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Tyson Ruling Tees Up More Class Action Evidence Fights

By **Vin Gurrieri**

Law360, New York (March 22, 2016, 9:51 PM ET) -- The U.S. Supreme Court ruled Tuesday that Tyson Foods workers could use statistical sampling to support class certification in a don-doff dispute but declined to adopt sweeping rules for the use of such evidence, which experts say could lead to case-by-case disputes over the admissibility of statistical samples.

(Credit: AP)

In **a 6-2 ruling**, the high court affirmed a $5.8 million judgment against Tyson Foods Inc. that pork-processing workers had won in a hybrid class and collective action they brought in 2007 over uncompensated time spent donning and doffing required gear and time spent walking.

The majority opinion authored by Justice Anthony Kennedy concluded that a statistical analysis performed by Dr. Kenneth Mericle that averaged the time workers spent donning and doffing was admissible to prove liability and damages. But the majority cautioned that this case was not one in which the court would adopt a broad rule governing the use of representative and statistical evidence in all class actions, saying such a rule "would make little sense" and be judicial overreach.

"There appeared to be little sympathy on the bench for a ruling that would categorically prohibit the use of statistical sampling in class actions," said Kevin McGinty, co-chair of Mintz Levin Cohn Ferris Glovsky & Popeo PC's class action working group.

Instead, the high court majority endorsed a case-specific approach to so-called representative evidence, saying that the ability to use a sample to establish classwide liability will depend on the purpose of the sample being introduced, its reliability and whether it can prove or disprove elements of the underlying cause of action.

Patrick Bannon, a management-side labor and employment partner at Seyfarth Shaw LLP, said the key lesson from the ruling is for employers "to be sure to look carefully" at opponents' statistical evidence or other evidence from experts.

"The Supreme Court put a lot of weight behind the fact that Tyson didn't challenge the expert study," Bannon said. "When there's a statistical study being offered, employers are going to want to look hard at it and persuade a judge that it's not valid."

As part of the ruling, the majority determined that the representative evidence was admissible in the Tyson case because the workers needed it "to fill an evidentiary gap" created by Tyson's failure to keep adequate records of the time they spent donning and doffing.

The majority also said that if representative evidence is relevant in proving a claim brought in an individual plaintiff's suit, it can't then be deemed improper if similar evidence is brought on behalf of a class. Had the more than 3,300 individual class members in the Tyson case proceeded with separate lawsuits, the justices said they each likely would have had to introduce Mericle's study to prove the hours they worked.

To support its conclusion, the majority cited its own precedent in a 1946 decision known as Anderson v. Mt. Clemens Pottery Co., which said that employers can't hide behind record-keeping failures by claiming plaintiffs haven't proved the precise amount of time worked.

Haynes and Boone LLP partner M.C. Sungaila, who co-authored an amicus brief in the case on behalf of the International Association of Defense Counsel, where she is chair of the amicus curiae committee, said the ruling amounted to an extension of Mt. Clemens and encourages the use of representative evidence by plaintiffs in wage and hour cases while also opening the door for such evidence in other types of class actions.

"The lack of certainty [over the admissibility of representative evidence] disproportionately impacts class action defendants [since] the issue goes to the core of whether there should be a class in the first place," Sungaila said, noting that certified class actions are more expensive to defend and give plaintiffs more leverage in settlement negotiations.

Absent a categorical rule, the fact-based standard proffered by the high court might give judges more leeway in determining whether such representative evidence should be allowed, and encourage some judges to consider the admissibility of such evidence at the summary judgment phase of a case instead of the class certification stage, according to Sungaila.

"If I were a plaintiffs' attorney, I would hire experts to use that kind of data as long as it passes the Daubert evidentiary test," Sungaila said.

Had the high court adopted a categorical rule excluding representative evidence, it could have impacted a wide swath of class actions beyond just the labor and employment arena that gave rise to the suit, a reason that lawyers in other practice areas were also keeping a close eye on the outcome of the case.

Irving S. Scher, an antitrust attorney at Hausfeld LLP who represents plaintiffs as part of his practice, said Tuesday that the ruling's importance lies in the majority's finding that reliable and scientific evidence of averages can be used to determine classwide injury so long as there is a method to ensure that uninjured class members don't recover damages.

"It's a very plaintiff-friendly decision because after [the high court's rulings in] Dukes and Comcast, defense counsel had been taking the position that you can't use statistical evidence and can't certify a class [that includes] uninjured members," Scher said. "Those

arguments have been killed as a matter of law."

Meanwhile, Skadden Arps Slate Meagher & Flom LLP securities partner Noelle Reed, who leads the firm's litigation practice in Houston, said that Tuesday's ruling can actually be seen as a win for defense lawyers.

"Certainly the defense bar would have liked to see a blanket rule against the use of representative evidence, but the specifics of this case ... make it of limited use for plaintiffs," Reed said. "Fortunately or unfortunately, the court punted and refused to give blanket guidance on the use of [representative sample] evidence. The opinion ended up being case-specific. The way the opinion was written, it certainly could apply in other class actions, but you'd have to get into the granularity of the case."

Tyson is represented by Michael J. Mueller, Emily Burkhardt Vicente and Evangeline C. Paschal of Hunton & Williams LLP, and Carter G. Phillips, Joseph R. Guerra, C. Frederick Beckner III, Kathleen Moriarty Mueller and Christopher A. Eiswerth of Sidley Austin LLP.

The plaintiff-respondents are represented by Scott Michelman, Scott Nelson and Allison Zieve of Public Citizen Litigation Group, Robert L. Wiggins Jr. of Wiggins Childs Quinn & Pantazis LLC, David Frederick, David Ho and Matthew Seligman of Kellogg Huber Hansen Todd Evans & Figel PLLC, and Eric Schnapper of the University of Washington School of Law.

The case is Tyson Foods Inc. v. Bouaphakeo et al., case number 14-1146, in the Supreme Court of the United States.

--Editing by Mark Lebetkin and Aaron Pelc.