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STATISTICS

CERTIFICATION

The Supreme Court's 6-2 ruling in *Tyson Foods v. Bouaphakeo* may seem like a triumph for the plaintiffs' bar, but a closer reading offers defendants a friendly rule for the use of statistical samples in class action practice, attorney Jonah Knobler says. *Tyson* may also give defendants a boost in the growing controversy over ascertainability, and put the brakes on some courts' ''willingness to indulge in classwide 'presumptions' of reliance and injury'' to facilitate class treatment in consumer protection cases, the author says.

Tyson Foods: Victory in Defeat for Class-Action Defendants?

By Jonah Knobler

At first glance, the Supreme Court's recent class-action decision, *Tyson Foods v. Bouaphakeo*, may seem like a triumph for the plaintiffs' bar.

Dividing 6–2, the Court blessed the use of ''representative evidence'' that ignored differences among class members to facilitate a classwide trial. But while *Tyson*'s top-line result favored the plaintiffs, a closer reading gives class-action defendants much to be encouraged about.

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The *Tyson* case involved the claims of 3,344 workers at Tyson's Storm Lake, Iowa plant who were allegedly denied pay for time spent ''donning'' and ''doffing'' protective gear. Tyson argued that the time each employee spent donning and doffing was an inherently individual question, requiring employee-specific evidence. The lower courts, however, permitted the workers to prove their claims through ''representative evidence'': an expert witness timed a small subset of workers donning and doffing, averaged those observations, and then extrapolated those averages to the entire class.

Before the Supreme Court, Tyson argued that this method of proof was improper and unfair. It maintained that ''statistical techniques that presume all class members are identical to the average observed in a sample'' have no place in class actions. By allowing the plaintiffs to prove the claims of a fictional average worker and extrapolate that result to the whole class, Tyson argued, the lower courts had ''disguised the presence of . . . individualized issues'' that should have precluded class treatment and ''deprived Tyson of its due process right to raise every available defense.''

In its opinion, the Supreme Court explained that ''[w]hether and when statistical evidence can be used to establish classwide liability'' is a context-sensitive ques-

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tion that ''depend[s] on facts and circumstances particular to [each] case[].'' While purporting to avoid categorical pronouncements, the Court offered this rule of thumb: a sample ''is a permissible method of proving classwide liability . . . ***[if] each class member could have relied on that sample to establish liability if he or she had brought an individual action***.''

As the Court explained, this follows from the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules of Civil Procedure ''shall not abridge, enlarge or modify any substantive right.'' If each of the Storm Lake workers could have relied on the same statistical sample to win his or her own individual case, the Court explained, ''that evidence cannot be deemed improper merely because the claim is brought on behalf of a class,'' as this ''would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.' '' But the principle cuts both ways: if a single statistical sample would *not* allow each class member to win his or her individual case, ''[p]ermitting the use of that sample in a class action . . . would . . . giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.'' That would be equally improper.

Thus, the question in *Tyson* boiled down to whether the proffered sampling evidence ''could have sustained a reasonable jury finding'' as to the time spent donning and doffing ''in each employee's individual action,'' had the 3,344 Storm Lake workers opted to sue separately. The Court answered that question ''yes''—and accordingly, the use of ''representative evidence'' was affirmed.

Three Factors Crucial to Result

Importantly, however, three case-specific factors were crucial to this result. These factors will not be present in many—perhaps most—class actions.

The first such factor was the unique proof structure of the Fair Labor Standards Act, the statute under which the workers sued. Under the FLSA, ''when employers violate their statutory duty to keep proper records,'' as Tyson had done, an employee's burden of proof is relaxed: he or she need only produce evidence that would permit a jury to make a ''just and reasonable inference'' about the number of hours worked. ''[T]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed.'' This Tyson had not done.

Most causes of action do not employ a proof structure of this sort. Ordinarily, a plaintiff must do more than proffer evidence that would allow a jury to find liability ''as a matter of just and reasonable inference.'' In the usual case, a plaintiff must affirmatively prove her claim by a preponderance of the evidence. Where that rule applies, a sampling of third parties' experiences is much less likely to serve as a viable method of proof. And, *Tyson* teaches us, if a plaintiff could not prevail in an individual suit with such a sample, that sample does not magically become acceptable when his or her claim is joined with those of many other people.

The second case-specific factor in *Tyson* was the perceived degree of cohesion among the 3,344 Storm Lake employees. In the Court's view, the workers were ''similarly situated'' in important ways: ''each employee worked in the same facility, did similar work, and was paid under the same policy.'' Because their factual circumstances were so much alike, the Court held, a ''reasonable juror could have believed that the [Storm Lake] employees spent roughly equal time donning and doffing.'' And if that was so, ''the experiences of a subset of employees [would] be probative as to the experiences of all of them.''

Many class actions, however, will not involve a naturally cohesive class of this kind. For example, the *Tyson* Court contrasted the Storm Lake workers with the class in *Wal-Mart Stores, Inc. v. Dukes*, a nationwide conglomeration of over 1.5 million employees with nothing in common other than the fact that they worked at Wal-Mart stores. Under those circumstances, the Court explained, a sampling of third parties' experiences would *not* be probative in any employee's individual case. As a result, ''[p]ermitting the use of that sample in a class action'' would improperly modify the parties' substantive rights. Many putative classes—especially sprawling, nationwide classes—will resemble the disparate group of workers in *Wal-Mart* more than the naturally cohesive group in *Tyson*.

The last case-specific factor underlying the result in *Tyson* was the fact that Tyson—for whatever reason—''did not raise a challenge to [the workers' expert's] methodology under *Daubert*.'' The Court acknowledged that ''[r]epresentative evidence that is statistically inadequate or based on implausible assumptions'' cannot support class treatment. However, the Court concluded, Tyson's failure to raise a *Daubert* challenge left ''no basis in the record'' to question the validity of the proposed sample or the reasonableness of extrapolating it to the entire class. After *Tyson*, attentive class-action defendants will be unlikely to make the same procedural mistake.

Fairly read, then, *Tyson* actually announces a relatively *defendant*-friendly rule for the use of statistical samples in class-action practice. Again, a sample is permitted in a classwide proceeding if that same sample could be used to prove the claim of each class member when brought individually. This should prove true only in relatively rare cases involving unique causes of action, especially cohesive classes, or both. In run-of-the-mill class actions, proof through sampling should usually be impermissible, as plaintiffs cannot ordinarily win individual cases just by pointing to the experiences of others not before the court.

Broader Impact on Classwide Litigation

But sampling aside, *Tyson* may prove helpful to class-action defendants in an even more fundamental way. For many years, in a wide variety of contexts, defen-

dants have complained that courts unfairly modify or relax legal rules that would apply in individual suits in order to facilitate class treatment. Citing the Rules Enabling Act, these defendants have argued that substantive law cannot be contorted to make classwide litigation work—even if doing so might advance interests of efficiency or deterrence. These arguments have met with mixed results. However, *Tyson* reaffirms and reinvigorates the principle, enshrined in the Rules Enabling Act, that substantive rights cannot be abridged or modified simply because Rule 23 has been invoked. In the words of the *Tyson* Court, it ''would . . . violate[] the Rules Enabling Act'' to ''giv[e] [either] plaintiffs [or] defendants different rights in a class proceeding than they could have asserted in an individual action.'' The application of this principle is broad indeed.

For example, *Tyson* may give defendants a boost in the growing controversy over ''ascertainability.'' Some courts require plaintiffs to show, as a prerequisite to class treatment, that the identity of the class's members could one day feasibly be ascertained. Other courts dispense with this requirement and force defendants to litigate against amorphous groups of persons whose identities will never be known and whose class membership, therefore, can never be challenged. It would be unthinkable to let lawyers bring *individual* suits, and extract *individual* judgments, on behalf of hypothetical ''clients'' whose personal circumstances will forever remain an abstraction. *Tyson*'s view of the Rules Enabling Act suggests that this practice should be equally impermissible in classwide proceedings—even if this would make class actions much harder to bring.

Tyson may also put the brakes on some courts' willingness to indulge in classwide ''presumptions'' of reliance and injury to facilitate class treatment in consumer protection cases. The consumer protection statutes of many states, including California, require plaintiffs to prove direct, personal reliance on the defendant's statement, and resulting injury, in order to recover. However, some California federal courts follow a purported rule that all absent class members are presumed to have relied and suffered injury as long as the lead plaintiff did. Worse yet, some courts treat this presumption as conclusive, ignoring defendants' proffered evidence that reliance and injury varied from person to person. In so doing, courts effectively apply one substantive rule of law for lead plaintiffs, and another, more lenient rule for absent class members. Again, *Tyson* tells us that this is improper: individuals who did not personally rely on a deceptive statement should not be able to recover as absent class members if they would not have a winning claim in an individual lawsuit.

As these two examples reflect, by emphasizing that class treatment cannot modify substantive rights, *Tyson* gives defendants powerful ammunition to combat class-action abuses extending well beyond the admission of statistical evidence. If *Tyson* succeeds in reminding lower courts of the Rules Enabling Act and its fundamental constraint on class-action practice, then for defendants, the admission of statistical studies in a modest number of cases would prove well worth the price.