Practice Pointers

March 29, 2016

Supreme Court Rules in *Tyson Foods*

In a 6–2 decision released March 22, 2016, the Supreme Court of the United States in *Tyson Foods, Inc. v. Bouaphakeo*, No. 4–1146, ___ U.S. ___ (2016), affirmed the district and appellate lower court decisions (1) certifying a Rule 23 state law class action that paralleled a Fair Labor Standards Act opt-in class; and (2) upholding a jury verdict finding liability and aggregate damages based upon expert testimony as to the average time it took for workers at a meatpacking plant in Iowa to don and doff protective gear in each of two departments.

A key focus of this case watched by many—the analysis of the appropriateness of using average data—is nuanced and will be the topic of much further discussion and case law development in other areas of substantive law (outside the overtime context). However, an immediate result of this decision is more clear.

In the wake of the Supreme Court's 5–4 decision in *Comcast Corp. v. Behrend,* 569 U.S. ___, 133 S. Ct. 1426 (2013), defense counsel have argued in hundreds of cases that plaintiffs fail to satisfy Rule 23(b)(3)'s predominance requirement unless they can establish that damages are susceptible of determination through common proofs. *Tyson Foods* rejects that argument.

The *Comcast* Decision

The Court's 2013 *Comcast* decision reversed class certification in an antitrust case. The majority opinion contained broad language that many defendants—inside and outside of the antitrust context—have cited to argue a new general rule:

> And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.

133 S. Ct. at (Scalia, J.)

In dissent, Justices Ginsburg and Breyer opined that this was not a holding applicable to all cases but limited to the case then before the Court. They pointed to a concession made by the plaintiff in that case that did not reflect what they claimed was well-established law:

> [T]he opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable "'on a class-wide basis.'"
> …
> The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.

133 S. Ct. at 1437 (citations omitted). (The majority opinion did not address this argument, but did acknowledge that the district court's holding that damages must be capable of classwide proof was "uncontested here." 133 S. Ct. at 1430.)

The flames of this dispute were fanned even higher when the Supreme Court, a short time after *Comcast* was handed down, summarily vacated and remanded for reconsideration in light of its decision two closely-watched class certification appellate rulings, neither of them antitrust cases: *Whirlpool Corp. v Glazer*, 133 S. Ct. 1722 (Apr. 1, 2013) (moldy washer consumer case); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (June 3, 2013) (same).

Later that summer, the D.C. Circuit Court of Appeals weighed in. In *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013)—a decision not authored by, but issued by, a panel that included current Supreme Court nominee Chief Judge Merrick Garland—that court succinctly ruled: "No damages model, no predominance, no class certification." However, virtually every other Court of Appeals has since disagreed. *See, e.g., Roach v. T.L. Cannon Corp*., 778 F.3d 401, 402 (2d Cir. 2015) ("We hold that [*Comcast*] does not require the damages be measurable on a classwide basis for certification under Rule 23(b)(3)."); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 374 (3d Cir. 2015) (rejecting argument based on *Comcast* that "[p]laintiffs must show that 'damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).'"); *In re Nexium Antitrust Litig.,* 777 F.3d 9, 23 (1st Cir. 2015) ("*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage—simply that at class certification, the damages calculation must reflect the liability theory."); *In re Deepwater Horizon,* 739 F.3d 790, 815 (5th Cir. 2014) (rejecting contrary assertion as "a misreading of *Comcast*"). The *Glazer* and *Butler* courts reaffirmed their prior rulings authorizing class certification after reconsideration in light of *Comcast* as well.

Enter *Tyson Foods*

As mentioned, *Tyson Foods* is an employment case in which workers at a meatpacking plant claimed that their employer failed to pay them required overtime in violation of both federal law and a state statute that provides a cause of action for the same conduct. The district court was required to assess the state claim under Rule 23 of the Federal Rules of Civil Procedure. And because Rule 23(b)(3) provides for an "opt out" regime—instead of the "opt in" regime of Section 216 of the FSLA—the state law class was much larger than the FSLA class in *Tyson Foods*.

The defendant argued below that the classes were not properly certified because common issues did not predominate. In particular, the defendant attacked the plaintiffs' expert's use of a study that calculated the average amount of uncompensated time spent donning and doffing protective gear by workers in each of two different job categories.

The Court in *Tyson Foods* began its analysis with the predominance issue, applying Rule 23. Its discussion resolves the question of whether *Comcast* had announced a rule requiring that damages be ascertainable by common proofs in order to certify a Rule 23(b)(3) class:

> The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the noncommon, aggregation-defeating, individual issues." 2 W. Rubenstein, Newberg on Class Actions §4:49, at 195–196 (5th ed. 2012). *When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages* or some affirmative defenses peculiar to some individual class members." 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123–124 (3d ed. 2005) (footnotes omitted).

Tyson Foods, slip op. at 9 (emphasis added). In other words, damages need not be determinable by common

proofs.

While the majority opinion in *Tyson Foods* did not mention *Comcast*, the significance of the above language did not escape the notice of the dissent. In his dissenting opinion—joined by Justice Alito—Justice Thomas references the above-quoted passage and in response writes:

> We recently—and correctly—held the opposite. In *Comcast*, we deemed the lack of a common methodology for proving damages fatal to predominance because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."

Tyson Foods, dissenting op. at 8 (quoting *Comcast*). Evidently the other six Justices did not share this view.

This is not to say that damages questions are irrelevant to class certification. For instance, in the antitrust context, decades of case law holds that where "impact" cannot be determined based on classwide proofs (with at most some indeterminate small margin of error), class certification under Rule 23(b)(3) is inappropriate. And, thorny individualized damages concerns are frequently (though less successfully) argued as a point against a finding of manageability, or even mixed in with ascertainability considerations. But the argument that *Comcast* created a mandatory requirement that damages be susceptible of proof by common evidence has now been rejected by the Supreme Court.

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