Client Alert

March 23, 2016

Certification by Statistics: U.S. Supreme Court Upholds Use of Statistical Sampling in Tyson Foods Employment Class Action

By Penelope Preovolos, Claudia Vetesi, Tritia Murata, and Stephanie Fong

Yesterday, the U.S. Supreme Court issued a 6-2 decision affirming a $2.9 million judgment against Tyson Foods, Inc. in an employment overtime pay case where statistical sampling was used to establish classwide liability and predominance of common issues. *Tyson Foods Inc. v. Bouaphakeo et al.*, Case No. 14-1146 (U.S. March 22, 2016). The Court was careful to note that the "case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions." Rather, the Court upheld the use of statistical sampling based on facts and law that are specific to the Fair Labor Standards Act (FLSA) and, in particular, to establishing the number of hours worked where there are no alternative means for doing so and the employees at issue are similarly situated.

While the Court did not expressly limit its reasoning to FLSA cases, it emphasized that "the fairness and utility of statistical methods in contexts other than those presented here will depend on the facts and circumstances particular to those cases." Though the case has been closely watched because it raises important issues concerning uninjured class members, the Court concluded that consideration of those issues would be premature on the record before it.

BACKGROUND

Tyson Foods is a processor and maker of chicken, beef, pork, and prepared foods. Plaintiffs are Tyson employees who work in a pork processing plant in Iowa. Tyson requires the employees to wear protective gear, but the exact composition of the gear depends on the task the worker performs on a given day. Tyson compensated some, but not all, employees for "donning and doffing" the protective gear, and did not record the time each employee spent on these activities. Plaintiffs filed suit, alleging that donning and doffing were integral and indispensable to their hazardous work and that Tyson's policy not to pay for those activities denied them overtime compensation required by the FLSA. The employees also raised a claim under an Iowa wage law. The employees sought certification of their state claims as a class action and certification of their FLSA claims as a collective action.

Since the employees' claims related only to overtime, each employee had to prove that, when added to their other time worked, the time spent donning and doffing protective gear caused their total hours to exceed 40 hours per week. Tyson argued that this required individual determinations that defeated predominance. Because Tyson did not keep records of the time spent donning and doffing, plaintiffs introduced expert evidence regarding the average time spent donning and doffing, which was 18 minutes and 21.25 minutes, and argued that it was a

permissible inference that all employees donned and doffed for the average times. An earlier Supreme Court decision, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-88 (1946), held that under the FLSA, where an employer failed to keep required time records, the employee could establish the amount and extent of his or her work through "just and reasonable inference." The district court relied on *Mt. Clemens* to permit the inference and certified both "collective action" claims under the FLSA and a Rule 23 state law class. The state law class consisted of 3,344 members; 444 employees opted into the FLSA collective action.

Plaintiffs sought to bifurcate the trial between liability and damages; Tyson opposed bifurcation and the case proceeded to trial on both liability and damages. Based on expert evidence, plaintiffs sought an aggregate award of approximately $6.7 million. Plaintiffs' expert admitted that several hundred class members were not injured. Tyson did not make a *Daubert* challenge to plaintiffs' expert evidence nor did it put on an opposing expert, instead arguing to the jury that differences in individual time spent donning and doffing made the case too speculative for classwide recovery. The jury awarded aggregate damages of $2.9 million. Tyson argued both in the trial court and on appeal that the jury's verdict made clear that the jury did not agree with plaintiffs' experts' conclusions and that because it was impossible to know the jury's reasoning, it could not be determined which employees had suffered injury or the amount of each employee's injury.

The Eighth Circuit affirmed the judgment and award against Tyson. The U.S. Supreme Court granted certiorari.

THE SUPREME COURT'S DECISION

The U.S. Supreme Court affirmed the district court's class certification ruling. As an initial matter, the Court noted that the parties did not dispute that the standard for certifying a collective action under the FLSA was no more stringent than for certification of a Rule 23 class, and that proof of an FLSA violation would also demonstrate a violation of the state statute. The opinion thus focused on Rule 23 requirements.

Use of Statistical or Representative Evidence. The Court declined to establish general rules governing the use of statistical evidence in class actions, noting that "whether and when" such evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being used and the elements of the underlying claim. The Court noted that in many cases, a representative sample will be the only way to establish a defendant's liability, and that the evidence cannot be deemed improper merely because the case is brought as a class action. The Court then held that plaintiffs could use representative evidence to prove classwide liability where each individual class member could have relied on that evidence if he or she brought an individual action. Here, the Court concluded that under *Mt. Clemens*, an individual plaintiff could properly have relied on the statistical evidence, so it was proper for the class to do so.

The Court distinguished *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), on the ground that there, the employees were not similarly situated and no employee in an individual action could have relied on depositions detailing the ways in which other employees were discriminated against. Here, however, each employee worked in the same facility, did similar work, and was paid under the same policy.

The Court made clear that not all inferences drawn from representative evidence in an FLSA case are "just and reasonable" under *Mt. Clemens*. Evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee worked. But here,

because Tyson did not make a *Daubert* challenge to the methodology, the statistical evidence was admissible and could serve as the basis for the inference. Importantly, the Court emphasized that the "fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases."

***Uninjured Class Members*.** In its certiorari petition, Tyson had asserted a second issue: Whether a class that included uninjured members could be certified. In its merits brief, however, Tyson conceded that "the fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." The Court relied on that concession and declined to address the issue. Tyson instead argued in its merits brief that plaintiffs had failed to demonstrate a mechanism for ensuring that uninjured class members could not recover. Tyson argued that the jury's damages award meant that it necessarily rejected plaintiffs' experts' estimates, so it would not be possible to know which employees were entitled to share in the award. Plaintiffs, however, argued that there were possible methodologies for making that determination. The Court held that since the trial court had not yet addressed that question or disbursed the award, a ruling on the issue would be premature. The Court also emphasized that the problem was one of the defendant's "own making" because it opposed bifurcation; the defendant should not be permitted to benefit from "the difficulty it caused."

While the Court did not reach the issue of uninjured class members, the concurring and dissenting opinions of Chief Justice Roberts and Justices Alito and Thomas make clear that they would not permit uninjured class members to recover. Thus, Chief Justice Roberts stated in his concurrence (joined in part by Justice Alito): "If 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." And in his dissent, Justice Thomas (joined by Justice Alito) highlighted the concern that the decision could be used to lessen the predominance requirement because the district court did not give proper consideration to the variable donning and doffing times, and that a FLSA violation was impossible without evidence that each employee worked over 40 hours per week with donning and doffing time included.

IMPLICATIONS OF THE *TYSON FOODS* DECISION

The Supreme Court issued a narrowly reasoned, fact-specific 6-2 affirmance that leaves existing law largely intact. And the absence of Justice Scalia's vote does not appear to have been a factor given the 6-2 majority for affirmance. There are several key takeaways from the decision:

- While the opinion permits the use of statistical averages to establish classwide liability in certain circumstances, it is highly dependent on the particular facts and law at issue. In *Tyson Foods*, the plaintiffs' expert's unchallenged representative study was permissible evidence to establish hours worked where there were no alternative means, the employees at issue were similarly situated, and an employee would have been permitted to rely on that evidence if he or she had brought an individual action. The opinion expressly reserves the issue of the "fairness and utility" of such evidence in other cases, including other FLSA cases.

- Where such evidence is offered, it will typically be advisable for the defendant to make a *Daubert* challenge to the evidence and to challenge it with rebuttal expert evidence.
- Defendants should carefully analyze the strategic implications of decisions like the one made in the trial court here to oppose bifurcation.
- The Court recognized potential problems with inclusion and recovery by uninjured class members as important, but those issues will have to await a decision in another case.

Contact:

Penelope Preovolos
(415) 268-7187
ppreovolos@mofo.com

Claudia Vetesi
(415) 268-6626
cvetesi@mofo.com

Tritia Murata
(213) 892-5765
tmurata@mofo.com

Stephanie Fong
(858) 314-7527
sfong@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for 12 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.