

# CLASS ACTIONS AND THE NEW SUPREME COURT: TYSON GETS SKEWERED

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# TYSON FOODS v. BOUAPHAKEO CASE HISTORY



# TRIAL COURT PROCEEDINGS

## Class Certification

- ▶ Two categories of employees
- ▶ Rule 23(b)(3) for State Claims
- ▶ Collective action for FLSA
- ▶ Court Rejects that Legal Issues Not Common

## Trial and Verdict

- ▶ Tyson Successfully Opposes Bifurcation of Damage Phase
- ▶ Tyson Concedes Records Could Have Been Kept
- ▶ Plaintiffs' Expert Analysis
- ▶ Jury Instructions
- ▶ Damages - \$5.8million
- ▶ No Plan for Distribution

# EIGHTH CIRCUIT AFFIRMS

- ▶ Variations Do Not Defeat Certification
- ▶ Because of Recordkeeping Violations, *Mt. Clemens* Applied
- ▶ Time Study Accepted, Large Sample
- ▶ Not Trial by Formula Because Study Based on Individualized Determinations
- ▶ Did Not Address Uninjured Class Members – Invited Error
- ▶ Dissent: Individual Differences Defeat Certification



# FIRST QUESTION PRESENTED

Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

# SECOND QUESTION CERTIFIED

Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

# THE PARADE OF HORRIBLES

WHAT WAS EVERYONE SO WORRIED ABOUT?

- ▶ **PROBLEM ONE:** Severe restriction on the use of statistical evidence in class actions.
- ▶ **PROBLEM TWO:** No class actions with uninjured members.



# THE COURT DECIDED ONLY THE **FIRST** QUESTION

- ▶ “Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on ‘the elements of the underlying cause of action.’

# STATS OK IN INDIVIDUAL CASE, THEN OK IN CLASS CASE

- ▶ “In a case where representative evidence is relevant in proving a plaintiff’s individual claim, *that evidence cannot be deemed improper merely because the claim is brought on behalf of a class.*”
- ▶ “each class member could have relied on [the evidence] to establish liability if he or she had brought an individual action.”

# DISTINGUISHED *WAL-MART V. DUKES*

- ▶ The key problem in Wal-Mart was that, in the Court's view, the plaintiffs had failed to provide "significant proof" that the company had violated the law, and they tried to use statistical proof to establish liability on a class wide basis.

HERE, UNLIKE WAL-MART,

“each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances, the experiences of a subset of employees can be probative as to the experiences of all of them.”

## AND P.S. [PRACTICE TIP HERE, FOLKS]

- ▶ “Petitioner did not raise a challenge to respondents’ experts’ methodology under *Daubert*; and as a result, there is no basis in the record to conclude it was legal error to admit that evidence.”

## BOTTOM LINE:

Court declines Tyson's invitation to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions."

Reaffirms *Mt. Clemens*.

COURT *PUNTS* ON SECOND  
QUESTION RE:  
UNINJURED CLASS MEMBERS

# THE ORIGINAL QUESTION PRESENTED

- ▶ *Original* question presented was whether a class may be *certified* if it contains members who were not injured and have no legal right to any damages.



# AT MERITS, TYSON REFRAMES QUESTION

“where class plaintiffs cannot offer” proof that all class members are injured, “they must demonstrate instead that there is some **mechanism** to identify the uninjured class members **prior to judgment** and ensure that uninjured members ... cannot recover such damages.”

# BUT WHAT ABOUT “UNINJURED” CLASS MEMBERS?

- ▶ Morphed from one with Article III implications to a damage apportionment and manageability issue.
- ▶ “The question whether uninjured class members may recover is one of **great importance**,” but held that it is not yet fairly presented in this case.

# THE COURT'S FINAL PARAGRAPH

- ▶ Respondents proposed bifurcating between the liability and damages phases of this proceeding for the precise reason that it may be difficult to remove uninjured individuals from the class after an award is rendered. It was petitioner who argued against that option and now seeks to profit from the difficulty it caused.

THE BIG PICTURE – A WIN FOR PLAINTIFFS

But how big a win?

# THE SUNNY SIDE OF *TYSON FOODS*

- ▶ Justice Kennedy and the “Liberals”
- ▶ “Trial By Formula” bites the dust
- ▶ Narrowing of *Comcast*? Rubenstein on Predominance.
- ▶ Statistics in consumer, wage & hour, and antitrust cases
- ▶ Implications for issue classes and ascertainability

# OTHER IMPLICATIONS OF *TYSON FOODS*?

- ▶ “Great importance” of uninjured class members question?
- ▶ Admissibility Issues?
- ▶ *Daubert* challenges?
- ▶ Other Red Flags?