Interpreting Duran V. US Bank In The Aftermath Of Tyson

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On March 22, 2016, the U.S. Supreme Court handed down its anticipated decision in Tyson Foods v. Bouaphakeo. The 6-2 majority held that plaintiffs could extrapolate how much overtime class members had worked from statistical evidence estimating how long it took an "average" employee at one plant to "don and doff" protective gear.

The court agreed plaintiffs could use inferences drawn from "representative sampling" to smooth over employee-specific differences — even though such variations directly impacted whether Tyson was liable to any given class member for overtime pay. In that sense, the outcome was night and day from the decision in Duran v. U.S. Bank: there, the California Supreme Court held that similar individual variations precluded the plaintiffs from using sampling to prove the defendant's liability to the class.

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These decisions seem like near-perfect mirror images. One approved the use of statistical sampling to establish an employer's liability to an employee class for unpaid overtime; the other rejected the use of these methods in the same type of case. On closer inspection, though, the court's reasoning in Tyson is more similar to the California Supreme Court's in Duran's than the outcomes would suggest.

In attempting to predict what influence Tyson might have on class actions in California and elsewhere, it is helpful to examine how Duran has been interpreted and applied by later decisions, including Hale v. Sharp Healthcare, 232 Cal. App. 4th 50 (Cal. Ct. App. 2014), and McAdams v. Monier Inc., No. C073435, 2015 (Cal. Ct. App. Oct. 14, 2015) (unpublished). Even after Tyson, (1) defendants will still have strong arguments against using sampling if they can show that liability turns on individual-by-individual inquiries, but (2) defendants must continue to wage the "battle of the experts" over the strengths and flaws of specific statistical models in specific cases.

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How Not to Sample: Revisiting the Duran Decision in Light of Tyson

In order to understand Tyson's significance, it helps first to revisit what the California Supreme Court held in Duran v. U.S. Bank (2014). While Duran did not announce a categorical rule against statistical sampling in class actions, the decision did articulate important limits on its use —
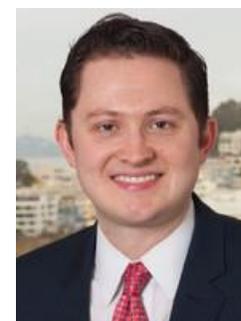
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several of which find echoes in Tyson.

Like Tyson, Duran centered on a class of employees bringing claims for unpaid overtime. The lead plaintiffs had alleged that U.S. Bank (USB) had underpaid its loan officers by misclassifying them as "outside salespeople" exempt from overtime pay rules.

Liability turned on whether class members spent more than half their working time inside USB banks, as opposed to making sales or doing business on the road. But addressing this issue on a classwide basis was "thorny" because these "exemptions frequently depend[ed] on how individual employees perform[ed] their jobs," requiring a plaintiff-by-plaintiff inquiry into what work each employee did in which location.

The trial court had "devised a plan to determine the extent of USB's liability to all class members by extrapolating from a random sample" of class members — 21 of the total 260 plaintiffs — who testified in the trial's first phase. In the second phase, the court "extrapolated the average amount of overtime reported by the sample group to the class as a whole, resulting in a verdict of approximately $15 million and an average recovery of over $57,000 per person."

The California Supreme Court reversed, finding that the "trial court's flawed implementation of sampling [had] prevented USB from showing that some class members were exempt and entitled to no recovery." The sample chosen by the court was neither large nor random enough to be "representative." The court had not consulted with either side's experts to determine whether a sample of 21 class members was sufficient. The sample was also inherently biased because the court had included two of the named plaintiffs — whom class counsel had chosen for the strength of their claims — while allowing other employees with weaker claims to opt out of the sample.

Furthermore, in extrapolating liability from this "small, skewed sample," the trial court had "refused to admit relevant evidence relating to [employees] outside the sample group" — "hamstringing USB's ability to defend itself." These "outlier" employees included at least 75 who had worked more than half their time outside their offices, and others who had opted out of the sample because they believed they were classified properly. The trial court's "refusal to permit any inquiries or evidence about the work habits of [employees] outside the sample group [had thus] deprived USB of the ability to litigate its exemption defense."

These errors were fatal because "a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." The more central such individualized questions are to the defendant's liability, the more difficult it is for statistical sampling to "paper over" the differences between individuals: "a defense in which liability itself is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability." The trial court had thus failed to "fairly manag[e] individual issues" by denying USB the opportunity to prove it was not liable to individuals outside the "representative" sample.

In Tyson Foods v. Bouaphakeo (2016), by contrast, the U.S. Supreme Court found that the plaintiffs' use of sampling to prove their overtime claims had not deprived the defendant of this right. But despite these conflicting results, both decisions proceed from foundational principles more similar than not.

For example, both decisions cited approvingly the U.S. Supreme Court's seminal decision in Wal-Mart v. Dukes, which instructed that "a class cannot be certified on the premise that the defendant will not be entitled to litigate its [affirmative] defenses to individual claims." Both decisions also declined to adopt

general rules explaining when the use of sampling was consistent with a defendant's right to raise individualized defenses.

Instead, both high courts took context-dependent approaches that focused on (1) the degree of variability among class members and (2) the reliability of the particular statistical methods used. Indeed, the "rule of thumb" followed in Tyson — that plaintiffs may defend a sample "by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action" — accords with Duran's admonition that "statistical methods cannot entirely substitute for common proof" in class actions.

These parallels notwithstanding, two key differences in Tyson led to a different outcome than Duran. First, there was much less "variability" among the class members in Tyson: unlike in Duran, the employees in Tyson all worked in the same location, performing essentially the same jobs, so that the chief differences among them were quantitative (e.g., hours worked), not qualitative (e.g., type of work performed).

Second, the sampling method in Tyson was more reliable — and better grounded in expert analysis — than in Duran. The Tyson plaintiffs developed their method of averaging "donning and doffing" time with the help of experts. Tyson, however, never sought a hearing to challenge this method's reliability, "nor did it attempt to discredit the evidence with testimony from a rebuttal expert." Indeed, the majority opinion returned repeatedly to Tyson's tactical decision not to challenge the sample with its own expert evidence. Tyson is thus consistent with Duran's instruction that a "trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced."

What Comes Next: Navigating the Wake of Tyson and Duran

The application of Duran — and the lessons of Tyson — were front and center in two California appellate decisions. First, in Hale v. Sharp Healthcare, the California Court of Appeal affirmed decertification where the plaintiff had sought to establish Sharp's liability to the class using sampling evidence. The plaintiff there had brought class claims under California's Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL) against the defendant hospital for overcharging uninsured patients.

The proposed class included individuals who had received emergent care from Sharp while uninsured. Sharp identified over 120,000 potential members, but asserted that it could not determine how, or what effective rate, these patients paid without reviewing each individual's record. The trial court agreed, decertifying the class because the plaintiff had no common proof of the right to recover damages.

On appeal, the plaintiff proposed to overcome this problem by determining liability by formula. Sharp's liability could be determined on a classwide basis, she argued, by (1) calculating the "reasonable value" of Sharp's services as a fixed percentage of its master rates, and then (2) assessing what amounts, if any, class members paid above that percentage. Sharp countered that determining the reasonableness of its rates would require examining thousands of procedures, a plethora of reimbursement rates, and many other cost variables.

Relying on Duran, the court of appeal rejected this approach as an improper "shortcut" to determining the defendant's liability to the class. This use of "statistical sampling [was] not an adequate evidentiary substitute for establishing commonality" and "would deny Sharp the ability to defend." Because Sharp's

liability turned on individualized inquiries into whether the rate charged each member was "reasonable," the plaintiff's sampling method threatened to manufacture common issues where none actually existed.

Similarly, in McAdams v. Monier, the court of appeal cited Duran in holding that the plaintiff's sampling method was inadequate to determine the defendant's liability to the class under the CLRA and UCL. The plaintiff had alleged that Monier, a roofing manufacturer, represented that certain roof tiles would last 50 years, when it knew that the tiles would deteriorate well before then. In order for Monier to incur liability to any given class member, that member had to have seen or heard a misrepresentation about the tiles' duration.

The plaintiff's expert sought to extrapolate the number of individuals who received such a misrepresentation using a sample from 127,000 homes. To do so, the expert identified 29 clusters of residences with the tiles, encompassing over 4,700 homes, using survey data from Monier. The plaintiff's counsel then randomly sent a questionnaire to 444 homeowners across the clusters, with a cover letter requesting each homeowner's "assistance" in making his case.

Under the expert's method, one representative homeowner from each cluster would testify at trial, and the jury would decide which homeowners had received a misrepresentation. Using this rate, the jury could then estimate the number of members who had been deceived overall. But the plaintiff had deposed only 22 homeowners, 16 of whom testified at trial.

The court of appeal concluded this method was unsound. First, the small sample posed "an intolerably large margin of error," based on the expert's testimony that taking 88 depositions, rather than 22, would have reduced the margin of error by 50 percent. The court also noted the sample was not random: the letter sent to homeowners "placed the plaintiff's counsel directly into administering and implementing the statistical sampling method," which may have led to selection bias. Additionally, the method of using live testimony was developed by the plaintiff's counsel and so "was not based on any prior studies or research in the relevant fields of statistics or surveys."

In sum, these decisions illustrate how courts have applied Duran's principles in practice — and help foreshadow how courts might apply Tyson going forward. As applied in Hale and McAdams, the contrasting fates of the sampling methods in Tyson and Duran suggest two key takeaway lessons:

1. Defendants should be prepared to offer evidence of plaintiff-specific differences — including evidence pertaining to unnamed class members — that go directly to the defendant's liability, not just the measure of damages.

2. Defendants are well advised to challenge sampling plans on their own terms, using defense experts to highlight flaws in the underlying methodology.

These lessons are worthwhile homework for counsel in shaping strategy to defend future class actions.

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