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Employer Update

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

By Jeffrey Klein, Gregory Silbert, David Singh and Hannah Jones

In This Issue

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]

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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]

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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).

Employee Representation in German Supervisory Boards

By Stephan Grauke, Marieke Pfeiffer and Johannes Allmendinger

Introduction to Co-Determination in Germany

Unlike in the U.S., where companies generally have a one-tier board structure, larger German companies generally have a two-tier structure consisting of a management board responsible for the day-to-day business and a supervisory board responsible for supervising and controlling management. Depending on the number of individuals employed by a German company or group of companies, the supervisory board must include a certain number of employee representatives. In general, two types of employee co-determination in supervisory boards can be distinguished, mainly depending on the number of employees:

- the so-called "one-third co-determination," where one third of the members of a supervisory board are nominated by the employees; and
- equal co-determination, where the supervisory board consists of an equal number of shareholder representatives and employee representatives.

In both types, the supervisory board members nominated by the employee side generally participate in the appointment and removal of the members of the management board and are under the obligation to monitor the company's management. In a one-third co-determined supervisory board, the shareholder representatives have a majority of the votes (two-thirds). In an equally co-determined supervisory board, shareholder and employee representatives have the same number of voting rights, however, in case of a tie, the chairman, who generally is a shareholder representative, casts a vote. In 2014, a one-third co-determined supervisory board existed in about 1,550 companies in Germany and about 650 companies had established a supervisory board with equal co-determination. Most recently, co-determination has attracted new attention. As of January 1, 2016, the German government introduced fixed gender quotas for supervisory board members of equally co-determined companies that are listed on a stock exchange.

Which Companies Must Establish a Co-Determined Supervisory Board?

In Germany, employee co-determination in supervisory boards is, in essence, governed by the One-Third Co-Determination Act (*Drittelbeteiligungsgesetz*), the Equal Co-Determination Act (*Mitbestimmungsgesetz*) as well as by the Coal and Steel Co-Determination Act (*Montanmitbestimmungsgesetz*).

The applicable type of co-determination law depends on

- the legal form of the company,
- the number of regular employees, and
- the company's industry.

Companies that are legally organized as stock corporations, partnerships limited by shares, limited liability companies and cooperatives under German law may be subject to co-determination depending on the number of employees. Companies established under foreign law are not subject to co-determination, even if their head office is located in Germany. Likewise, co-determination at the supervisory board level is not mandatory in enterprises directly and primarily engaged in political, religious, charitable, educational, scientific, and artistic or news reporting activities.

In terms of headcount, one-third co-determination is mandatory for companies which regularly employ more than 500 employees. Equal co-determination applies to any company regularly employing more than 2,000 employees. Special rules apply to stock corporations and partnerships limited by shares for which the main business is the mining or production of hard coal, lignite, iron ore, iron or steel (hereinafter "Coal and Steel Companies"), requiring co-determination already if the company has more than 1,000 employees.

For the purpose of equal co-determination, all employees employed within a group are also considered to be employees of the controlling company. As a consequence, if the entire group regularly employs more than 2,000 employees, the controlling company is also obliged to establish a co-determined supervisory board (irrespective of whether the controlling company is merely a holding

company with no employees). Since German co-determination stops at the German border, no co-determined supervisory board must be established at the level of a foreign controlling company.

Different calculation rules apply to one-third co-determination, where employees of controlled group companies are only taken into account if the German controlling company has entered into a domination agreement in accordance with the German Stock Corporation Act, or if the controlled entity is legally integrated into the controlling company. Recently, due to the growing influence of European law and its acknowledged principles of non-discrimination and the freedom to move, it was discussed whether individuals employed by affiliates outside Germany must be considered employees of the controlling German company as well. Whereas the Local Court of Frankfurt affirmed this question (case no.: 3-16 O 1/14 – *Deutsche Börse AG*), the Local Court of Berlin denied that employees of foreign affiliates registered abroad must be taken into account for the purpose of German co-determination (case no.: 102 O 65/14 AktG – *TUI AG*). The Berlin case is now pending at the European Court of Justice.

Election of Employee Representatives

Depending on the size of the company, employee representatives in the supervisory board are either elected directly by the employees of the company or indirectly through employee delegates previously elected in a secret ballot. The absolute number of employee representatives to be elected depends on the size of the board, which, for the purpose of one-third co-determination, can consist of up to 21 members, depending on the share capital of the company, and, for the purpose of equal co-determination, of up to 20 members, depending on the number of employees (again, an exception exists for Coal and Steel Companies, the supervisory board of which consists of 11 members in total including one neutral member who can break the tie between the shareholder and the employee representatives; the total number of board members can again be increased to up to 21 individuals, depending on the share capital of the company).

Gender Quota for Members of the Supervisory Board

Effective as of January 1, 2016, German listed companies with an equally co-determined supervisory board (about 100 entities) are under the obligation to appoint at least 30% women and at least 30% men as members of their supervisory boards in any new election. Unless the employee or the employer side objects, the gender quota has to be met by the supervisory board in its entirety. In case of non-compliance, the relevant board position has to remain vacant, and an appointment not in line with the new law will be null and void. Moreover, all other German companies that are either listed or co-determined (about 3,500) are under the obligation to internally establish a binding minimum gender quota for occupying the positions in supervisory boards, management boards and the two next-lower management levels. The new law reflects that of several other European countries, including Belgium, the Netherlands, and Norway.

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Supervisory Board Duties and Influence of Employee Representatives

The supervisory board is responsible for monitoring management and may, in this capacity, also establish a catalogue of measures for which management requires its prior approval. In addition, the supervisory board has reviewing duties, particularly regarding financial statements, and reporting obligations. Moreover, the supervisory board represents the company vis-à-vis its management board and appoints and removes the members thereof.

Within the scope of fulfilling their duties, the supervisory board has to consider the view of its members nominated by the employee side (i.e., employees, who are in practice often also a member of a company works council and/or a union). However, given that (other than in Coal and Steel Companies) the shareholder representatives have the majority (in the case of one-third co-determination), or at least a casting vote in case of a tie (in the case of equal co-determination), the influence of the employee side is limited. In German practice, however, most decisions of the supervisory board are made on a consensual basis.

Although co-determined supervisory boards have a long history in Germany, there are structures available to avoid German co-determination, in particular by making use of the fact that foreign entities do not have to establish a German co-determined supervisory board. This normally requires the restructuring of the existing group, which must be customized to fit to the individual case.

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