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Tyson Should Not Significantly Affect Securities Cases

Law360, New York (March 30, 2016, 11:09 AM ET) -- While the U.S. Supreme Court on March 22, 2016, sanctioned the use of representative evidence to establish that common issues of fact or law predominate over individual issues in a proposed wage-and-hour class action, the opinion effectively cabined the application of that principle to a narrow subset of class actions. Because securities cases are highly unlikely to involve analogous situations, they should not be significantly impacted by the court's recent opinion.


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In Tyson Foods Inc. v. Bouaphakeo, the plaintiffs asserted claims under the Fair Labor Standards Act and a state wage law based on allegations that the defendant failed to pay overtime compensation to employees for time spent putting on and taking off required clothing and protective gear. To prove that class members performed uncompensated work and to calculate the quantum of damages (amount of unpaid overtime wages), the plaintiffs relied on statistical models to aggregate and average the time employees spent donning and doffing protective equipment. This figure was then used to extrapolate the amount of overtime compensation due to the class, which the plaintiffs' expert calculated to be $6.7 million. The parties agreed that at least some members of the class did not perform any uncompensated work and were not owed any unpaid overtime wages, but the plaintiffs' damages model did not identify which class members were uninjured and did not propose a methodology for identifying uninjured class members. The case was tried to a jury, which awarded the class $2.9 million in damages.

Addressing whether the plaintiff class could properly apply a statistical study of the average time employees spent donning and doffing protective gear to establish classwide proof of liability and damages, the court expressly declined to adopt a broad rule permitting or prohibiting the use of representative evidence generally in class actions. Instead, the court observed that representative or statistical samples, like all evidence, are simply a means parties may rely on in appropriate cases to establish a fact. This is true, the court noted, regardless of whether the case is an individual or class action. The question, therefore, is the "degree to which the [representative] evidence is reliable in proving or disproving the elements of the relevant cause of action." Accordingly, whether and when statistical evidence can be used to show classwide issues of fact or law is a case-specific inquiry that depends on the purpose for which the evidence is being used and the elements of the underlying cause of action.

The court further explained that in applying this standard, courts should examine whether the representative evidence proffered on behalf of a class would be admissible and could

support a jury finding as to an element of the plaintiff's claim if that claim were brought individually. Applying these principles in Tyson, the court focused on the employer's failure to keep records of the actual time employees spent donning and doffing gear, as required by the FLSA. In the absence of such records, even individual plaintiffs could have relied on the same type of statistical evidence used by the class to establish liability and damages. Noting that the employer did not raise a Daubert challenge to the methodology used to collect or evaluate the statistical evidence, the court concluded that the evidence was admissible and the persuasiveness of the study was a matter for the jury.

In addition, the court held that the possibility that uninjured class members might recover was not yet fairly presented to the court because the damages award had not yet been disbursed to the class. The court left open the employer's ability to raise future challenges on this issue once the district court identifies the methodology it will use to calculate payments to individual class members.

The court's approval of the use of representative evidence in Tyson clearly turned on two key facts: (1) that an individual class member could have relied on the same representative evidence to prove his damages because the employer failed to keep statutorily required records of time worked, and (2) that the defendant had not raised a Daubert challenge to the representative evidence. Thus although the court did not categorically reject the use of representative evidence to prove class claims, its analysis in Tyson should significantly limit the use of such evidence in class actions generally and in securities class actions specifically.

Looking at the elements of a typical 10b-5 case, for instance, it is difficult to imagine how plaintiffs could benefit from the type of statistical analysis at issue in Tyson. The elements of a 10b-5 claim are: (1) a material misrepresentation or omission by the defendant, (2) scienter, (3) a connection between the misrepresentation or omission and a securities transaction, (4) reliance, (5) a loss, and (6) loss causation. Courts already allow securities class action plaintiffs to rely on the rebuttable fraud-on-the-market theory to establish reliance, and the Tyson analysis should have no impact on that principle. None of the remaining elements readily lends itself to the type of representative proof at issue in Tyson because each depends on specific facts that are either within the knowledge of each individual plaintiff or turn on an analysis of ascertainable facts. A survey will not establish whether a statement was a material misrepresentation — only the statement itself and the underlying facts will do so. Nor will it show whether a party actually relied on the statement (regardless of whether the plaintiff attempts to prove reliance directly or through a fraud-on-the-market theory). Nor is there likely to be an analogue in the securities litigation context for the FLSA employer record-keeping requirement underlying the Tyson analysis.

In short, while the true impact of the Tyson opinion cannot be known at this early stage, the practical application of the narrow analysis adopted by the court may be nearly as effective as a categorical bar on the use of representative evidence in securities class actions.

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DISCLOSURE: Skadden filed an amicus brief in the case on behalf of the Product Liability Advisory Council Inc. in support of petitioner Tyson Foods.