Tyson Foods, Inc. v. Bouaphakeo: The Supreme Court Produces a Narrow Holding Involving FLSA Precedent and Rule 23 Principles

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Employees have been bringing wage-and-hour collective actions since long before class procedures were officially integrated into the Federal Rules of Civil Procedures in 1966. Section 16(b) of the Fair Labor Standards Act (FLSA) permitted collective actions when it was passed in 1938. In 1946, the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), amplified that power by holding that employees, after establishing class-wide liability, were entitled to a reasonable inference based upon representative sampling to compute class member damages. Section 16(b) was amended in 1947 to establish more rigorous requirements for collective actions, including the opt-in requirement. *See Hoffman-LaRoche Inc.*, 493 U.S. 165, 173 (1989).

As FLSA collective action litigation bubbled over in the past decade, citations to *Mt. Clemens* followed. But the rule remained that the plaintiffs first had to establish the existence of class-wide liability, and only then did *Mt. Clemens* permit a just and reasonable inference regarding damages.

That long-standing rule received a contemporary update this week when the Supreme Court issued its opinion in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. __ (2016). For the first time, the Court condoned relying on *Mt. Clemens'* reasonable inference to use statistical sampling to establish liability as well as damages in an FLSA collective action.

In *Tyson Foods*, a group of workers brought a proposed Rule 23(b)(3) class action against their employer for unpaid overtime in violation of Iowa state wage-and-hour law as well as a putative collective action under the FLSA. The presence of the FLSA claim alongside the state law claim substantially influenced the Court's legal reasoning regarding statistical proof of class-wide liability. The workers claimed Tyson did not compensate them for the total time they spent "donning" and "doffing" protective and sanitary equipment at Tyson's facility. The plaintiffs

argued that Tyson violated the FLSA by not providing overtime pay to those employees whose donning and doffing time, when added to their regular hours, exceeded 40 hours in a given week.

The key issue the Court addressed in *Tyson Foods* was whether the plaintiffs could use statistical evidence to prove that, inclusive of donning and doffing time, Tyson workers were working over 40 hours per week without overtime pay. Tyson argued that the times spent donning and doffing varied significantly among the individual plaintiffs – even within departments, each worker wore different combinations of gear, requiring different amounts of time to don and doff. Because of that, it was not possible to establish class-wide liability without representative sampling, which Tyson argued was not permitted under *Mt. Clemens*.

Drawing a rebuke from dissenting Justices Clarence Thomas and Samuel Alito, a 6-2 majority opinion written by Justice Anthony Kennedy held that there is no bar to relying on representative sampling to establish liability:

> "Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as [the industrial relations expert's] has been permitted by the court so long as the study is otherwise admissible." (Citing *Mt. Clemens* at 687.)

As a result, it may no longer be sufficient for FLSA defendants to argue categorically that the *Mt. Clemens* reasonable inference is inapplicable to liability. Rather, the lesson from *Tyson Foods* appears to be that class action battles in such cases will focus on the quality of the representative sample as it applies to the class, regardless of liability or damages. Indeed, the Court stated that when an employer fails to fulfill its "statutory duty" to maintain proper timekeeping records, the plaintiffs may prove their claims through reasonable inference. This is a powerful tool for statistical proof with historical roots in FLSA actions that the Court thus far has limited to FLSA claims. Otherwise, the public policy of the FLSA of not creating an "impossible hurdle" for the employee to prove his or her claims would be frustrated. Here, the plaintiffs' evidence was sufficient for the jury to make a just and reasonable inference as to each individual employee – the plaintiffs worked in the same facility, did similar work, and were paid under the same policy. The Court also noted (twice) that *Tyson* did not challenge the validity of the studies under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) or attempt to discredit those studies.

The Court also rejected as premature Tyson's challenge that the jury's award would provide compensation to class members who did not suffer any injury because the damages award had not yet been distributed, and the record did not indicate how it would be distributed. Although the Supreme Court affirmed Tyson's right to challenge an award to uninjured plaintiffs, any challenge would have to come after an indication of how the award would be disbursed to class members.

In his concurring opinion, Justice Roberts attempted to further explain portions of the majority opinion. First, he asserted that *Mt. Clemens* did not "provide a 'special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases'" (citing Justice Thomas' dissenting opinion at 7). It was with "that understanding that [he] joined the opinion of the Court."

Second, he discussed Tyson's concern that hundreds of class members suffered no injury in the case. Agreeing with the Court's decision, he concluded that those issues must be addressed by the District Court on remand. But, he cautioned: "[i]f there is no way to ensure that the jury's award goes only to injured class members, that award cannot stand."

BakerHostetler LLP was counsel for the Cato Institute as amicus curiae in *Tyson Foods, Inc. v. Bouaphakeo*.

Bottom Line: While the *Tyson Foods* holding is narrow, it will likely be used in the future by plaintiffs' counsel as a basis for class claims supported only by statistics in areas well beyond FLSA actions.