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Tyson Foods: Supreme Court Punts on Statistical Evidence and Uninjured Class Members in Class Actions

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The U.S. Supreme Court largely avoided important class-certification issues and resolved *Tyson Foods, Inc. v. Bouaphakeo* on narrow grounds. 2016 WL 1092414 (Mar. 22, 2016). The Court affirmed a classwide jury verdict for employees seeking unpaid overtime; the verdict relied on a statistical average of unpaid overtime to show both liability and damages. The Court concluded that the statistical sampling was permissible, but only because such evidence could have established liability and damages in individual cases. The Court thus declined to create "broad and categorical rules governing the use of representative and statistical evidence in class actions." *Id.*, *11. The Court also declined to consider whether class certification could permit "uninjured class members [to] recover" damages, finding the question not ripe for review. *Id.*, *12. The Court did recognize that Rule 23 could not be used to enlarge plaintiffs' substantive rights or deprive defendants of individualized defenses. Thus, class-action defendants retain strong arguments against certifying classes based on statistics or that include uninjured members.

Plaintiffs used a statistical average to establish liability and damages for unpaid overtime.

Class members were employees who were required to put on ("don") and take off ("doff") protective equipment. The employer did not pay for all don/doff time, so plaintiffs sued and claimed that the uncompensated don/doff time caused employees to work more than 40 hours without overtime.

There were no records of don/doff time for each class member, and uncompensated time varied by class member. Protective equipment varied by department and task, and don/doff time varied by individual employee.

Plaintiffs relied on a statistical average of don/doff time based on hundreds of observations. Plaintiffs added the average to the employees' work time to determine which employees worked more than 40 hours (including don/doff time) without overtime pay and to determine the amount of uncompensated overtime for the class.

The court certified a class, and the jury (after finding don/doff time was compensable) awarded classwide damages of $2.9 million. There were no findings to show how the jury calculated damages; plaintiffs sought $6.7 million. It was undisputed that using plaintiffs' average showed that not every member of the class had worked more than 40 hours without overtime, meaning some class members had no claim.

The employer appealed before the trial court calculated how to disburse the jury award to the class, and the Eighth Circuit affirmed.

SCOTUS allows statistical evidence so long as it would be admissible in an individual case.

The Supreme Court held plaintiffs' statistical evidence supported the classwide verdict because the evidence supported a finding that "each employee donned and doffed for the same average time." *Tyson Foods*, *8. The Court found the evidence met class members' burden of proving uncompensated overtime, which shifted the burden to the employer to show individual employees had less don/doff time than average. *Id.*, *9. The Court agreed each class member was required to prove injury and damages and held the statistical average made that showing. *Id.* ("Rather than

absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.").

Critical to the Court's analysis was its conclusion the statistical evidence would have been admissible in an individual case. *Id.*, *11 ("the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action."). The majority used this to distinguish *Wal-Mart v. Dukes*, where class certification was denied because anecdotal evidence of discrimination against some employees did not show discrimination against others. *Id.*, *10. The Court found similarities among class members existed here that did not exist in *Dukes*. *Id.*, *11 ("each employee worked in the same facility, did similar work, and was paid under the same policy.").

The Court limited its holding in three ways. First, it said statistical evidence wouldn't always be admissible in FLSA cases and that such evidence can be challenged under *Daubert* or other rules of evidence. *Id.*, *11. Second, the Court held that while statistical evidence may be permissible in FLSA cases, "the fairness and statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those case." *Id.* Finally, the Court recognized Rule 23 is limited by the Rules Enabling Act, which prohibits "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Id.*, *10.

SCOTUS does not address problem of uninjured class members.

The employer complained the classwide verdict could award damages to class members who had not worked more than 40 hours without overtime. *Id.*, *12. While recognizing that "the question whether uninjured class members may recover is one of great importance," the Court found the "question [was not] yet fairly presented by this case because the damages award has not yet been disbursed." *Id.* The Court remanded the case to the trial court to allocate the award "to only those individuals who worked more than 40 hours" (*Id.*, *12), and noted the employer could challenge how the trial court allocated the award.

Class-action defendants retain strong arguments against class certification.

Tyson Foods has a limited holding: average don/doff time for hundreds of employees doing a similar job in the same facility is a reasonable estimate of the don/doff time for an individual employee. That doesn't legitimatize statistical evidence in other settings, such as consumer lawsuits where consumers share no such similarities, or employment settings where fewer similarities exist. Defendants should oppose statistical evidence where the evidence does not accurately reflect the experience of any specific class member. Similarly, defendants can continue to rely on the Rules Enabling Act (28 U.S.C. §2072) to oppose class certification if it would reduce a class member's individual burden of proof or deprive defendants of the inability to present individualized defenses. Further development on these issues may come in *Pulaski v. Google*, where defendants have petitioned the U.S. Supreme Court for certiorari (Case No. 15-1101) arising out a Ninth Circuit decision finding class certification could be appropriate based on statistical evidence of damages.

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