THE IMPACT OF *TYSON FOODS V. BOUAPHAKEO* ON ANTITRUST CLASS ACTIONS

By Aaron M. Panner & Rachel Proctor May [1]

I. INTRODUCTION

After Justice Scalia's death in February, James Surowiecki published a shrewd commentary in *The New Yorker* arguing that although "Scalia's death will have only a limited impact on the culture wars" – abortion, same-sex marriage and other civil rights issues – the question of Justice Scalia's replacement would have "huge consequences" in the Supreme Court's attitude towards business.[2] The Rehnquist and Roberts Courts had been perceived as very business friendly, and one aspect of that pro-business attitude was a skepticism about litigation. In a series of decisions, many of them decided by narrow majorities, the Court, led by Justice Scalia, has erected a series of barriers to litigation by consumers against corporations, especially by making it more difficult to pursue class action lawsuits.[3] The Court did so in two principal ways. First, it made it easier for corporations to require customers to arbitrate claims on an individual, not a class-wide, basis.[4] Second, the Court tightened standards for class certification under

[1] Aaron M. Panner & Rachel Proctor May are partner and associate respectively at Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC.

[2] James Surowiecki, "Courting Business," *The New Yorker* (Mar. 7, 2016).

[3] See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

[4] See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Both decisions were authored by Justice Scalia.

Rule 23.[5]

At its outset, the 2015-16 Supreme Court term looked like it might continue that trend, with three cases on the docket with the potential to affect the availability of the class action device.[6] It didn't happen.

Perhaps the case with the greatest potential to move the law was *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which involved a class action (and collective action) under the Fair Labor Standards Act and state law.[7] *Tyson Foods* was a "donning and doffing" case involving whether an employer had failed to compensate employees for time spent putting on and taking off protective gear. As the petition for certiorari framed the issues, that case presented two questions of potentially enormous importance for class-action litigation. The first was whether a class plaintiff could establish liability and damages by relying, not on individualized proof of harm, but on "statistical techniques" that "presume all class members are identical to the average observed in a sample." And the second question was whether a class may be certified when it contains "hundreds of members who were not injured and have no legal right to any damages."[8]

Those legal issues had obvious potential implications for antitrust class actions as well. When a plaintiff class sues for damages, it must seek certification under Federal Rule of Civil Procedure 23(b)(3). Thus, in addition to showing that the requirements of Rule 23(a) are satisfied – that is, that the class is too numerous to permit joinder of all members; that there are questions of law or fact common to the class; that the claims of the class representative is typical; and that the class representative will adequately protect the interests of the class – the plaintiff must also show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods" for adjudicating the case. The grant of review in *Tyson Foods* held out the possibility that approaches long thought indispensable to establishing predominance – that is, using representative evidence, and extrapolating individual class-member injury from statistical analysis – might run afoul of Rule 23(b)(3).

As it turned out, *Tyson Foods* signals at least a pause – if not a reversal – in the march towards stricter certification standards. The result and the Court's analysis will likely reinforce the majority rule favoring certification in most cases of alleged price fixing and output restraint.

II. THE PREDOMINANCE INQUIRY AND CHALLENGES TO PLAINTIFFS' STATISTICAL

[5] See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Again, both decisions were authored by Justice Scalia.

[6] *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), decided in December 2015, involved the question whether the California Court of Appeal's decision that an arbitration agreement was unenforceable was preempted by the Federal Arbitration Act. That decision applied but did not significantly extend *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), decided in January 2016, involved the question whether an unaccepted offer of judgment made to a plaintiff seeking to represent a class mooted a complaint; the Court held that an unaccepted settlement offer cannot moot an individual claim (irrespective of whether the claimant represents a class).

[7] Full disclosure: the authors' law firm represented Respondents in *Tyson Foods*.

[8] Brief for Petitioner at Section (i), *Tyson Foods v. Bouaphakeo* (S. Ct. filed Aug. 7, 2015).

EVIDENCE IN ANTITRUST ACTIONS

For decades, antitrust cases involving per se violations of Section 1 of the Sherman Act – price fixing and output restraint, for example – have been among the legal claims most likely to be certified under Rule 23(b)(3). Imagine that all sellers of a commodity – say, sugar – agree to sell the product at the same, elevated price. To make out a claim, the plaintiffs must establish (1) that the defendants conspired; (2) that buyers suffered impact – antitrust injury – as a result of the violation; and (3) that buyers suffered damages.[9] Each of these elements appears to be well suited to class-wide adjudication: whether the defendants reached an unlawful agreement is a prototypical common issue; and if plaintiffs can show that prices of sugar were elevated as a result of the conspiracy, then all purchasers will have suffered impact and damages in the form of overpayment.

But matters are usually not so simple. Although defendants' anticompetitive conduct is often conceded to be a common issue, the impact on particular buyers may look much more highly individualized. There may be many different grades of sugar, each directed to different groups of purchasers; buyers in certain industries may employ long-term fixed-price contracts; the largest buyers may get deep discounts off list prices; certain buyers may purchase only seasonally; and so forth.

Plaintiffs typically offer common evidence of antitrust impact and damages in the form of economic models that show, for example, that the anticompetitive behavior raised market prices during the period of the conspiracy over what they would have been absent the anticompetitive behavior. For example, an economist might use multiple-regression analysis – a statistical technique that seeks to isolate the impact of one variable (the existence of a conspiracy) on another (price) – to determine that an alleged conspiracy allowed the defendants to overcharge for their product by 15.6 percent when compared to what the price may have been in absence of the conspiracy.[10] Plaintiffs often use the same model to establish damages by using their business records to show how much of a product each class member purchased, and calculating overcharge based on the average during the conspiracy period (in this example, 15.6 percent).

Defendants, however, may attack the use of such a model to establish class-wide impact by arguing that extrapolating from an estimate of average overcharges to the impact on individual class members improperly ignores the differences among them. As noted, at least in cases involving industrial commodities, many purchases will be made pursuant to individualized negotiations and, sometimes, long-term contracts; there may be variations among individual purchasers' requirements as well, leading to customization rather than perfect standardization. Purchasers may buy only from local factories, and there may be geographic variation in demand or product preferences. Defendants will typically argue that variations among the circumstances of particular buyers makes it more difficult to infer impact – and requires individualized investigation. The prevailing view is that the presence of individualized negotiations alone does not defeat predominance,[11] but some courts have found

[9] See, e.g. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008), *as amended* (2009).
[10] See *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1251 (10th Cir. 2014).
[11] See, e.g. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014).

that evidence of variations in market conditions can indeed defeat predominance.[12] These varying determinations are not, of course, necessarily inconsistent: there may be cases where defendant succeed in showing that variations in market conditions indicate that the alleged conspiracy, even if proven, would not affect all purchasers.

Other issues affecting the propriety of class certification may also arise. One is the question whether certain members of the proposed class suffered any injury at all. For example, in a case involving allegedly unlawful "reverse payment" settlements related to the heartburn medication Nexium, the class was defined to include purchasers of the branded drug in the relevant time period, and the defendants argued that some percentage of purchasers are brand loyal and would have bought branded Nexium even if there was a generic alterative.[13] Defendants argued that certification in these circumstances was improper. The First Circuit rejected that argument. It held that, so long as the class included a relatively small number of uninjured parties, and so long as there was a potential mechanism to ensure that those uninjured parties did not recover damages, any objections based on Article III, due process and the Seventh Amendment were adequately addressed.[14] The possibility that the existence of injury-in-fact would require individualized determination did not mean that such a determination would predominate over common questions and defeat class certification under Rule 23.[15] By contrast, the dissenting judge would have vacated the certification decision to require the plaintiffs to propose, and the court to approve, an administratively feasible mechanism for identifying uninjured parties.[16]

A third issue stems from the Supreme Court's most recent statement on the predominance inquiry in antitrust class actions, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In *Comcast,* the plaintiffs offered four theories of antitrust impact, and an economic model showing the damages based on the assumption that all of these theories were cognizable.[17] The district court rejected all the theories but one, but certified the class anyway, and the Third Circuit affirmed.[18] When the case reached the Supreme Court, the Court – in a 5-4 decision authored by Justice Scalia – held that the model was incapable of proving impact or damages in that case: it was developed to show the impact based on four alleged theories of antitrust impact, and was incapable of showing the impact of only one theory.[19] The Court held that the plaintiffs could not satisfy the predominance inquiry "without presenting another methodology," because individual damages questions would necessarily predominate.[20]

On the one hand, *Comcast* could be read to stand for straightforward principle that an economic model used to prove impact or damages must measure the anticompetitive effect of

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[12] See *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005).
[13] *In re Nexium Antitrust Litig.*, 777 F.3d 9, 17 (1st Cir. 2015).
[14] See id. at 21.
[15] See id. at 21; see also *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (the "possibility or indeed inevitability" that a class "will . . . include persons who have not been injured . . . does not preclude class certification").
[16] See *Nexium*, 777 F.3d at 33 (Kayatta, J., dissenting).
[17] 133 S. Ct. at 1431.
[18] *Id.*
[19] *Id.* at 1433.
[20] *Id.*

the challenged conduct, and not something else – a class representative must present a "theory of loss that matche[s] the theory of liability."[21] On the other hand, defendants have suggested that *Comcast* stands for a further proposition – that to satisfy the demands of Rule 23, plaintiff must show either that there is a common method of proving class members' damages, or at least that the calculation of individual damages will not predominate over common issues.[22]

Tyson Foods potentially implicated all of these controversies. If employees cannot use representative evidence and statistical inference to establish individual damages, why should purchasers alleging an antitrust conspiracy? If the possibility that a class includes uninjured employees defeats certification, why not uninjured purchasers? And if the need to calculate employees' damages for unpaid overtime on an individual basis is enough to defeat certification, why not purchasers' overcharge damages? As it turned out, all of the defendant's objections to certification were rejected, with potentially significant consequences for antitrust litigation as well.

III. *TYSON FOODS* UPHOLDS THE USE OF STATISTICAL EVIDENCE TO ESTABLISH CLASS-WIDE INJURY

In *Tyson Foods*, a group of employees from a Tyson Foods pork processing facility in Iowa brought claims under the federal Fair Labor Standards Act of 1938 ("FLSA") and an Iowa state labor law. They claimed that Tyson Foods had withheld overtime pay for time spent putting on ("donning") and taking off ("doffing") special gear to protect them from the hazards of pork processing. There was no dispute that the case posed a common question:[23] whether donning and doffing was covered by the FLSA's requirement that employees be paid for all activities "integral and essential" to their regular work. Assuming the company was required to pay its employees for donning and doffing time, the case also posed the questions of which employees were owed damages and how much.

Because the case involved unpaid overtime, Tyson Foods would owe an employee damages if the amount of uncompensated time plus the time actually worked was over 40 hours in a given week. Because Tyson Foods had kept no records establishing how long its employees had spent donning and doffing – something it was required to do under the FLSA – the class members offered an expert's time-and-motion study as "representative evidence."[24] Based on hundreds of videotaped observations, the expert calculated the average amount of time each employee spent donning and doffing per day (which varied somewhat by department); plaintiffs argued that the class members could rely on this study to prove their

[21] *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014).
[22] *Cf. In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 253 (D.C. Cir. 2013) ("No damages model, no predominance, no class certification.").
[23] As the Court explained, a question is common when "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods*, 136 S. Ct. at 1045 (internal quotation marks omitted; alteration in original).
[24] Id. at 1043.

individual damages.[25]

Defendants, however, argued that the time any particular employee spent donning and doffing was an individual question that made class certification improper. Defendants' position was that reliance on a representative sample was categorically inappropriate, because it would "absolve[] each employee of the responsibility to prove personal injury" and "deprive[] [defendant] of any ability to litigate its defenses to individual claims."[26] The key question in the case, then, was whether plaintiffs' representative evidence could be used to prove each individual employee's injury.[27]

By a 6-2 margin, the Court rejected defendant's argument. Instead, the Court held that the class could rely on representative evidence if "each class member could have relied on that sample to establish liability if he or she had brought an individual action." 136 S. Ct. 1036. As the court explained, "a representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.*

In the circumstances of *Tyson Foods*, the representative evidence could establish the unrecorded hours because, under the Court's prior interpretation of the FLSA, when the employer has not kept records sufficient to establish the precise amount of uncompensated hours worked – as Tyson Foods had not – the employee can prove her hours worked by "just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). In other words, if any employee had brought an individual lawsuit, she could have used the time-and-motion study to prove her uncompensated time by inference. 1036 S. Ct. at 104.

The Court rejected defendant's argument that the use of representative evidence in this context was tantamount to the "trial by formula" rejected in *Wal–Mart*. In that case, plaintiffs alleged sex discrimination, but they failed to prove that there was any common policy of discrimination.[28] Plaintiffs sought to overcome the absence of commonality by using a sample of employees to determine, on average, how many employees had valid claims and the typical damages suffered by an employee who suffered discrimination. The Court rejected that approach, because it would mean granting recovery to plaintiffs who suffered no injury and denying defendants the right to litigate defenses to individual claims. Since employees were not similarly situated, "there would be little or no role for representative evidence" in an individual suit; the same was true for a class proceeding.[29]

As for the defendant's claim that the class could not be certified because it contained uninjured parties, that issue evaporated before the Court heard argument. Instead, the defendant argued only that plaintiffs could establish a mechanism – prior to judgment – to identify uninjured class members and to ensure that they did not contribute to the size of the

[25] Id. at 1044.
[26] Id.
[27] Id. at 1046.
[28] See *Wal-Mart*, 131 S. Ct. 2541.
[29] *Tyson Foods*, 136 S. Ct. at 1048.

award or collect damages.[30] But since the damages had not yet been disbursed, it was still possible for the plaintiffs to propose a methodology that would appropriately award damages solely to those employees who had worked more than 40 hours in a week.[31] The defendant's argument was thus premature.

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Read for all it is worth, *Tyson Foods* is likely to reinforce the clear trend among the courts of appeals to uphold class certification in price-fixing cases, laying to rest the argument that the use of statistical evidence to establish injury is categorically impermissible in class actions.

First, *Tyson Foods* confirms that it is generally permissible to use statistical evidence to establish that impact is a common issue subject to class-wide proof. The Supreme Court held, quite sensibly, that if statistical evidence could be used to establish liability and damages in individual litigation, it can be used in a class action as well. In a typical antitrust case, an individual plaintiff could indeed rely on statistical evidence to establish injury: for example, a purchaser might use a regression analysis to show that the market prices it paid were elevated during the period of unlawful conduct. To be sure, such analysis is an approximation. But long-established Supreme Court precedent allows for poof of antitrust impact and damages by "just and reasonable inference," and it has long been established that the use of a model showing market-wide impact supports an inference that plaintiffs were overcharged.[32]

Defendants will also seek to limit the reach of *Tyson Foods* by pointing out that the case involved a defendant's failure to keep records that it was required to keep; a prior Supreme Court case held that "when employers violate their statutory duty to keep proper records," employees can establish the hours of work performed "'as a matter of just and reasonable inference.'"[33] But antitrust plaintiffs, as noted, are permitted to establish impact and damages in the same way.

To be sure, the fact that a plaintiff may introduce such statistical evidence to establish impact does not mean that any particular study is reliable, and there will be cases where defendants can demonstrate that a study is "unrepresentative or inaccurate."[34] A harder question is what happens when a defendant argues at the certification stage that a model used to prove impact fails to address important variations such that it wrongly indicates impact where none exists. The Court indicated that such a defect is a common question – not an individual question – thus leaving the way clear for certification.[35] *Tyson Foods* thus suggests that – so long as plaintiffs' study is admissible and there is a dispute among experts on the question – the question whether plaintiffs have adequately proven class-wide impact – or

[30] Id. at 1049.
[31] Id. at 1050.
[32] See, e.g. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).
[33] *Tyson Foods*, 136 S. Ct. at 1047 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).
[34] *Tyson Foods*, 136 S. Ct. at 1047.
[35] See id.

impact to any particular constituents of the class – is for the jury.[36]

Second, although it left the question open, *Tyson Foods* will likely make it harder for defendants to argue that the possibility that a class includes uninjured parties poses an obstacle to certification. At the outset, if there were an Article III problem – i.e. if the question implicated the court's jurisdiction – the Supreme Court might not have been willing simply to disregard the issue.[37]

Perhaps more significant, the Court was content to view the problem of uninjured class members as simply a problem of allocation of a damages award. And that analysis is likely to be a favorable one for antitrust class plaintiffs. Again, the typical way to establish aggregate class-wide damages to a class of purchasers is to estimate the average overcharge and to apply that average to class purchasers. Usually, the aggregate damages will then be allocated to buyers in proportion to the amount they purchased during the class period. No purchases, no damages – no problem.

Defendants may argue that some purchasers will have paid above-average overcharges and others below-average, depending on the precise timing of purchase and the characteristics of the individual purchaser. As a result, it might be argued, some class members will be overcompensated, and others undercompensated by an award based on a class-wide average. But it is hard to see how that objection has much force. Defendants are not any worse off so long as the aggregate damages are not inflated. And an individual plaintiff could reasonably choose to rely on average overcharges to establish damages; the burden would then be on a defendant to show that the average overcharge is too high – an opportunity that would presumably be open to a defendant in a class action as well.

Third, because the Court found any challenge to plaintiffs' allocation method to be premature, *Tysons Foods* casts little light on the question whether *Comcast* permits the certification of a class despite the absence of an approved method for calculation of individual damages. It may be fair to read the opinion as reflecting less hostility towards class actions and a greater willingness to accept the remedial benefits of the class action device in certain types of cases than some of the Court's recent opinions.[38] But pitched battles over class certification are not going away, and defendants will continue to subject claims of class-wide impact to

[36] This will likely make it more important for defendants to object to the admissibility of expert evidence at the class certification stage.

[37] Two concurring Justices suggested that there would indeed be an Article III problem if the plaintiffs' method of allocating damages resulted in awarding "relief to any uninjured plaintiff." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring). The concurring Justices argued that because the jury awarded damages less than the plaintiffs asked for, there might be no way to determine which plaintiffs suffered injury. See id. at 1052. In a typical antitrust case, to the extent plaintiffs rely on average overcharges, a jury award below the amount requested by the plaintiffs might simply reflect a jury finding that the overcharge was lower than claimed, which would create no allocation problem. On the other hand, if the concurring Justices' view prevails, defendants will have an incentive to introduce additional objections to aggregate damages – for example, claims that particular subclasses of plaintiffs suffered no damages – to preserve the claim that a lower award cannot stand because it cannot be effectively allocated. For their part, plaintiffs could seek to combat such tactics through the use of special verdict forms in which the jury can confirm that it found all purchasers to have been injured (or specifying which purchasers avoided injury).

[38] See supra nn. 3&4.

searching scrutiny.

That makes sense. The consequences of certification – particularly in the case of a massive class – can be as grave for defendants as the consequences of denial of certification can be for plaintiffs. Once they are certified, even weak claims can put tremendous pressure on defendants to settle because of the threat of ruinous verdicts.[39] Nevertheless, *Tyson Foods* may suggest – at least pending results in November and a change in personnel on the Court – that the pendulum swing towards stricter certification standards has reached its full amplitude.

[39] See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).