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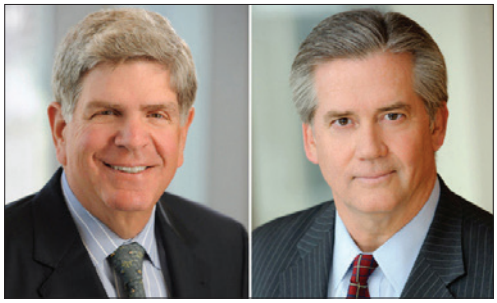
ANTITRUST TRADE AND PRACTICE

Expert Analysis

U.S. Supreme Court to Address Class Certification—Again

In June, the U.S. Supreme Court granted certiorari in the case *Bouaphakeo v. Tyson Foods*. There, the court will—for the third time this decade—address the certification of a class action under Rule 23 of the Federal Rules of Civil Procedure. Specifically, the court has been asked to review the use of statistical averages in liability and damages calculations as well as the inclusion of potentially uninjured individuals within a class. The court's answers will no doubt be of interest to all court watchers lay and professional, with antitrust practitioners and hobbyists apt to pay particularly close attention to *Tyson's* potential impact on private antitrust class actions proceeding under Section 4 of the Clayton Act.



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Background

The underlying action was brought by employees at Tyson's meat-processing facility in Storm Lake, Iowa. Tyson paid such workers for what the company refers to as "gang time"—i.e., time when employees are at their work stations and the production line is moving. Tyson also paid a daily amount of "K-Code" time to employees who, because they worked with knives or in departments where individuals worked with knives,[1] were required to don and doff personal protective equipment and walk to and from the production line. K-Code time was fixed, and Tyson did not record the actual amount of time each employee spent donning, doffing, and walking.

In 2007, employees sued Tyson under the Fair Labor Standards Act (FLSA) and Iowa Wage Payment Collection Law (IWPCL). The employees argued that, even counting K-Code time, Tyson was not compensating them sufficiently for time spent donning and doffing protective equipment and walking to their stations. Over the opposition of Tyson, the Northern District of Iowa certified the claims as a collective action under the FLSA, pursuant to 29 U.S.C. § 216(b), and as a Rule 23 class action under the IWPCL.[2] At trial, in order to prove both injury and damages, the employees introduced both statistical average donning, doffing, and walking times as well as individual employee timesheets. The jury awarded the employees a verdict of nearly $2.9 million, which, with the addition of liquidated damages, grew to a final judgment of approximately $5.8 million.

Tyson appealed to the U.S. Court of Appeals for the Eighth Circuit, where a divided 2-1 panel affirmed both class certification and liability.[3] First, the court disagreed with Tyson's contention that class certification had been improper because factual differences among the employees prevented the "generat[ion of] common answers apt to drive the resolution of the litigation": "[w]hile individual plaintiffs varied in their donning and doffing routines," the variation among class members was not so great as to make class treatment inappropriate.

Second, the court said that any error stemming from evidence that the class contained members who did not work overtime (and thus were not entitled to damages and lacked standing) was invited by Tyson's jury instruction regarding the treatment of uninjured class members.[4] Third and finally, the court rejected Tyson's argument that the class' use of statistical averages had resulted in an impermissible "trial by formula"; although the class had relied on "inference from average[s]," they had "appl[ied] this analysis to each class

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member" by use of individual timesheets.

After the Eighth Circuit denied rehearing en banc, Tyson petitioned the Supreme Court for a writ of certiorari.[5] Tyson's petition presented two questions for resolution: (1) whether "differences among individual class members may be ignored and a class action certified…where liability and damages will be determined with statistical techniques that presume all class members are identical to the average" and (2) whether a class may be certified where it "contains hundreds of members who were not injured and have no legal right to any damages."[6] According to Tyson both questions have sharply divided the circuit courts.[7] The class members, in their opposition, argued that Tyson had waived the first question and that the second was not properly before the court; it also maintained that, regardless, the lower courts had correctly decided the issues and Tyson's "circuit split" was illusory.[8]

On June 8, 2015, the Supreme Court granted certiorari.

Context

Tyson will be the third time in roughly a half-decade that the Supreme Court wades into important questions surrounding class certification. In the past two cases, the court is generally seen as having "ratcheted up" the Rule 23 requirements, and made it more challenging to certify a class. The question, then, is whether *Tyson* too will demand more "rigorous analysis" of putative class actions prior to certification. And, in addition to having an effect on class actions generally, *Tyson* could be of particular interest to the antitrust-minded. Although *Tyson* will not directly address antitrust class actions, any real guidance on questions of quanta of proof or uninjured class members could have a major impact on antitrust class action litigation.

'Dukes' and 'Comcast.' Two prior Supreme Court cases provide important context for *Tyson*. In 2011, in *Wal-Mart v. Dukes*, the Supreme Court addressed what the majority opinion referred to as "one of the most expansive class actions ever," a Title VII case against Wal-Mart brought by a group of approximately 1.5 million current and former female employees, who alleged that Wal-Mart's "corporate culture" of sexism resulted in common harm to all female employees. The court, however, held that the employees had not pleaded a common contention "capable of classwide resolution," because there was no question for which "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[9]

The court also held that the employees' proposal for determining individual monetary damages—a sample set of employees would be deposed under the supervision of a special master and extrapolations would be made thereafter—would constitute a "trial by formula" that deprived Wal-Mart of its statutory right under Title VII to litigate defenses to individual claims. This, the court said, would constitute a violation of the Rules Enabling Act,[10] which requires that the Federal Rules of Civil Procedure (and other judicially promulgated rules) not "abridge, enlarge, or modify any substantive right."

Just two years later, the court again faced questions about the strictures of class certification when, in *Comcast v. Behrend*, cable subscribers in the Philadelphia area brought antitrust claims against Comcast. As in *Dukes*, the court felt that too lax a standard had been applied by the lower courts. The subscribers had alleged four theories of how Comcast's behavior had injured them, but the district court found only one of the four capable of classwide proof.[11] However, the subscribers' expert witness, in calculating the class' damages, used formulas and models that made no attempt to focus exclusively on damages attributable to the accepted theory of injury. Without so distinguishing, the subscribers had not met their burden to show that individual damages questions would not predominate over common questions: "such assurance is not provided by a methodology that identifies damages that are not the result of the wrong."[12]

Will *Tyson* be more of the same, or will it be a limiting principle? Both *Dukes* and *Comcast* showed the court give bite to its demand for "rigorous analysis" prior to certifying a class.[13] And both cases expressed some degree of skepticism about the use of models to determine classwide impact. It is easy, then, to think that *Tyson* will be of the same ilk. But both *Dukes* and *Comcast* also exposed disagreements among the justices about just how exacting the standards of Rule 23 are.[14] It is possible, therefore, that *Tyson* could be the court's opportunity to draw a line in the sand and say that—at least in the case before it—the class had met its burden for certification. Because no opinion accompanied the grant of certiorari (as is common), case-watchers will have to wait until at least oral argument for a preview of where the court is headed.

Antitrust. Predictions aside, *Tyson* nods to serious questions about private antitrust class actions, which proceed, in substance, under Section 4 of the Clayton Act. Section 4 requires not only that a defendant violate the antitrust laws but also that the plaintiff suffer injury "to his business or property."[15] Some courts have opined that this language means that proof of individualized injury is the crux of a Section 4 private action.[16]

Of course, antitrust suits under Section 4 have been certified as class actions for many years. Sometimes, proving individual injury and its amount can reasonably be derived from common proof (for example, in a commodity price-fixing action in which the price list was public, combination of the price list with proof of purchase would be sufficient to establish individual injury). At

other times, however, individualized proof is an extremely complicated endeavor. In those instances, particularly given the courts' rigorous analyses, plaintiffs in a putative class may not be able to meet their burden to prove individual injury.[17]

When presented with such situations, the U.S. Court of Appeals for the Fourth and Fifth Circuits have stated the class should not be certified, because doing so would convey a right to damages to individuals who had suffered no injury to their "business or property." Indeed, by so expanding the antitrust class, the courts said, certification would "enlarge" substantive rights under the Clayton Act, in violation of the Rules Enabling Act.[18]

In *Tyson*, the court will address similar questions about the effect of including uninjured individuals in a damages class actions. The court could—either in its opinion or after the fact—purport to limit its analysis to the FLSA and disclaim a broader import to its decision. Even if that were the case, however, Tyson is likely to offer important insight into how the court views the interplay between substantive rights conveyed by statute, like the private right to damages in Section 4 of the Clayton Act, and the Rules Enabling Act. Hopefully, when the court decides *Tyson*, it will at least keep in mind *Windham* and *Blue Bird*, important and longstanding precedent that seem to suggest that inclusion of uninjured individuals in a class definition would defeat the certification of a private antitrust class.

Conclusion

One thing is certain: *Tyson* is a case to watch. Private class actions, in antitrust and in myriad other subject matters, are filed frequently with courts across the nation. They often include high-profile defendants and damages awards that can reach into the billions of dollars. Indeed, the issue is significant enough to have gained some attention in Congress, where the House Judiciary Committee recently certified a bill that would require that "the party seeking to maintain a class action affirmatively demonstrate[] through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives."[19] Ultimately, one hopes that the court—or Congress—will provide additional clarity that creates a path to both robust and also efficient enforcement of the antitrust laws.

Endnotes:

1. Until 2007, Tyson paid four minutes per day of K-Code time to all workers in departments where knives were used. Following the Supreme Court's decision in *IBP v. Alvarez*, 546 U.S. 21 (2005), Tyson implemented K-Code time policies more tailored to individual roles; K-Code times ranged from four to seven minutes per day.

2. *Bouaphakeo v. Tyson Foods*, 564 F.Supp.2d 870 (N.D. Iowa 2008).

3. *Bouaphakeo v. Tyson Foods*, 765 F.3d 791 (8th Cir. 2014).

4. Tyson's instruction was: "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages."

5. See Petition for Writ of Certiorari at 15-25, *Bouaphakeo v. Tyson Foods*, No. 14-1146.

6. The class framed the questions differently: whether (1) "the use of individual timesheet evidence and representative proof…was permissible and sufficient to sustain the jury's verdict of liability"; and (2) "a class may be certified when it contains members who may not have been injured." See Respondents' Brief in Opposition on Petition for Writ of Certiorari at i, *Bouaphakeo v. Tyson Foods,* No. 14-1146 [hereinafter "opposition"].

7. According to Tyson, the U.S. Court of Appeals for the Tenth Circuit allows representative proof, while the Seventh, Fourth, Second, Fifth, and Ninth circuits do not; and the Seventh, First, and Third circuits permit the presence of uninjured class members, but the Second and D.C. circuits do not.

8. See opposition, supra note 6, at 6-19.

9. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

10. 28 U.S.C. §2072(b).

11. *Comcast Corp. v. Behrend*, 264 F.R.D. 150, 165, 174, 178, 181 (E.D. Pa. 2010).

12. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013).

13. *Dukes*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432.

14. See *Dukes*, 131 S. Ct. at 2561 (opinion of Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, concurring in part and dissenting in part); *Comcast*, 133 S. Ct. at 1435 (dissenting opinion of Ginsburg, Breyer, Sotomayor, and Kagan).

15. 15 U.S.C. §15.

16. See, e.g., *Windham v. American Brands*, 565 F.2d 59, 66 (4th Cir. 1977) (en banc).

17. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) ("[The decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.").

18. *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *Windham v. American Brands*, 565 F.2d 59, 66.

19. See Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. §1716.