member that, by definition, will fail to adequately represent the claims of many class members and potentially dilute the recoveries of the truly injured."[21] The Chamber also cited the fact that class actions generally drag on for years a time as well, as the enormous cost of defending them, and the impact to an organization's reputation as factors that disproportionately affect businesses, especially small businesses, and ultimately those businesses' customers.[22]

The question remains whether the Supreme Court will use *Tyson Foods* to bring arguably non-conforming circuits in line with its ruling in *Dukes* where it rejected a "trial-by-formula" approach to damages, or use this opportunity to limit its ruling in *Dukes* to the facts of that case (i.e., where individual issues predominated due to the nature of the claims alleged).

The issues raised by *Tyson Foods* also were addressed in a recent California case where the state's Supreme Court held that a trial court erred in trying a wage and hour class action by means of a sampling technique that provided neither a valid basis to determine liability nor permitted the defendant its due process right to raise an affirmative defense to plaintiffs' claims.[23] Regardless of how the Supreme Court comes out in *Tyson Foods*, the decision will undoubtedly have resounding impact in how employment class action lawsuits are litigated and the type of evidence used by plaintiffs to support, and defendants to oppose, class certification. Given the use of statistical evidence in other areas beyond employment law, one can expect the *Tyson Foods* decision to shape the way class actions are litigated going forward, especially with respect to the use of expert testimony and challenges to the admissibility or reliability of such evidence in showing whether class certification is appropriate in a given case.

Notwithstanding its obvious impact in the employment law context, the Supreme Court's decision will shed light on future class actions across numerous other fields. For example, in the antitrust context, *compare In re Nexium Antitrust Litig. and In re Urethane Antitrust Litig. with In re Rail Freight Fuel Surcharge Antitrust Litig.* 725 F.3d 244 (D.C. Cir. 2013).[24] In *In re Nexium Antitrust Litig.*, the First Circuit held that the existence of a *de minimis* number of non-injured class members was not a bar to class certification. Similarly, in *In re Urethane Antitrust Litig.*, the Tenth Circuit held

that plaintiffs had established that common questions predominated despite the possibility that some purchasers would have minimal to no damages. By contrast, in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, the D.C. Circuit vacated the lower court's grant of class certification on a Federal Rule of Civil Procedure 23(f) interlocutory appeal, remanding for further examination of the plaintiffs' expert's damages model, given that it produced some false positives. The district court certified a class of shippers based primarily on a multiple regression model that claimed to show that impact and damages could be proven on a common basis for all class members. However, the D.C. Circuit vacated, holding that the regression model produced "false positives," thus improperly including non-injured members in the class.[25] The D.C. Circuit explained that predominance demands that the plaintiffs "show that they can prove, through common evidence, that all class members were in fact injured," though they are not required to prove the "precise amount" of damages at the certification stage.[26]

The recent interlocutory appeal granted by the First Circuit in *In re Prograf Antitrust Ligit.*[27]—in which a class of consumers and companies accuse defendant Astellas of delaying entry of a generic form of its immunosuppressant—also tees up the issue of whether a so-called "issue class" may be certified if it includes some allegedly non-injured members. The district court partially certified the indirect purchaser class consisting of consumers and companies that paid for the drug Prograf. Astellas argued that the certified class improperly included a large number of class members who were not injured because some members stayed with Prograf after the introduction of the generic drug (and even benefitted from its delayed entry). The defendant also argued that no manageable method existed to determine which class members were injured. The district court separated the end payors' common substantive antitrust issues from the economic impact of generic delay on individual class members, certifying an issue class regarding the former. In certifying an issue-only class, Astellas maintains that the district court allowed the plaintiffs to bypass the predominance requirement as it relates to whether there is common proof of injury.

The Supreme Court's decision in *Tyson Foods* may provide greater clarity as to whether plaintiffs can try to circumvent commonality and/or predominance issues with potentially overbroad classes by seeking certification of issue classes only.[28]

Tyson Foods may also affect a defendant's litigation strategy for disputing class certification generally, including the decision to bifurcate class and merits discovery, as well as other issues. For example, if a plaintiff seeks to represent a class that includes uninjured or potentially uninjured members, the *Tyson Foods* decision may impact whether those uninjured members even have standing to sue in the first instance. Depending on the ruling in *Tyson Foods*, one can foresee defendants moving to strike overbroad class allegations on this basis with greater regularity and obtaining an early strategic victory in a class action lawsuit. Additionally, depending on the outcome of *Tyson Foods*, a defendant may wish to consider whether a case should be bifurcated, such that the issue of whether there is common proof of injury to every putative class member is presented to the court first, as the issue could be dispositive. This bifurcation could put the focus of discovery on the named plaintiff(s) and absent class members, for instance, to demonstrate whether the putative class included uninjured members. Of course, however, the full extent of the ruling's potential impact is at this point merely speculation.

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011).
2. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013).
3. *Tyson Foods* is also expected to deliver clarity in the products liability context as well, because, contrary to what many expected, the Supreme Court did not grant certiorari in the three front-loading washer cases, in which broad classes of consumer product owners alleged a defect in a certain type of washing machine, leading to the growth of mold and mildew inside the machines and resulting in odors and stained laundry. Despite plaintiffs' claims that the defect existed in all of the products, only a small minority of class members experienced the problem. See *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013); *Cobb v. BSH Home Appliances Corp.*, No. 13-80000, 2013 WL 1395690 (9th Cir. Apr. 1, 2013); *Glazer v. Whirlpool Corp.*, 678 F.3d 409 (6th Cir. 2012). The Supreme Court

had previously granted certiorari in *Butler* and *Glazer*, at which the time the Court vacated the decisions below granting certification in both instances, and remanded back to the circuit courts to be decided according to *Comcast v. Behrend* (in which the Court decided that the Third Circuit should have more carefully examined the plaintiffs' damages model before certifying the class). After both the *Butler* and *Glazer* courts affirmed their prior decisions granting class certification, defendants re-applied for certiorari, which the Supreme Court denied.

4. *Tyson Foods, Inc. v. Bouaphakeo*, 135 S.Ct. 2806 (2015).
5. *Id*. at 2561.
6. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014).
7. The Eighth Circuit did not expressly address the propriety of certifying a class with putative class members who had no damages. The Eighth Circuit did note that Tyson stipulated that "workers at the Storm Lake plant tend to work a significant amount of overtime on a weekly basis." *See id*. at 800. The Eighth Circuit continued, "Plaintiffs show uncompensated overtime work by applying average donning, doffing, and walking times to employee timesheets. The evidence is 'susceptible to [the] reasonable inference' that the jury's verdict is correct." *Id*.
8. The Eighth Circuit reasoned: "[h]ere [unlike in *Dukes*], plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages. Using statistics or samples in litigation is not necessarily trial by formula. *See Comcast*, 133 S.Ct. at 1434 (considering expert's multiple-regression model); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir. 2011) (favoring 'a calculation based on the summation of mean times' to represent 'the amount of time that employees working at the plant actually spend donning and doffing'). *Cf. Martinez v. Ryan*, – U.S. –, 132 S.Ct. 1309, 1325 n. 5, 182 L.Ed.2d 272 (2012) (relying on 'a sample of federal habeas cases')." *Tyson Foods, Inc.*, 765 F.3d at 798.
9. Brief for Petitioner at (i), 2015 WL 1285369 (No. 14-1146).
10. *See McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013); *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014).
11. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014); *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014).
12. Brief for Petitioner at 2-4, 2015 WL 1285369 (No. 14-1146).
13. *See Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013).
14. *See Krell v. Prudential Insurance Company of America*, 148 F.3d 283 (3d Cir. 1998); *Kohen v. Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010).
15. Brief for Petitioner at 2-4, 2015 WL 1285369 (No. 14-1146)
16. *See* Brief for Respondent at 2-4, 2015 WL 1951858 (No. 14-1146).
17. Specifically, in addressing Tyson's reliance on *Dukes*, plaintiffs noted that, "[a]bsent a common discriminatory policy or practice … a 'sample' determination that some plaintiffs had been discriminated against would say nothing about the reasons other plaintiffs had not been promoted. This case concerns a wholly different type of claim: a claim for unpaid overtime, which depends on common proof as to the employer's compensation policies and an objective determination of the amount of time worked." Plaintiffs further noted that "[t]hese types of differences are on a different scale from the minor variations at issue in this wage/hour case." Id. at 10-13.
18. Reply at 2, 2015 WL 2251177 (No. 14-1146).
19. Brief for The Chamber of Commerce of United States of America et. al. as Amici Curiae Supporting Petitioner, *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (2015).
20. *Id*. at 6.
21. *Id*. at 19.
22. *Id*. at 20-21.
23. *See Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014).
24. *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).
25. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 253-255.
26. *Id*. at 252.
27. *In re Prograf Antitrust Litig.*, No. 15-1290 (1st Cir. Mar. 4, 2015).
28. Some companies defending cases outside of the employment context have tried to invoke the forthcoming *Tyson Foods* ruling as a basis on which to stay proceedings. *See In re Polyurethane Foam Antitrust Litig.*, No. 10-MD-2196, 2015 WL 4459636 (N.D. Ohio July 21,

2015) where a court declined to do so. The district court denied defendants' motion to stay the indirect purchasers' litigation accusing defendants of fixing polyurethane foam prices. The defendants asked for a stay pending the Supreme Court's decision in *Tyson Foods*. The district court's ruling denying the stay cited to the plaintiff's opposition, noting that it is speculative as to whether the *Tyson Foods* decision will produce any change in the law that would impact the case. The plaintiff's opposition also highlighted that the issue in *Tyson Foods* is the use of statistical sampling to establish liability, whereas the indirect purchaser plaintiffs at issue do not intend to use statistical sampling to establish liability, but rather will use testimonial and documentary evidence, econometric regressions of actual data produced in the case, and economic analysis.

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