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U.S. Supreme Court Issues Its Much-Anticipated Ruling in *Tyson Foods*

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Class Action Litigation

The U.S. Supreme Court issued its first class-action ruling in the wake of Justice Scalia's death, holding that statistical evidence may be used to obtain class certification and prove classwide liability based on harm to an "average" class member, but only in those instances in which such evidence would have been admissible to prove class members' claims on an individual basis. The Court left for another day the closely-watched issue of whether a class action may be maintained if the class includes uninjured class members – a question the Court acknowledged "is one of great importance."

The Court's Opinions

In *Tyson Foods, Inc. v. Bouaphakeo*, the plaintiff filed a class action lawsuit accusing Tyson Foods of violating the Fair Labor Standards Act ("FLSA") by not compensating employees adequately for time spent putting on, removing, and cleaning the personal protective equipment worn on the job. Tyson Foods opposed class certification on the theory that individualized questions of injury and damages – including how much time employees spent donning protective equipment – predominated over any common ones. Because Tyson Foods did not maintain records of how much time each employee spent donning protective equipment, plaintiffs presented as "representative evidence" expert testimony about the average time employees spent on that activity. The district court found that this testimony justified certifying a class, and at trial permitted the plaintiffs to establish classwide liability based on the expert's testimony about how much a statistically "average" employee had been undercompensated.

In a 6-2 decision, the Supreme Court affirmed. The Court rejected Tyson Foods's invitation to establish a categorical rule prohibiting the use of statistical evidence to establish classwide liability. Instead, the Court held that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." In particular, the Court pointed out, there was no reason to bar the use of such evidence to establish liability for a class where the same evidence would have been sufficient to establish the claims of class members had they sued individually. Under established law, an individual plaintiff in an FLSA case could have relied on the same evidence presented by the class. Because individual employees could have relied on this evidence, the Court held that relying on that same expert testimony to establish liability for the class was proper, because the employees all worked at a single plant and were similarly situated.

The Court declined to reach the second issue presented, namely, whether a class may be certified if it contains members who were not injured and have no legal right to damages. Observing that Tyson Foods had reframed its argument on this issue in its merits brief to focus only on whether damages could be distributed to class members who had suffered no actual

injury, the Court found that question to be "premature," as the district court had not yet determined how the jury's single lump-sum damages award would actually be distributed to class members. However, the Court expressly recognized that "the question whether uninjured class members may recover is one of great importance," citing an amicus brief (authored by Covington) filed by the Consumer Data Industry Association.

Chief Justice Roberts issued a separate concurrence agreeing with the Court's narrow holding on the statistical evidence issue, as well as with its determination that the question of how to avoid distributions to class members who had suffered no injury should be left to the district court in the first instance. He expressed skepticism, however, that this task could be accomplished as a practical matter, and suggested that "it remains to be seen whether the jury verdict can stand." (Justice Alito joined in this portion of the Chief Justice's opinion.)

Justice Thomas, joined by Justice Alito, dissented. Justice Thomas accused the majority of, among other things, adopting a new standard for determining whether individual questions predominate over common ones for purposes of Rule 23(b)(3). While the majority stated that Rule 23(b)(3)'s predominance requirement could be met by showing that "one or more of the central issues in the action are common to the class . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses," Justice Thomas opined that this standard is inconsistent with the Court's 2013 ruling in *Comcast Corp. v. Behrend* that found no predominance when "questions of individual damages calculations will inevitably overwhelm questions common to the class."

Analysis

Despite its approval of a the use of statistical evidence for classwide proof in the case before it, the Court made clear that its holding was quite narrow, and it offered several examples of situations in which reliance on such evidence would not be appropriate. *First*, the Court cited its landmark 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* for the proposition that statistical evidence is improper if class members are not similarly situated or could not rely on statistical evidence to prove their individual claims. *Second*, the Court found that reliance on statistical evidence would be improper if the evidence was "statistically inadequate or based on implausible assumptions"; importantly, Tyson Foods had not asserted a *Daubert* challenge to the plaintiffs' expert's methodology. *Third*, Tyson Foods lacked individual records that class members could have relied on to prove harm; the result might be different for businesses that do maintain such records (or, conversely, do not have a duty to maintain them in the first place).

Tyson Foods has, of course, been closely watched because the original certiorari petition presented the question of whether a class action may be certified and maintained when the class contains hundreds of members who were not actually injured. Although declining to decide this issue, the Court did recognize it as "one of great importance" – a conclusion with which the dissenters clearly agree. It will not be surprising if the Court finds an opportunity in the near future to address that issue in another case.

One final note: As the dissent observed, the majority opinion mentions in passing that the predominance requirement can be satisfied even if "important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." The Court cited nothing beyond a treatise for this proposition (which is arguably dictum), and while lower courts have accepted almost universally that the existence of individualized issues as to damages does not bar class certification, there is plainly a tension between this statement and the Supreme Court's decision in *Comcast Corp. v. Behrend*. The level of proof required at class certification in those cases in which plaintiffs actually wish to try damages on a class basis appears to remain an open question. If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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