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Employer Update

Confidentiality Provisions Under Heightened Government Scrutiny

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In This Issue

Employers use a number of workplace documents containing provisions requiring employees to maintain the confidentiality of specified company information. These documents may take the form of employment or separation agreements, handbooks, codes of conduct, or policies governing internal investigations or settlement of disputes. In recent years, several governmental agencies have scrutinized such confidentiality provisions in a variety of contexts, finding that even standard confidentiality requirements may trespass on employees' rights to disclose information to the government or to other employees.

For instance, the National Labor Relations Board (NLRB) has invalidated a number of confidentiality provisions for infringing on employees' rights to discuss wages with co-workers under Section 7 of the National Labor Relations Act (NLRA), even where such confidentiality provisions make no specific mention of wages. In addition, with the enactment of Defend Trade Secrets Act (DTSA) in May of this year, employers now must provide notice of the statute's immunity and anti-retaliation provisions in contracts governing the use of trade secrets or other confidential information.

In this article, we examine key developments impacting confidentiality provisions in workplace agreements and policies, and provide recommendations for employers in drafting such provisions in order to reduce the risk of challenges to their enforceability.

Reporting Misconduct to Government

Both the Equal Employment Opportunity Commission (EEOC) and Securities Exchange Commission (SEC) have scrutinized confidentiality provisions in recent years, reasoning that such provisions may discourage or prohibit employees from reporting suspected misconduct to the government. For instance, in *EEOC v. CVS Pharmacy, Inc.,* No. 14-cv-863 (N.D. Ill. 2014), the EEOC challenged the confidentiality provision in CVS's separation agreement as unlawfully limiting communications with the EEOC in violation of Title VII. One provision in that separation agreement defined confidential information to include "wages and benefit structures," "duties of [CVS] employees," "information pertaining to... charges," "information that could affect [CVS's] business," and "personnel [information]," which the EEOC argued were "categories so broad that they cover essentially all information that could ever be relevant to an EEOC

investigation." EEOC Opposition at 14, *CVS Pharmacy, Inc.,* No. 14-cv-863. Additionally, CVS conditioned the disclosure of confidential information on CVS's prior written authorization to share such information, which the EEOC found contrary to the right to "assist or participate[ ] in any manner in an EEOC investigation." *Id.* at 15.

[W]ith the enactment of Defend Trade Secrets Act… employers now must provide notice of the statute's immunity and anti-retaliation provisions in contracts governing the use of trade secrets or other confidential information.

While CVS's separation agreement did contain a sentence under the paragraph "No Pending Actions; Covenant Not to Sue" stating that nothing in that paragraph was to interfere with the employee's right to participate or cooperate in a governmental proceeding or investigation to enforce discrimination laws, the EEOC found this carve out insufficient to counteract the "broad and ambiguous" language elsewhere that would "deter reasonable employees from fully exercising Title VII rights." *Id.* at 15-16.

Courts have not evaluated the EEOC's arguments on the merits, as both the district and circuit courts dismissed the EEOC's claims due to its failure to conciliate. *See EEOC v. CVS Pharmacy, Inc.,* 809 F.3d 335 (7th Cir. 2015). Nevertheless, to avoid litigation, employers may wish to consider including carve outs in confidentiality provisions that expressly permit employees to disclose confidential information to governmental agencies, as well as removing requirements to obtain employer authorization prior to such disclosure.

The SEC also has assumed an aggressive enforcement posture with respect to confidentiality provisions. Last year, it launched its first enforcement action against an employer for violating Rule 21F-17 of Dodd-Frank. *See In re KBR, Inc.,* Exchange Act Release No. 74619 (Apr. 1, 2015). Rule 21F-17 states, in relevant part, that "[n]o person may take any action to impede an individual from communicating directly with the [SEC] about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement... with respect to such communications." In its enforcement action, the SEC targeted confidentiality agreements that KBR used during internal investigations. Because the confidentiality agreements required witnesses to provide notice to and obtain pre-approval from KBR before discussing information from the investigation with outside parties, and further stated that violation of the agreement could result in discipline up to and including termination of employment, the SEC found that these requirements potentially discouraged employees from reporting securities violations to the SEC.

The SEC's basis for finding a Rule 21F-17 violation has not been tested in court, as KBR settled the action. Yet, multiple courts have acknowledged, at least in the False Claims Act (FCA) setting, that public policy interest in reporting wrongdoing to the government allows employees to provide confidential information to the government in breach of their confidentiality agreements. *See, e.g., United States ex. Rel. Cieszyski v. LifeWatch Services Inc.,* No. 13-cv-4052 (N.D. Ill. May 13, 2016).

Neither the EEOC nor SEC appears to be challenging the validity of confidentiality provisions that seek to protect proprietary business information such as financial data or customer lists that are unrelated to any suspected misconduct. Nor did the SEC question the employer's ability to protect information covered by the attorney-client privilege.[1]

Right to Communicate with Co-workers

The NLRB has scrutinized workplace agreements and policies with respect to employees' rights to disclose confidential information to co-workers and other third parties. Section 7 of the NLRA has long protected employees' rights to engage in "concerted activity," which includes the right to discuss wages and other terms and conditions of employment with employees, union officials, the NLRB, or the media. Under

Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004), maintenance of a workplace rule that does not explicitly restrict Section 7 activity nevertheless violates the NLRA if employees would "reasonably construe" it as prohibiting Section 7 activity. There, the NLRB upheld a facially neutral handbook rule prohibiting harassment and abusive language, finding employees would reasonably construe it to have the purpose of ensuring a "civil and decent workplace" rather than to restrict Section 7 activity.

Recently, the NLRB has applied the "reasonably construe" test of *Lutheran* to invalidate several facially neutral confidentiality provisions. For example, in *Schwan's Home Service, Inc.,* 364 N.L.R.B. No. 20 (June 10, 2016), the NLRB held that Schwan's confidentiality agreement violated Section 7 rights by prohibiting employees from using "confidential information" to the benefit of employees or third parties, or to the company's detriment, where "confidential information" included information pertaining to the wages, commissions, performance, or identities of employees. Based on this definition, the NLRB concluded that employees would reasonably understand the confidentiality agreement to preclude employees from disclosing the terms and conditions of employment to permissible parties. In *Flex Frac Logistics, L.L.C. v. NLRB,* 746 F.3d 205 (5th Cir. 2014), the Fifth Circuit upheld a similar ruling where the only reference to wages in the definition of "confidential information" was the term "personnel information," finding that this term "implicitly included wage information."

Memorandum GC 15-04 by the NLRB's General Counsel (Mar. 18, 2015), sets forth examples of confidentiality provisions in handbooks that the NLRB General Counsel considers *per se* unlawful and facially lawful. The NLRB General Counsel's views further underscore the need for employers to carefully word confidentiality provisions to avoid enforcement actions by the NLRB. *Per se* unlawful provisions include generalized statements such as "[d]o not discuss 'customer or employee information' outside of work," or blanket prohibitions on disclosing non-public information or employer details. By contrast, facially lawful provisions tend to enumerate specific business information, without mention of employee information or anything that would reasonably be considered a term or condition of employment. Examples of facially lawful provisions include those that prohibit unauthorized disclosure of "business secrets" or the disclosure of "confidential financial data, or other non-public proprietary information," including "information regarding business partners, vendors or customers." NLRB precedent further suggests that a savings clause may be effective if it explicitly provides that the otherwise suspect confidentiality provision does not apply to employees who communicate with others about terms and conditions of employment, and immediately follows the arguably offending provision. *See Tiffany Co.,* No. 01-CA-111287 (N.L.R.B. Aug. 5, 2014). *But see Am. Red Cross Blood Servs.,* No. 08-CA-090132 (N.L.R.B. June 4, 2013) (savings clause fails to cure overbroad confidentiality policy without specific mention of right to discuss terms and conditions of employment).

Statutory Notice Requirements

The DTSA further constrains workplace confidentiality agreements by requiring employers to provide notice to employees of the act's immunity and anti-retaliation provisions, designed to protect individuals who may need to disclose trade secrets. These provisions, specified in detail below, must be "in any contract or agreement with [employees, consultants, and contractors entered into or updated after May 11, 2016] that governs the use of trade secrets or other confidential information." 18 U.S.C. § 1833(b)(2). Employers have two means by which to comply. They may include the requisite language directly in such agreements, or insert a cross-reference in the agreements to a policy document that includes the employer's procedures for reporting a suspected violation of law. Employers who fail to include this notice will not be able to seek punitive damages or attorneys' fees under the DTSA. Note, however, that the DTSA does not prevent employers from seeking such relief under state law.

Practice Pointers

In light of these recent developments, employers should revisit their workplace agreements and policies

to ensure that their confidentiality provisions conform to a number of requirements. First, employers might wish to include carve outs accompanying confidentiality provisions explaining that it is always permissible to report suspected illegal activity to the government. A carve out might state that the employee is permitted to disclose "confidential information" to governmental agencies for purposes of participating in or assisting with an investigation conducted or managed by such agencies. In the context of internal investigations, employers should additionally make clear, preferably orally and in writing during the *Upjohn* warning, that while the attorney-client privilege protects communications between attorneys and employees, it does not prohibit disclosure to the government of any facts underlying the investigation, provided that those facts were not learned exclusively through privileged communications.

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Second, in all contracts with employees, consultants, and contractors that discuss trade secrets or confidential information entered into or updated after May 11, 2016, employers might state that the employee has been notified, in accordance with the DTSA, that (i) individuals shall not be held liable for trade secret disclosure (a) made in confidence to a government official or attorney solely for reporting or investigating a suspected legal violation, or (b) made in a document filed under seal in a proceeding; and (ii) individuals who file employer retaliation lawsuits for reporting suspected violations of law may disclose trade secrets to their attorneys and use trade secret information in a court proceeding if they file the trade secret documents under seal and do not disclose the trade secrets except pursuant to court order. Employers might alternatively incorporate similar language into a company policy, and reference the policy in all relevant agreements, provided that parties to such agreements also receive the policy.

Third, employers should ensure that confidentiality provisions are consistent with employees' Section 7 rights. For example, employers may wish to include a savings clause immediately following a provision which requires confidentiality of an employer's wage or benefit policies, stating that the provision does not interfere with employees' rights to discuss terms and conditions of employment with co-workers or governmental agencies.

Finally, employers should be cautious of accusing whistleblowers of illegally revealing confidential information, as courts have held that employees may share employers' confidential information if required by law or justified by policy. For instance, the Sarbanes-Oxley Act (SOX) mandates whistleblower disclosures under certain circumstances, and courts have rejected employers' attempts to enforce confidentiality agreements where enforcement would frustrate the purpose of the FCA. Accusing an employee of breaching a confidentiality agreement could be seen as an attempt to take adverse action against an employee whose intent was to reveal misconduct, inviting claims that the employer violated anti-retaliation provisions of statutes such as SOX, Dodd-Frank, or the FCA.

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1. The SEC did not address attorney-client privilege in its enforcement order. Rule 21F-17 itself exempts from coverage agreements concerning information covered by the attorney-client privilege. *See* 17 CFR § 240.21F-4(b)(4).

Interpreting *Tyson Foods*: What Does the Recent SCOTUS Decision Mean for the Defense Bar?

By David R. Singh and Hannah L. Jones

In March 2016, the U.S. Supreme Court decided *Tyson Foods, Inc. v. Bouaphakeo,*[1] which was initially panned by some as a win for the plaintiff bar and a walk back from the Court's landmark decisions in *Wal-Mart v. Dukes*[2] and *Comcast v. Behrend*[3] which seemed to reject "trial by formula" in class action cases. In *Tyson Foods*, the Supreme Court held that a class of 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 similar Iowa state law. In so holding, the Supreme Court declined to address the other issue raised by Tyson's petition for certiorari—whether plaintiffs must demonstrate a mechanism for ensuring that uninjured class members do not receive damages.

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While technically a victory for plaintiffs, the *Tyson Foods* majority opinion, authored by Justice Kennedy, made clear that it was not a broad ruling sanctioning the use of representative proof, often called "trial by formula," in class actions. Indeed, as detailed below, the Supreme Court laid the foundation for defendants to challenge the introduction of sampling evidence in class actions in several ways. First, by deciding the case on its facts, the Supreme Court in *Tyson Foods* left open whether its holding is limited to FSLA collective actions. Second, *Tyson Foods* emphasized that the underlying admissibility question is whether the representative evidence could have been used to establish liability in an individual action, reinforcing that pursuant to the Rules Enabling Act, there can be no special rules relaxing the standards for class actions. Third, Justice Roberts' concurrence suggested that plaintiffs must present a trial plan explaining how they intend to use the representative sampling and their proposed method for allocating damages, which provides defendants with yet another tool to expose due process, manageability and other issues related to the use of sampling evidence early in the case. Finally, now, a few months after the decision, it has become apparent that lower courts are beginning to interpret and apply *Tyson Foods* in ways that are often favorable to defendants.

Plaintiffs Sought to Prove Tyson's Liability Through Statistical Averages

First the facts: the plaintiffs in *Tyson Foods* 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 an Iowa state wage and hour law. The district court permitted 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 who were thus not injured). After denial of Tyson's motion to decertify the class,[4] 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, Tyson argued that the Supreme Court's 2011 decision in *Wal-Mart v. Dukes* should have precluded the district court from certifying the putative class.[5] In *Dukes*,[6] a sex discrimination class action, the Supreme Court rejected the use of representative proof 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, in an opinion penned by the late Justice Scalia, 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.[7] Tyson also argued that class certification was improper because the putative class included many individuals who were not underpaid and who have no legal right to damages.

The Eighth Circuit rejected Tyson's arguments and affirmed the district court's rulings. When Tyson further appealed to the Supreme Court, it 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.[8] In its merits brief, however, Tyson reframed the second issue by arguing only that plaintiffs needed to show how they planned to exclude uninjured class members "prior to judgment" for damage allocation purposes—not prior to class certification.

A Limited Majority Opinion on the Permissibility of "Trial by Formula"

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, noted 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."[9] The Court further explained 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."[10]

Underlying the Court's decision to permit the use of statistical analysis in *Tyson Foods* were the facts that the case was an FSLA 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.,*[11] an FSLA case 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.[12] Second, because Tyson had failed to keep adequate records regarding its employees, each employee would have likely needed to rely on statistics to prove the amount of time he or she worked had each class member brought an individual lawsuit.[13] The Court wrote that "[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."[14]

The Supreme Court also rejected Tyson's argument that the use of statistical averages contravened its decision in *Wal-Mart Stores, Inc. v. Dukes*.[15] 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.[16] Such evidence may be used to establish liability where it 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 inconsistent with *Dukes*.[17]

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).[18] 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—whether each employee worked over 40 hours without receiving full overtime pay—to make it susceptible to class-wide proof.[19]

In the wake of *Tyson Foods*, defendants will likely see an increase in the number of class action plaintiffs proffering statistical evidence in an attempt to establish liability and damages.

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—reasoning that it would be inappropriate to decide the issue since Tyson reframed the argument in its merits brief where Tyson argued that plaintiffs needed to set forth a more complete trial plan, *i.e.* articulate a feasible method for identifying uninjured class members to ensure that they would not receive damages. The Court similarly declined to decide the issue as reframed by Tyson on the record before it because it was unclear whether plaintiffs' proposed damages allocation method would successfully identify uninjured class members.[20] But the Court noted that Tyson could raise its challenge to the trial plan when the case is remanded to the district court for disbursal of the jury award. Justice Roberts further emphasized this point in a concurrence, expressing his concern that plaintiffs would be unable on remand to the district court to devise a means of distributing the jury award to only 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."[21] The Supreme Court granted certiorari on a similar issue in *Spokeo, Inc. v. Robins*.[22] While holding that a named plaintiff must show that he has suffered a "particularized" and "concrete" harm, *Spokeo* also left open the issue of whether a class can be certified if it is clear that some potential class members are uninjured and would not themselves meet Article III's standing requirements.[23]

Practical Defense Strategies Post-*Tyson Foods*

In the wake of *Tyson Foods*, defendants will likely see an increase in the number of class action plaintiffs proffering statistical evidence in an attempt to establish liability and damages. However, as noted above and discussed in further detail below, the *Tyson Foods* opinion laid the foundation for various strategies for challenging such evidence and defeating class certification.

Tyson Foods May Be Limited to Its Facts

Defendants should argue that the decision in *Tyson Foods* authorizing the use of statistical sampling was limited to its facts in the context of FSLA collective actions and, therefore, is not a radical endorsement of "trial by formula." The Supreme Court was clear that the permissibility of representative evidence outside of the FSLA context "depend[s] on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action."[24] In *Tyson Foods*, the underlying cause of action was an FSLA collective action, giving plaintiffs the benefit of clear prior Supreme Court precedent—the *Mt. Clemens* decision—endorsing the use of representative sampling to prove liability in collective actions where the employer failed to keep adequate records in accordance with its statutory duties. To date, few lower courts have applied *Tyson Foods*, leaving the question of what circumstances outside of FSLA collective actions with similarly situated class members permit the use of representative sampling unanswered.

In fact, only one reported opinion, in a case that also involved wage and hour claims, has approved of the use of statistical sampling since *Tyson Foods*. In

Villalpando v. Exel Direct Inc.,[25] defendant Exel Direct Inc. ("Exel") moved to decertify a class of delivery drivers asserting wage and hour claims under the California Labor Code, arguing that the *Mt. Clemens*-rule permitting the use of statistical evidence of hours worked by the average employee to show liability did not apply where the employer maintained adequate time records.[26] The District Court for the Northern District of California disagreed, finding that the burden was on the employer to show that its employee time records were complete and accurate and that Exel had failed to meet this burden even though it had produced over four million pages of timesheets and other records.[27] Representative sampling, the district court held, could be used in cases where an employer's records were simply unorganized or missing certain information and even where there was no statutory duty for an employer to keep the specific records at issue.[28] In short, *Villalpando* seemed to expand on the circumstances offered in *Tyson Foods* where statistical sampling could be used.

On the other hand, the rule in favor of allowing statistical sampling in FLSA and wage and hour class actions does not appear to be absolute, and defendants should consider challenging the use of sample evidence even when faced with an FSLA collective action on the basis that the class members are not "similarly situated" like the workers in *Tyson Foods*. In *Senne v. Kansas City Royals Baseball Corp.,*[29] for example, the District Court for the Northern District of California decertified a FSLA class of minor league baseball players on the ground that plaintiffs' trial plan brought to light "the variations among class members as to the types of activities in which they engaged and the time spent performing those activities [that] ma[d]e th[e] case distinguishable from *Tyson Foods*."[30] There, plaintiffs' work activities were not significantly uniform; many players testified that they had discretion as to their work schedule, including deciding when they arrived at the stadium before games and when they left after games.[31] Under those circumstances, the district court found that "[r]ather than merely filling in 'evidentiary gaps' in a situation where all of the employees were similarly affected by a uniform policy, Plaintiffs here are attempting to paper over significant material variations that make application of the survey results to the class as a whole improper."[32]

Other post-*Tyson Foods* decisions also suggest that defendants may have a strong argument against the use of statistical evidence in class actions based on allegations of fraud or deceit. For instance, in *United States v. Vista Hospice Care, Inc.,*[33] the District Court of the Northern District of Texas, declined to allow plaintiffs to present representative sampling evidence to prove fraud in a False Claims Act case. There, the court rejected plaintiffs' attempt to use representative sampling and extrapolation to show liability where plaintiffs alleged that a chain of nursing homes submitted claims for Medicare patients who did not qualify for hospice care.[34] The United States sought to introduce evidence of the total number of false claims based on a sample of 291 hospice patients. Citing *Tyson Foods*, the court noted that permissibility of statistical sampling turns on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.[35] Accordingly, because the underlying determination of eligibility for hospice is inherently subjective, patient-specific, and dependent on the judgment of physicians, the court held that statistical sampling was not permissible to establish fraud in submitting claims for ineligible patients.[36]

Sampling Evidence Must Be Admissible in an Individual Action to Establish Class Liability

Tyson Foods also reaffirmed another maxim that is highly favorable to defendants — that class actions are no different than individual actions. Indeed, in the majority opinion, Justice Kennedy emphasized that, under 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 individual defenses. The result in *Tyson Foods* is also in line with that premise—representative and statistical evidence was admissible to prove Tyson's liability, because, and only because, sampling would have been admissible *in an individual lawsuit* to prove liability and damages.

District courts after *Tyson Foods* have declined to certify classes of plaintiffs where the statistical

evidence offered to prove liability would not have been admissible in an individual action. In *In re Celexa & Lexapro Marketing & Sales Practices Litigation,*[37] for example, the District Court for the Northern District of Massachusetts rejected a class action plaintiff's attempt to rely on statistical sampling to prove liability in a case involving allegations that that defendants, prescription drug companies, had induced doctors into prescribing antidepressant drugs for off-label uses which resulted in plaintiffs, several different insurance companies, overpaying benefits for unnecessary prescriptions.[38] During the class certification stage, the insurance companies argued that the case did not require individualized determinations about whether a particular prescription was induced by fraudulent off-label marketing and cited *Tyson Foods* in support of the use of statistical evidence to establish but-for causation and liability.[39] The district court, however, refused to certify the class for lack of predominance, finding that the insurance companies could not rely on statistical evidence because they could not make the threshold showing identified in *Tyson Foods*—that each plaintiff in the proposed classes could have relied on the aggregate statistical evidence to prove but-for causation in an individual action.[40] The district court found the regression analysis that the expert used suggested that all promotional activities, *i.e.,* both fraudulent and non-fraudulent, increase drug sales but it did not specifically suggest that such a correlation is a reasonable proxy for the relationship between fraudulent promotions and fraudulently induced sales. In the district court's view, that flaw precluded both an individual plaintiff and the putative class from using the statistics as evidence of but-for causation.[41] Therefore, the argument that courts should not relax the rules for class actions could prove indispensable to defendants in challenging sampling evidence.

Defendants Should Insist on a Trial Plan

In his *Tyson Foods* concurrence, Justice Roberts suggested that, on remand to the district court, plaintiffs needed to set forth a viable plan to allocate the jury's award to ensure that uninjured class members would not recover—and if plaintiffs could not set forth such a plan, the class should be decertified.[42] This underscores the importance of pushing plaintiffs to submit a trial plan early in the proceedings. The trial plan should describe, among other things, what statistical evidence, if any, plaintiffs plan to present and how damages will be allocated among class members if they prevail at trial. Although there is no trial plan requirement in Rule 23, the advisory committee notes to the 2003 amendments emphasize that "[a] critical need is to determine how the case will be tried," and observe further that an "increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof."[43] Some jurisdictions have held that a trial plan is a requirement prior to certification,[44] but in other jurisdictions a trial plan is simply something that be requested via interrogatory[45] or that a judge may order in her discretion as part of her inherent authority over management of the case. A trial plan may illustrate to the judge that the use of sampling evidence would prevent the defendant from raising individualized defenses and thus poses due process concerns or manageability issues. Indeed, demanding plaintiffs produce a trial plan based on Justice Robert's concurrence in *Tyson Foods* can be a powerful tool to bring to light arbitrary sampling evidence or practical manageability problems in adjudicating their claims on a class wide basis.[46]

Conclusion

While at first glance *Tyson Foods* appeared to be a win for the plaintiff bar, a deeper analysis of the opinion shows that it actually laid the foundation for defendants to challenge the use of statistical evidence in class actions to defeat class certification. Therefore, in the long run, this narrow victory for plaintiffs may prove a big win for defendants. Weil will continue to monitor lower court interpretations of *Tyson Foods* and will continue to report any new developments concerning the use of sampling evidence in class actions.

1. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).
2. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).
3. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

4. *Bouaphakeo v. Tyson Foods, Inc.,* No. 5:07-CV-04009-JAJ, 2011 WL 3793962 (N.D. Iowa Aug. 25, 2011).
5. Brief for Appellant at 20, 2013 WL 663846 (No. 12-3753).
6. *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011).
7. *Id.* at 2561.
8. *Tyson Foods, Inc. v. Bouaphakeo,* 135 S.Ct. 2806 (2015).
9. *Id.* at 1041 (internal quotation marks and citations omitted).
10. *Id.* at 1049.
11. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946).
12. *Tyson Foods, Inc.,* 136 S. Ct. at 1047-49 (2016).
13. *Id.* at 1047.
14. *Id.* at 1046.
15. *Id.* at 1048.
16. *Id.*
17. *Id.*
18. *Tyson Foods, Inc.,* 136 S. Ct. at 1057 (Thomas, C., dissenting).
19. *Id.*
20. *Tyson Foods, Inc.,* 136 S. Ct. at 1049.
21. *Tyson Foods, Inc.,* 136 S. Ct. at 1053 (Roberts, J. concurring).
22. *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1543 (2016), as revised (May 24, 2016).
23. *See id.*
24. *See id.* at 1036 (internal quotation marks and citations omitted).
25. *Villalpando v. Exel Direct Inc.,* No. 12-CV-04137-JCS, 2016 WL 1598663 (N.D. Cal. Apr. 21, 2016).
26. *See id.* at *8.
27. *See id.*
28. *See id.*
29. *Senne v. Kansas City Royals Baseball Corp.,* No. 14-CV-00608-JCS, 2016 WL 3940761 (N.D. Cal. July 21, 2016).
30. *See id*. at *51.
31. *See id.*
32. *See id.*
33. *United States v. Vista Hospice Care, Inc.,* No. 3:07-CV-00604-M, 2016 WL 3449833, at *11 (N.D. Tex. June 20, 2016).
34. *See id.*
35. *See id.*
36. *See id.*
37. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.,* No. CV 13-13113-NMG, 2016 WL 3102004 (D. Mass. June 2, 2016).
38. *See id.* at *9-10.
39. *See id.* at *10.
40. *See id.*
41. *See id.*
42. *Tyson Foods, Inc.,* 136 S. Ct. at 1053 (Roberts, J. concurring).
43. Fed. R. Civ. P. 23(b)(3) advisory committee's notes (2003).
44. *E.g., Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co.,* 319 F.3d 205, 220 (5th Cir. 2003) ("Certification of a class under Rule 23(b)(3) requires that the district court consider how the plaintiffs' claims would be tried."); *see also In re MTB Prods. Liab. Litig.,* 209 F.R.D. 323, 351-53 (S.D.N.Y. 2002) (refusing to certify class based on unmanageable trial plan); *but see Chamberlan v. Ford Motor Co.,* 402 F.3d 952, 961 n. 4 (9th Cir.2005) (declining "Ford's suggestion that the district court's failure to adopt a trial plan or to articulate how the class action would be tried was an abuse of discretion ... [since] [n]othing in the Advisory Committee Notes suggests grafting a requirement for a trial plan onto the rule."); *Olson v. Tesoro Refining & Marketing Co.,* 2007 WL 2703053, *7 (W.D. Wash. Sep. 12, 2007) ("[T]he Court rejects defendant's contention here that a trial plan is required for class certification").
45. *See* 1 McLaughlin on Class Actions § 3.7 (5th ed. 2009) (providing sample interrogatory).
46. *See e.g., Senne v. Kansas City Royals Baseball Corp.,* No. 14-CV-00608-JCS, 2016 WL 3940761, at *51 (N.D. Cal. July 21, 2016) (rejecting plaintiffs' proposed trial plan and decertifying the class where the statistical sampling method identified in the plan was not a viable option to show liability).

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