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Attorneys React To High Court's Tyson Class Action Ruling

Law360, New York (March 22, 2016, 7:53 PM ET) -- The U.S. Supreme Court on Tuesday affirmed a $5.8 million judgment against Tyson Foods in a worker don-doff case, holding that averages and other statistical analyses can be used to show similarities between disparate class members. Here, attorneys tell Law360 why the Supreme Court's ruling in Tyson Foods Inc. v. Bouaphakeo is significant.

Randy Avram, Kilpatrick Townsend & Stockton LLP

"Tyson gives employees another tool for bringing class action lawsuits against their employers. It was a donning and doffing case, but its significance is that the court made it clear that now class action plaintiffs can use statistics to fill evidentiary gaps. The court previously held in Wal-Mart v. Dukes that statistics were inadmissible because they deprived defendants the right to litigate individual defenses. However, the court distinguished Tyson from its previous decision, saying the statistics at issue could have been used in individual lawsuits against the employer, and so they were also admissible in the class action."

Richard L. Alfred, Seyfarth Shaw LLP

"The court's holding is narrow. With no adequate time records to prove liability on overtime claims, plaintiffs used an expert's time study to show the average time employees spent donning and doffing protective gear. Tyson did not sufficiently challenge the admissibility of that study, leaving the court to assume that it would have been admissible as evidence of each individual's actual time worked. From there, it was a short step to the court's conclusion that the study could serve as common proof for a class action. The study, however, did not show that the case was properly certified as a class. On the contrary, the study showed that some employees spent 10 times longer donning and doffing than others, making it vulnerable to a Daubert attack."

Robert A. Boonin, Dykema

"While the defense bar hoped for a different outcome, the case may be limited and representative testimony may still be suspect in other contexts. Here, the court found that an individual plaintiff could have used the expert's averaging to prove his own damages. That ability is likely limited to donning and doffing cases in which time comparisons to other employees performing the same tasks may help to determine the amount of time the individual spent on those tasks. In off-the-clock and misclassification cases, the differences in duties and time spent will likely vary too much for representative testimony to work."

Joanna S. Bowers, Verrill Dana LLP

"By allowing the use of statistical evidence to substitute for individualized proof, the Supreme Court's decision makes it easier for plaintiffs to obtain class certification where the class members' evidence as to liability is varied. The exact circumstances under which statistical proof may be used is unclear, as the court declined to offer a clear rule and instead held that the permissibility of using statistical evidence in any particular case will depend on the purpose for which it is offered and the underlying cause of action."

Kenneth Chernof, Arnold & Porter LLP

"Perhaps the most significant aspect of the court's decision in Tyson Foods is the litigation it will ignite. The court declined to establish a much sought-after bright line rule on the issue of whether statistical sampling may be used to establish 'predominance' of common issues under Rule 23(b)(3). Instead, the court held only that such sampling was appropriate on the facts of this case, because the sampling study at issue 'could have been used to establish liability in an individual action' had it been brought by just one plaintiff — and if it was appropriate for one plaintiff to use the study to establish his or her case, it was an appropriate basis upon which to establish a classwide claim as well. This decision will surely lead to hotly contested litigation in future cases as plaintiffs attempt to argue that their sampling studies satisfy this test."

Barbara Jean D'Aquila, Norton Rose Fulbright

"The decision is significant because the majority approved the district court's consideration of statistical averaging of employee donning and doffing time in its FLSA class certification ruling. The majority declined to establish broad, categorical rules governing when representative and statistical evidence may be used to establish classwide liability and instead indicated that 'whether and when' such evidence is permissible depends on the underlying claim elements, the purpose for the evidence's introduction, and its reliability. This case reinforces the importance of an employer's accurate time record keeping. Absent that, one must expect a heated dispute involving the use of statistical or other representative evidence."

David Eisenberg, Baker Sterchi Cowden & Rice

"Court watchers looking for broad guidance on Article III standing, and the 'case or controversy' requirement, may be disappointed by this ruling. Although the parties and amici curiae had much to say about the Article III issue, the court punted, concluding it was 'premature' to address whether the class included members who suffered no injury because they might well be screened out in a later stage of trial court proceedings. A more likely vehicle for analysis of the constitutional standing issue is Spokeo v. Robins, a Fair Credit Reporting Act case argued in November, where website provider Spokeo posted inaccurate information about Robins, but the information was generally of a positive nature, overstating the plaintiff's educational and professional background."

Seth Ford, Troutman Sanders LLP

"Tyson Foods Inc. v. Bouaphakeo highlights the importance for employers to be accurate and precise when it comes to wage and hour record keeping. The court's emphasis on Tyson Food's lack of record keeping led to the court affirming sole reliance on representative sample evidence on a classwide scale. As the financial incentives of FLSA lawsuits are too significant to be going away anytime soon, employers should use every tool in their arsenals to limit liability. This includes accurate and thorough record keeping and express language in collective bargaining agreements addressing any potential compensation for donning and doffing equipment. While use of statistics from a sample of employees was upheld in this instance, this case should not lead to rampant use of statistical evidence in class actions generally. The court correctly emphasized that the use of such evidence is a fact-specific, individualized determination."

Rachel Geman, Lieff Cabraser Heimann & Bernstein LLP

"Tyson is an important ratification of the principle that substantive proof cannot be more stringent in a class action, which is a procedural device, than in an individual case. Related, the case shows that statistical methods are suitable to show liability where appropriate. By giving a contemporary imprimatur and context to the seminal rulings about representative proof in Anderson, and showing how Dukes supports class certification when Rule 23 is satisfied, Tyson is a useful road map for parties and courts in litigation that is seeking to vindicate basic rights for often low-paid employees."

Naveen Kabir, Constangy Brooks Smith & Prophete LLP

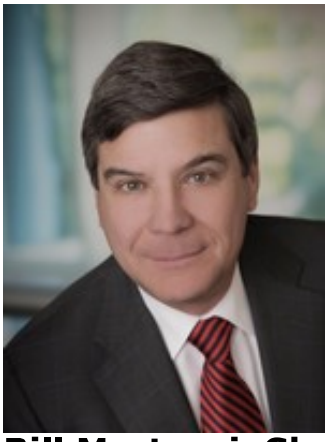
"I think it's a good reminder that the burden to keep records — and prove compliance with wage and hour laws at trial — rests with employers. Today's decision is consistent with the questions at oral argument about the case turning on the merits of the FLSA claims, i.e., the Mt. Clemens Pottery framework, as opposed to Rule 23. It is important for employers to remember that in the absence of accurate records of hours worked, the courts are free to look elsewhere for evidence of the amount of time worked."

Thomas Kaufman, Sheppard Mullin Richter & Hampton LLP

"The case is not as bad for employers as one might assume given that the decision affirmed the class certification. In my view, the case is most significant for the way it construes the Supreme Court's earlier landmark class action decision, Wal-Mart Stores Inc. v. Dukes. Its construction of that decision is more helpful to the defense bar than to the plaintiff's bar. The plaintiff's bar would have wanted a decision stating that the previous rejection of 'trial by formula' in Wal-Mart applied only to class actions arising under Title VII based on peculiarities of that federal statute. The majority opinion clearly rejects that view and set forth a rule of broader application: 'The underlying question in Wal-Mart, as here, was whether the sample at issue could have been used to establish liability in an individual action.' In other words, if the defendant can show that the statistical evidence cannot fairly be extrapolated to any individual class member, that is a basis to reject its use to support a class action."

Christopher A. Lilly, TroyGould PC

"The Tyson Foods decision is a battle of the experts in the wage and hour class action field that will probably be interesting only to legal insiders. However, Tyson should take away from the decision the importance of optics. The hogs head into the 'Kill Department' and employees are paid under a 'gang-time' system. The court homed in on those phrases in concluding that the employees' work was 'grueling.' At that point, it was all but certain the employees would get the benefit of any doubt. Employers are reminded that judges deal in words, and words matter to them."



Bill Martucci, Shook Hardy & Bacon LLP

"Simply put, 'representative evidence,' if based on statistical analysis by a qualified expert, will be permitted under the appropriate circumstances in wage and hour class action litigation. What may be more intriguing, however, is the concurring opinion by Chief Justice Roberts. Chief Justice Roberts notes a clear, constitutional issue which focuses on the difficulty of establishing that the jury's damages award goes only to injured class members. In the absence of a way to establish that point, Chief Justice Roberts states the jury award cannot stand. This issue remains for the district court to resolve in further proceedings on remand."

Carl Mayer, Mayer Law Group

"Today's opinion is a rare legal victory for American workers who are too often taken advantage of by large corporations, particularly when those giant companies fail to pay workers their full wages as required by law. For at least the last decade, courts in the United States, particularly the Supreme Court, have been shutting the courthouse door to ordinary American citizens, either through unconscionable arbitration clauses, limits on class actions or limits on damages. This was a huge David v. Goliath victory for over 3,000 low-income workers who took on the second largest meat packer in the planet."

Kevin McGinty, Mintz Levin Cohn Ferris Glovsky & Popeo PC

"Based on the argument, this result was unsurprising. There appeared to be little sympathy on the bench for a ruling that would categorically prohibit the use of statistical sampling in class actions. Justice Kennedy suggests that the test is whether the statistical approach would be admissible under the Federal Rules of Evidence, and that any test that would not be admissible in an individual case would be inadmissible in a class action. The question that interested most of the class action bar — when it is proper to certify a class that includes uninjured class members — was not decided."

Philip Oliss, Squire Patton Boggs LLP

"The Tyson Foods decision ultimately just reaffirms that a proponent of class certification must be able to demonstrate that the same evidence that would be required of an individual plaintiff is being required of the class. It so happens that representative evidence may be admissible in an individual wage and hour case; and, therefore, it can also constitute common proof in a class action. In my view, this does nothing to undermine Wal-Mart v. Dukes or to change the burden for class action plaintiffs in other contexts."

Pablo Orozco, Nilan Johnson Lewis

"The major takeaway from the Bouaphakeo v. Tyson Foods ruling is probably what wasn't decided more so than what was, given that the high court declined to consider whether the use of representative evidence would impermissibly allow employees who weren't harmed to form part of the class and receive a part of the award. Although decidedly not the pro-employer decision many companies had predicted, the ruling leaves companies with various avenues to challenge plaintiffs' use of representative evidence."

Seth Rafkin, Cooley LLP

“Many employment class actions lawyers have been closely watching and waiting for the Supreme Court’s decisions in Tyson Foods v. Bouaphakeo. The case concerns the ability of class action plaintiffs to offer statistical evidence as proof of an important fact in a case — here to prove the amount of time class members spend putting on and taking off protective safety gear. The issue is important because the plaintiff claims that class members were not paid for that time as they should be under the Fair Labor Standards Act. The case took on additional import as it follows the Supreme Court’s recent ruling in a case involving Wal-Mart where the court rejected the use of statistical evidence to provide a pattern of discrimination. This morning the court issued its opinion in the Tyson case. The court upheld the use of statistical evidence in this case. The court explained that it has long been established that there is no per se bar against use of statistical evidence, provided certain thresholds are met.”

Noelle Reed, Skadden Arps Slate Meagher & Flom LLP

"The Supreme Court's decision today in Tyson Foods v. Bouaphakeo is unlikely to have a significant impact on securities litigation plaintiffs' burden to meet the requirements for class certification. The court declined to adopt any general principles permitting or precluding the use of representative evidence to establish the type of classwide facts or issues that are required as a prerequisite to class certification under Rule 23 of the Federal Rules of Civil Procedure. Instead, the court endorsed a case-specific approach, noting in this case that because Tyson had not kept records of time employees spent donning and doffing protective gear as required by the FLSA, those employees would have been entitled to rely on statistical evidence to prove the elements of their claims even in an individual suit."

David Reis, Arnold & Porter LLP

"The court found that this case was not a proper vehicle to establish categorical rules about the use of statistical evidence in class actions. Instead, the court reaffirmed existing law, dating back to at least 1946, allowing the use of statistical sampling in wage and hour cases where the employer has failed to keep accurate time records. The case demonstrates how

critical it is for employers to challenge the veracity and admissibility of expert sampling studies. The case also acknowledges but leaves open as premature important issues about the problem of disbursing damages in a situation where the sampling study used to establish liability also shows that many in the plaintiff class did not suffer damages."

David Sanford, Sanford Heisler Kimpel, LLP

"This case represents a classic instance of defense overreach. And the lesson the defense bar should have learned is that when you continually shoot for the moon, eventually you will land in the ocean. Since Dukes v. Wal-Mart, defendants have claimed that representative samples are an impermissible means of establishing classwide liability. That option is now dead. Put another way: plaintiffs may now proceed with representative samples to prove classwide liability. The court ruled correctly that representative proof and statistical evidence have their rightful place in class actions as long as that evidence is reliable. This should not exactly be an earth shattering conclusion, but in these days of judicial activism, it is a good reminder of what sensible rulings look like."

Irv Scher, Hausfeld LLP

"The Supreme Court ruled today 6-2 in Tyson Foods v. Bouaphakeo that a class seeking damages under Rule 23 of the Federal Rules of Civil Procedure can be certified based on reliable representative proof, even though some class members have not been injured, so long as a mechanism is presented to assure that only injured members ultimately will recover."

Leslie Simoneau, Tressler LLP

"The U.S. Supreme Court's decision to allow an unpaid overtime verdict against Tyson Foods to stand based on representative evidence is significant to employers because it allows plaintiffs to recover based on statistics rather than actual time worked. The decision potentially allows uninjured workers to recover based on representative evidence or statistics. This decision essentially lessens the burden of the 'predominance' standard required for plaintiffs to prove a putative class. Going forward, individual issues will be less likely to defeat class certification. This is a significant shift in favor of employees."

Damon W. Suden, Kelley Drye & Warren LLP

"The court refused to adopt an outright ban on statistical evidence to establish liability in a class action, concluding instead that statistical evidence could be used to establish liability on a classwide basis if that same type of statistical evidence would have been admissible in an individual suit. The court did not reach the question of whether a class may be certified if it contains members who were not injured and have no legal right to any damages. Here, the takeaway for employers is to keep accurate records. The court permitted class members to prove that they worked uncompensated overtime with expert statistical analysis because their employer failed to keep adequate records. The takeaway for counsel is to challenge statistical analysis before it gets to the jury. The court noted that statistics may be inadmissible if based on implausible assumptions, but Tyson never challenged the evidence under Daubert."

M.C. Sungaila, Haynes and Boone LLP

"Tyson Foods is important both for its impact on wage and hour law and class actions. First, the majority opinion extends the court's prior opinion in Mt. Clemens, which allowed the use of statistical proof to give rise to 'just and reasonable inferences' concerning the amount of damages in a wage and hour case where liability was certain, and applies that same reasonable inference standard to establish liability in a wage and hour case where liability is disputed. This ruling encourages the use of statistical evidence to prove both liability and damages in wage and hour violations, whether they are collective actions or not. Second, the majority opinion makes clear that the propriety of using statistical evidence in other types of class actions will depend on the purpose for which the statistical sample is introduced, the elements and proof required for the underlying claim, as well as the Federal Rules of Evidence. This encourages decisions concerning the use of statistical evidence and the propriety of class certification in particular cases to be more firmly in the hands of district judges."

James Tysse, Akin Gump Strauss Hauer & Feld LLP

"As indicated by the lopsided 6-2 vote in this extremely contentious area of the law, the Supreme Court issued a narrow decision that rejects the 'broad and categorical rules governing the use of representative and statistical evidence' advocated by both sides — and which thus broke little new ground."

Jack Wallace, Constangy Brooks Smith & Prophete LLP

"The Tyson decision rings a death knell to the argument that individual variations in class member damages — even where the variations could result in the inclusion of class members who suffered no legal harm — can trump class certification. However, the court made clear that class certification will not stand where, as in Dukes, the plaintiffs fail to show that they are linked by a common policy or practice of the employer. After Tyson, employers opposing class certification will likely focus on Dukes-based arguments even more so than before."

David Yandle, Womble Carlyle Sandridge & Rice LLP

"In Tyson Foods Inc. v. Bouaphakeo, the Supreme Court ruled 6-2 that employees could rely on statistical sampling evidence to establish commonality for class certification and to prove liability. Meat processing plant workers sought compensation for overtime incurred while donning and doffing protective gear. In the absence of time records per employee, the court allowed the statistical evidence. Tyson Foods did not raise a Daubert challenge, but argued the evidence was insufficient to prove individual injury necessary for class membership or damages. The unique facts and employer's failure to maintain records combine to narrow the impact of this decision."

--Editing by Mark Lebetkin.