Donning And Doffing Damages: Tyson Takeaways For Antitrust

By Aaron C. Yeater and Mark Lewis; Analysis Group, Inc.

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Aaron C. Yeater

Mark J. Lewis

The U.S. Supreme Court's recent decision in Tyson Foods Inc. v. Bouaphakeo et al. focused on the use of statistical techniques to satisfy questions for class certification[1]. While the facts of the case focused narrowly on labor law, the court's opinions in the case may offer insights for lawyers and experts considering how to address certification of a broader array of classes, including purchasers allegedly harmed by anti-competitive conduct.

The Case

The putative class was made up of employees of Tyson Foods working in a pork processing plant in Iowa. These employees must wear protective gear while performing their jobs killing, cutting and retrimming pork products. However, many were not compensated (or not compensated fully) for the time it took to "don and doff" (to use the court's language) the gear in the course of their work day. The employees claimed the activity was essential to their jobs and that, in some cases, the time spent doing so meant that they were owed overtime compensation required by the 1938 Fair Labor Standards Act[2]. The employees sought certification as a class, claiming the issues were sufficiently common to resolve on a classwide basis[3].

Tyson claimed that individual inquiry would be needed to determine (1) what gear each employee needed to don and doff, (2) how long it took each employee to do so, and (3) whether that additional time pushed the employee's total work time for the week above

40 hours necessitating overtime compensation under the FLSA[4] However, Tyson did not maintain records of the time each employee took to don and doff the gear[5].

To address liability and damages, the putative class relied on an expert in industrial relations, who studied a sample of 744 videotaped observations of employees donning and doffing the gear. The expert calculated that employees involved in cutting and retrimming work spent an average of 18 minutes per day, and employees of the kill department spent an average of 21.25 minutes per day, donning and doffing equipment[6].

A second expert reviewed the employment records that Tyson did maintain, and calculated for each employee whether their total work time for each week would have exceeded 40 hours if this additional time was added to the time recorded[7]. In other words, if an employee worked 39 hours of recorded time over a six-day work week, and 18 minutes per day (or 1.8 hours over six days) were added to their recorded time, they would have a total of 40.8 hours of work. Under FLSA the putative class claimed the 0.8 hours were uncompensated overtime for which they were due 1.5 times the hourly wage.

For 212 of the 3,344 class members, their hours never exceeded 40 hours per week, even with the addition of this time[8]. Damages of $6.7 million were calculated by plaintiffs' expert, which could be distributed to the remaining class members. However, a jury reduced the damages awarded to the class to $2.9 million[9]. As we will see, this seemingly straightforward finding introduced challenges for the class that the court examined.

Issues Before the Court and Findings

Tyson petitioned the Supreme Court on two issues. First, Tyson broadly questioned whether the putative class could rely on a statistical sample for determination of class wide liability. In particular, Tyson argued that "[r]eliance on a representative sample … absolves each employee of the responsibility to prove personal injury," and instead insisted "the Court should announce a broad rule against the use in class actions of what the parties call representative evidence[10]."

The court's majority found this argument to be too broad, noting that "a categorical exclusion … would make little sense[11]." They recognized that sampling is often the only practical way to describe relevant information, and concluded that since one might imagine an individual plaintiff presenting evidence from a representative sample to establish they were undercompensated, then the class could do the same.

Here, the court emphasized a particular problem identified in Anderson v. Mt. Clemens: that a defendant's failure to keep appropriate records cannot be used as a reason to exclude other evidence that plaintiffs might reasonably use[12]. In effect, the court concluded that in class cert., the perfect may be the enemy of the good, and that enemy should not be used to vanquish a putative class (at least in labor standards matters).

The second question posed to the court was to what extent the court must have a method available to avoid compensating class members that were not injured. As noted above, the class's damages expert identified 212 class members that were not injured.

However, the jury's decision to reduce damages created uncertainty: They either found the estimates of donning and doffing time by the plaintiffs' expert unreliable (which would change which class members exceeded the minimum of 40 hours needed to generate overtime wages) or reduced those estimates to exclude some portion of the estimated donning and doffing time that the jury concluded did not need to be compensated (specifically around meal breaks)[13]. The presence of two groups of class members (those in the kill department and those in cutting and retrimming) with different average donning and doffing times, and a single damages finding, exacerbated the uncertainty.

Here the court noted that since no distributions had been made to class members, avoiding compensation of uninjured class members was a problem for the district court. However, Chief Justice John Roberts opined that this problem might not be overcome, since the reasoning of the jury in reducing the damages award was not transparent and the court would find it difficult to "reverse-engineer" the estimated uncompensated time for the two groups from the lump sum awarded by the jury[14]. Therefore, the district court would almost certainly compensate some class members that were uninjured in the jury's opinion.

Implications for Class Certification and Antitrust

While the court's focus in Tyson was on unpaid wages, the court's reasoning on these issues offers guidance for plaintiffs and defendants contemplating analysis of antitrust damages for a putative class.

The broad conclusion of the court that "representative evidence" may be available to putative classes is not surprising and should reassure plaintiffs that, despite the tighter standards applied under Comcast v. Behrend and Rail Freight, the court is not yet ready to upend the standard methods and evidence relied on in antitrust class actions[15]. However, in dissent Justice Clarence Thomas declared himself so ready, noting that in Comcast, the court held that the class could not be certified without a valid common method for proving damages. In this case, the presence of variation in "donning and doffing" times doomed this common method of using a statistical sample[16].

A finding that any reliance on a sample would have disqualified a class from certification would have had broad implications for antitrust cases, as noted by several amici for the plaintiffs[17]. For example, classes of indirect purchaser end users often rely on transaction data from intermediaries to establish that price increases were "passed through" to them by upstream purchasers. Such putative classes may involve millions of purchasers in various states purchasing from a variety of suppliers; plaintiffs and defendants alike often rely on samples of data including such transactions to examine pass-through across the "supply chain." Requiring that plaintiffs establish pass-through to each class member through every transaction that preceded the indirect purchase that defines a class member would make it much more difficult to certify many classes.

Left unanswered by the court in Tyson Foods is whether a poorly constructed or unreliable sample could be sufficient grounds to disqualify a putative class. The

majority's reminder that the defendant did not pursue a Daubert challenge against plaintiffs' methodology suggests at minimum that a Daubert challenge may be needed to disqualify a class for this reason, though Justice Thomas concluded that Comcast specifies no such challenge is required. Defendants may increase the use of Daubert at class certification as a result.

Perhaps more interesting is whether the majority's emphasis on certification of classes using lesser data where better data are not available finds its way into antitrust argumentation. Plaintiffs may claim that, with better data, they could address concerns about the merits of their damages methods raised during class certification. If the ideal data are unavailable because of actions of defendants, or of third parties, could classes apparently excluded by Comcast make a comeback? When defendants are unable to provide more detailed data in discovery, plaintiffs may argue from Tyson Foods their burden is lessened at class certification.

It isn't all good news for plaintiffs though. Chief Justice Roberts' concurring opinion, endorsed by Justice Samuel Alito's dissent, highlights difficulties the district court may have in ensuring that uninjured class members do not recover improperly. While this opinion was generated in part by the jury's verdict in this case, the applications to antitrust are not difficult to foresee.

Consider an example: A direct purchaser class claims $1 billion of damages associated with conduct over a two-year period. The class damages expert testifies that damages during the first year were $800 million and in the second year, damages were $200 million. The jury awards damages of $800 million. Did the jury find the claims of damage in the second year to be incredible, and that those purchasers were not injured? Or, does each class member get 80 percent of the original claim?

Absent a clearer finding, the court may be hamstrung to release recoveries to claimants. Should classes be certified if proposed damages approaches cannot plausibly offer guidance to juries and judges to resolve these issues? One solution may be for courts to craft more specific jury instructions based on facts articulated at trial and the claims of the parties, to provide courts with insight into which class members may have been harmed. This approach may have the added benefit of encouraging juries to deliberate on damages and other economic issues carefully, rather than picking a number from a hat.

Conclusion

Despite its origins in labor law, Tyson Foods has broader implications for methods and evidence in class certification in antitrust matters. The question for lawyers and experts on all sides is whether Tyson Foods tightens or weakens standards for certification. Tyson Foods supports use of samples and surveys of data by putative classes to address the Rule 23 predominance standard, especially where more "complete" data may be unavailable. However, litigants may find that courts will scrutinize damages methods even more at the class certification stage to ensure that they provide finders of fact with sufficient information to distinguish the injured from the uninjured.

Endnotes

1 Tyson Foods, Inc. v. Bouaphakeo, et al., 577 U.S. ____ (2016) ("Tyson Foods").

2 There were also claims under Iowa labor law, though the Court assumed (as did the parties) that there was no distinction "between the requirements for the class action raising the state-law claims and the collective action raising the federal claims." Tyson Foods, Majority Opinion, p. 8.

3 Id., pp. 1-7.

4 Id., pp. 3, 7.

5 Id., p. 5.

6 Id., p. 5.

7 Id., pp. 5-6.

8 Id., p. 6.

9 Id., p. 7.

10 Id., p. 10.

11 Id., p. 10.

12 Id., p. 11.

13 Id., p. 16. See also Tyson Foods, Concurring Opinion, pp. 4-6.

14 It is unclear whether the difference between the jury's damages award and the plaintiffs' calculations could not solely be accounted for by the donning and doffing around meal times, for which the jury decided the plaintiffs would not receive compensation. However, consistent with Chief Justice's argument, defendants' petition for a writ of certiorari cites the testimony of the plaintiffs' expert Dr. Fox, who testified that if the jury concluded that Dr. Mericle's estimated donning and doffing time was inaccurate "you would have no idea what kind of back wage calculations would result." See Petition for Writ of Certiorari, Tyson Foods, Inc., Petitioner v. Bouaphakeo, et al., Respondents, March 19, 2015.

15 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 57 CR 1487, 81 U.S.L.W. 4217 (2013) [2013 BL 80435]; In Re: Rail Freight Fuel Surcharge Antitrust Litigation – MDL No. 1869, BNSF Railway Company, et al., Petitioners.

16 Dissent, p. 9

17 See, e.g., "Brief of Economists and Other Social Scientists as Amici Curiae in Support of Respondents," Tyson Foods, Inc. v. Bouaphakeo, et al., September 29, 2015, p. 1 ("These arguments, if accepted, would have farreaching and in our view negative consequences in litigation."); "Brief of Amicus Curiae Complex Litigation Law Professors in Support of Respondents," Tyson Foods, Inc. v. Bouaphakeo, et al., September 29, 2015, p. 2 ("[W]e are concerned that the petitioner seeks an unnecessarily broad decision that would bar 'statistical techniques' long used in a wide variety of complex cases.).