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Supreme Court Charts Narrow Course for Stats in Class Certification

Commentary by April Boyer and Yamilet Hurtado, Daily Business Review

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On March 22, the U.S. Supreme Court issued a narrow decision in *Tyson Foods v. Bouaphakeo* regarding the use of statistical evidence in wage-and-hour class and collective actions and, in so doing, identified an exception from a prior ruling disapproving of such use.

In 2011, the Supreme Court forbade "trial by formula." The plaintiffs in that sex-discrimination case proposed a large nationwide class of female employees who were subject to varying employment policies. To overcome that lack of similarity, the would-be class sought to depose a statistical sample of its members to establish the alleged discrimination. The court categorically rejected the use of statistical evidence in this manner, finding that the individual class members could not attempt to present common issues of fact and law through reliance on depositions that detailed the ways in which other employees allegedly were discriminated against by their particular managers.

However, the court's decision in *Tyson Foods* modified its earlier categorical rule and permitted the plaintiffs' use of statistical evidence at the class-certification stage under certain limited circumstances. In doing so, the court affirmed a \$5.8 million verdict against Tyson.

Tyson Foods involved employees at an Iowa pork-processing plant who sought back wages for alleged overtime violations under the Fair Labor Standards Act and Iowa law. They claimed that they were entitled to compensation, including overtime, for time they spent putting on and taking off protective gear.

Because the class members wore different types of protective gear, the plaintiffs were faced with solving the evidentiary problem of how much time purported class members spent donning and doffing protective gear. They dealt with the issue by relying on a study conducted by an expert who examined how much time a sample of workers spent on donning and doffing protective gear. The expert averaged the time spent on these activities by the sample population and added that to the time sheets of each employee to calculate classwide recovery. Tyson did not challenge the reliability and validity of the study.

Tyson argued that reliance on the sampling method was improper because of the varying amounts of donning and doffing time as well as the fact that it would result in recovery for workers who had not actually worked any overtime. The Supreme Court disagreed, however, holding that in certain instances statistical evidence could be used to establish liability. While the court's *Tyson Foods* decision permitted use of statistical evidence in that case, it does not create a broad rule authorizing the use of statistical evidence to establish a class in all cases. Rather, the court articulated a case-by-case approach to the use of statistical evidence that would depend on the purposes for which the evidence is being introduced and on the elements of the underlying cause of action.

Thus, on the facts before it in *Tyson Foods*, the court found statistical evidence potentially was admissible where each class member otherwise could have relied on the sample data in an individual suit. Because Tyson had obligations under wage-and-hour laws to record how much time its hourly employees work, the court suggested that an individual worker could have used the statistical evidence "to fill the evidentiary gap" created by the lack of such records in order to meet the applicable burden of proof.

Implications

The Fair Labor Standards Act and its state-law counterparts make Tyson Foods unique because employers are required to maintain detailed time records. Because the employer did not maintain those records, the court permitted the use of statistical evidence as a proxy for actual records. While the holding is narrow, the significance of Tyson Foods is that class-action plaintiffs may be able to use statistical evidence, particularly to prove evidentiary gaps where an employer is unable to provide the requisite particularized evidence. Therefore, in dealing with wage-and-hour collective and class actions, employers should:

- Avoid "evidentiary gaps" that could be filled by representative evidence by maintaining appropriate records.
- Make timely challenges to its validity and admissibility when statistical evidence is proffered.
- Consider all strategic options to minimize inclusion of uninjured class members.

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