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Class Action Monitor

Tyson Foods, Inc. v. Bouaphakeo: SCOTUS Issues Narrow Ruling Permitting the Use of Sampling Evidence in The Instant Case

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On March 22, 2016, the second of three closely watched class action cases argued before the U.S. Supreme Court last fall was decided in *Tyson Foods, Inc. v. Bouaphakeo*.[1] In January, the Court held in *Campbell-Ewald Co. v. Gomez* that a defendant's unaccepted offer of judgment does not moot the individual claim of a named plaintiff in a putative class action.

This week, in *Tyson Foods*, the Supreme Court handed the plaintiff bar another win, albeit a narrow one. The Court held that workers in a food-processing facility could rely on representative sampling and statistical analysis regarding hours worked "to fill an evidentiary gap" created by Tyson's failure to keep adequate records to establish class wide liability for alleged violations of the Fair Labor Standards Act (FLSA) and a parallel state law. While technically a victory for plaintiffs, the majority opinion, authored by Justice Kennedy, clearly underscored that this holding does not constitute a broad ruling sanctioning the use of representative proof, often called "trial by formula," in class actions. On the contrary, the Supreme Court laid the foundation for defendants to challenge the introduction of sampling evidence and other statistical analyses in class actions by emphasizing that the underlying question is whether such evidence could have been used to establish liability in an individual action; *i.e.*, there are no special rules allowing the introduction of sampling evidence or other statistical analyses to establish liability in class actions. Further, the Supreme Court declined to address the other issue raised by Tyson—whether plaintiffs must demonstrate a mechanism for ensuring that uninjured class members do not receive damages. Nevertheless, a concurrence by Chief Justice Roberts expressing concern that the district court would not be able to fashion a method for awarding damages only to those class members who suffered an actual injury invites future arguments by defendants that class certification is improper where not all members of the class have been injured.

Plaintiffs Sought to Prove Tyson's Liability Through Statistical Averages

On June 8, 2015, the Supreme Court granted *certiorari* in *Tyson Foods* to resolve Tyson's challenge to a multi-million dollar jury verdict awarded to a class of meat-processing plant employees who claimed insufficient compensation. The plaintiffs were hourly workers who alleged that Tyson failed to compensate them for time spent donning and doffing protective equipment in violation of the FLSA and Iowa wage and hour 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 district court certified a class that included members whom plaintiffs' own expert conceded were not underpaid and thus not injured. After denying Tyson's motion to decertify,[2] the case went to trial and resulted in a $2.9 million 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.

On appeal to the Eighth Circuit, Tyson argued that the Supreme Court's recent decision in *Wal-Mart v. Dukes* precluded the district court from certifying the workers as a class.[3] In *Dukes*,[4] in an opinion authored by the late Justice Scalia, the Supreme Court rejected as "trial by formula" plaintiff's 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]

The Eighth Circuit rejected Tyson's arguments and affirmed the district court's rulings, holding that (1) the "averaging" method used by the workers was distinguishable from the "trial by formula" method the Supreme Court rejected in *Dukes*, and (2) class certification was permissible although the class definition included individuals who clearly incurred no damages.[6]

The Supreme Court granted *certiorari* on two issues: (1) whether differences among individual class members may be ignored and a class certified under Federal Rule of Civil Procedure 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.[7] But in its merits brief Tyson reframed the second issue, arguing only that plaintiffs must identify a mechanism for excluding uninjured class members "prior to judgment" for damage allocation purposes—not prior to class certification.

Use of Statistical Evidence Depends on the Facts and Circumstances of Plaintiff's Case

In holding that the plaintiffs in *Tyson Foods* were permitted to use statistical averages to show Tyson's liability for unpaid overtime, Justice Kennedy, joined by Justices Roberts, Ginsburg, Breyer, Sotomayor and Kagan, held that the ability for future plaintiffs to use statistical analysis "depends on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action."[8] Further, the Court stated that "[t]he fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases."[9]

Underlying the Court's decision to permit the use of statistical analysis in *Tyson Foods* were the facts that the case is an FLSA collective action and that Tyson had failed to keep adequate records of the hours each employee worked. First, citing *Anderson v. Mt. Clemens Pottery Co.*,[10] an FLSA case from 1946 that was discussed at length during oral argument, the Court noted that it had previously allowed employees to use statistical analysis in FLSA collective actions to show hours worked.[11] Second, because Tyson had failed to keep adequate records regarding its employees, each employee would have likely needed to rely on statistical averages to prove the amount of time he or she worked had each class member brought an individual lawsuit.[12] The Court emphasized representative proof can be used in class actions only if the same proof would be admissible in an action brought by an individual class member: "[i]f the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action."[13]

The Supreme Court also rejected Tyson's argument that the use of statistical averages contravened it's decision in *Wal-Mart Stores, Inc. v. Dukes*.[14] The Court explained that *Dukes* did not stand for the broad proposition that representative samples could never be used to establish a defendant's liability.[15] The point of

distinction was whether the sample at issue could have been used to establish liability had the class members brought individual actions. In *Dukes*, the plaintiffs did not provide significant proof of a common policy of discrimination to which each employee was subject and, therefore, none of them could have prevailed in an individual suit by relying on evidence detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, in *Tyson Foods*, class members worked at the same plant, used similar equipment and were paid under the same policy and, under these circumstances, statistics regarding a subset of employees was probative of the experience of all class members. Thus, the Supreme Court 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*.[16]

In dissent, Justice Thomas joined by Justice Alito stated that the district court erred in certifying the class because the class of workers did not satisfy the predominance requirement of Federal Rule of Procedure 23(b)(3).[17] Justice Thomas wrote that the district court failed to undertake a rigorous analysis to ensure that the statistical evidence offered by the workers was sufficiently probative of the individual issue to make it susceptible to class wide proof as required by the Rule.[18]

The Question of Uninjured Class Members Remains Unresolved

The Supreme Court declined to address the second issue on which it granted *certiorari*—whether a class could be certified with uninjured class members. It obsered that Tyson had reframed the argument in its merits brief, arguing that plaintiffs needed to demonstrate a method for identifying uninjured class members to ensure that they would not receive damages. Because damages had not yet been disbursed and there was no evidence in the record about how damages would be disbursed, the Court concluded that the argument, as reframed by Tyson, was premature.[19] The Court noted that Tyson may raise a challenge to the allocation method when the case is remanded to the district court for disbursement of the jury award. Chief Justice Roberts further emphasized this point in a concurrence joined in relevant part by Justice Alito, expressing concern that plaintiffs would be unable to devise a means of distributing the jury award only to injured class members: "[i]f there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand. This issue should be considered by the district court in the first instance."[20]

The Takeaway

The Supreme Court's decision in *Tyson Foods* turned on the facts at issue in that case and is not a wholesale endorsement of "trial by formula" and, at best, is a narrow victory for plaintiffs. After *Dukes* was decided in 2011, many defense counsel championed the decision as a blanket repudiation of "trial by formula." In *Tyson Foods*, the Supreme Court walked back to more of a middle-ground position that there is no bright line rule permitting or prohibiting the use of sampling evidence or other statistical analysis to prove liability. In practice, this means that evidentiary battles regarding whether the facts-and-circumstances of a particular case permit the use of sampling evidence will become a routine part of most class actions in which plaintiffs rely on "trial by formula." Moreover, the Supreme Court's reconciliation of its opinions in *Tyson Foods* and *Dukes* suggests that plaintiffs face a high bar—they must show a level of class uniformity such that statistics would be admissible had each class members brought an individual lawsuit.

Further, *Tyson Foods* reaffirmed a maxim that is highly favorable to defendants—that evidentiary standards and the burden of proof in class actions are no different than individual actions. In the majority opinion, Justice Kennedy emphasized that, pursuant to the Rules Enabling Act, the class action device cannot be used to enlarge the substantive rights of class members thereby depriving defendants of their right to litigate statutory defenses to individual claims. The result in *Tyson Foods* is consistent with that premise—representative and statistical evidence was only admissible to prove Tyson's liability, because, and only because, sampling would have been admissible in an individual lawsuit to prove liability and damages. Therefore, *Tyson Foods* strongly

supports the argument that courts should not relax the rules just because a case is brought as a class action.

Lastly, *Tyson Foods* left unresolved the issue of whether a class including uninjured members may be certified, as well as the reframed issue raised in Tyson's merits brief of whether a class should be decertified where plaintiff failed to fashion a mechanism for ensuring that damages are not disbursed to uninjured class members.

Weil will monitor how the district court in *Tyson Foods* rules on these issues after remand.

1. *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, 2016 WL 1092414 (U.S. Mar. 22, 2016).
2. *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3793962 (N.D. Iowa Aug. 25, 2011).
3. Brief for Appellant at 20, 2013 WL 663846 (No. 12-3753).
4. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).
5. *Id*. at 2561.
6. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014).
7. *Tyson Foods, Inc. v. Bouaphakeo*, 135 S.Ct. 2806 (2015).
8. *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, 2016 WL 1092414, at *1 (U.S. Mar. 22, 2016) (internal quotation marks and citations omitted).
9. *Id*. at *11.
10. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).
11. *Tyson Foods*, 2016 WL 1092414, at *9-11.
12. *Id*. at *9.
13. *Id*. at *8.
14. *Id*. at *10.
15. *Id*.
16. *Id*.
17. *Tyson Foods*, 2016 WL 1092414, at *15 (Thomas, C., dissenting).
18. *Id*.
19. *Tyson Foods*, 2016 WL 1092414, at *12.
20. *Tyson Foods*, 2016 WL 1092414, at *15 (Roberts, J. concurring).

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