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The Law of Averages: In a Narrow Ruling, the Supreme Court Allows Representative Evidence "to Fill Evidentiary Gaps" in *Tyson Foods, Inc.*

The US Supreme Court yesterday handed down a decision in the second of three cases this term that were expected by many to each have a broad impact on class action practice. In the first, *Campbell-Ewald Co. v. Gomez,* No. 14-857, the Court ruled that an unaccepted offer of judgment on a plaintiff's individual claim does not render a case moot when the complaint seeks both individual and class relief, but left open the possibility that an actual tender of money to the individual plaintiff may render a case moot. While the full effect of *Campbell-Ewald Co.* remains to be seen, it has had an immediate impact on the strategic use of Rule 68 offers of judgment in class actions.

The second class action case, *Tyson Foods, Inc. v. Bouaphakeo et al.,* No. 14-1146, involved a class action and Fair Labor Standards Act collective action on behalf of Tyson employees for unpaid overtime relating to time beyond allotted periods spent "donning" and "doffing" of protective clothing.

Because it was undisputed that the time individual employees spent donning and doffing clothing depended on their job responsibilities, *Tyson Foods* seemed to present the Court with the opportunity to address uncertainty in the federal courts regarding whether a class action may be maintained when the class contains members who were not injured or have no legal right to any damages.

The Court declined to rule broadly on that question, instead issuing a narrow 6-2 ruling that the district court did not err in allowing workers to rely on statistical analysis to show average hours worked for purposes of establishing class-wide liability under the Fair Labor Standards Act (FLSA).

The use of statistical evidence as common proof in class actions has been very controversial, and while many plaintiffs' lawyers will argue *Tyson Foods* gives them broad license to substitute statistical studies for proper evidence, the majority opinion authored by Justice Kennedy rejects any such claim: "[T]his case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions." The Court carefully pointed out the relatively unique burden-shifting aspects of FLSA, as well as other relatively unusual circumstances presented in the case.

In the end, as the Court says, "[w]hether and when statistical evidence can be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced and on 'the elements of the underlying cause of action.'" *Tyson Foods* and the ongoing threat posed by the use of statistics in class action litigation is another reason companies should look for specific class action defense expertise.

Tyson Foods, Inc. v. Bouaphakeo et al.

In *Tyson Foods,* the District Court certified a Rule 23(b)(3) class action and FLSA collective action alleging that, while Tyson Foods employees were allotted time to don and doff protective gear, they were not paid appropriately for all time spent doing so. Because Tyson Foods had failed to keep records of the amount of time each employee spent on these tasks, plaintiffs sought to prove injury through the use of statistical evidence that averaged donning and doffing time. This was notwithstanding that the employees used varying protective gear depending on their job classification and it was undisputed that some employees included in the certified class were not entitled to additional compensation based on the time involved in taking their specific protective clothing on and off.

The class prevailed at trial, where a jury, after hearing expert testimony regarding the average time class members worked, awarded the class about US$2.9 million in unpaid wages. In August 2014, a divided Eighth Circuit panel upheld the judgment. The Court of Appeals acknowledged that a verdict for the employees "require[d] inference" from their representative proof, but held that this was permissible in light of Supreme Court precedent.

The Supreme Court granted *certiorari* to decide two questions that combined could have a potentially broad impact on Rule 23(b)(3) class actions: (1) whether a class action can be certified "where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample," and (2) whether a class action may be certified when it "contains hundreds of members who were not injured and have no legal right to any damages."

The Court answered the first question with a tailored holding that made clear its limited applicability – "[i]n FLSA actions, inferring the hours an employee has worked from a study…has been permissible so long as the study is otherwise admissible." In making this determination the Court relied significantly upon *Anderson v. Mt. Clemens,* 328 U.S. 680 (1946), another FLSA case in which employees were permitted to use a representative sample to shift burdens of proof and "fill an evidentiary gap created by their employer's failure to maintain adequate records" as required by law. The Court emphasized that because such statistical evidence could have been appropriately used in an individual action to show liability on account of the company's policy, its use in a class action did not present evidentiary concerns. But in regard to class actions generally, the Court stated "whether and when statistical evidence can be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action."

Because Tyson Foods reframed its argument in regard to the second question originally included in its petition for certiorari, the Court declined to address it. The opinion noted that the record was premature because no ruling yet had been made regarding how the damages award was to be disbursed among class members. Once a method of allocation for the damages award is decided upon, Tyson Foods could challenge its propriety before the District Court.

Significance of Ruling

While *Tyson Foods* was closely watched for its potentially broad impact, its ultimate holding is narrow. As discussed above, the Court expressly declined to adopt "broad and categorical rules" about the use of statistical evidence, and allowed the use of such proof only in the unusual circumstances of the case.

Critically, the Court was careful to affirm the vitality of its much-wider-ranging decision in *Wal-Mart Stores, Inc. v. Dukes,* 564 U. S. 338 (2011), where the Court rejected the use of statistical analysis as common proof of liability where the class attempted to use representative evidence as a means to overcome the absence of evidence that the challenged employment policies and practices existed at all.

One lesson of *Tyson Foods,* however, is that class action defendants are well-advised to mount a vigorous *Daubert* challenge to expert testimony where practicable. Notably, *Tyson Foods* had not challenged the statistical evidence used by the employees' expert under *Daubert*.

About Our Class Action & Multidistrict Litigation Practice

Our Class Action & Multidistrict Litigation Practice successfully represents clients, across all industries, in hundreds of nationwide, multistate and statewide class actions, mass actions and multidistrict litigation (MDL). With Class Action & Multidistrict Litigation lawyers in 17 offices in 10 states, around the US, we have, competitively, one of the most robust Class Action & Multidistrict Litigation practices in the US. We have particularly strong experience in the most aggressive class action states, including California, Florida, Illinois, New Jersey, New York, and Ohio.

In 2015, we were recognized as Class Action Defense Lawyers of the Year – California by *Corporate America Magazine* Legal Elite Awards.

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