News Release

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DRI Files Amicus Brief in *Tyson Foods, Inc. v. Bouaphakeo, et al.*

Brief Questions Certification in Class Action Case

CHICAGO – (August 17, 2015)— DRI – The Voice of the Defense Bar has filed an amicus brief with the U.S. Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo, et al.*, a case that raises important questions about class action law and procedure. The brief was filed through DRI's Center for Law and Public Policy. DRI had petitioned for certiorari on April 21st, which the Court subsequently granted.

In this case, the named plaintiffs brought suit in Iowa federal district court against their employer, Tyson, on behalf of a class of workers at a meat-processing facility. The suit alleged principally that Tyson failed to give its employees sufficient credit for time spent donning and doffing protective gear and walking to and from the production line. As a result, they contended, Tyson owed overtime to the class members. They tried the case based on average donning, doffing, and walking times, and the jury returned a verdict in their favor.

On appeal, the Eighth Circuit affirmed the class certification and judgment, even though "individual plaintiffs varied in their donning and doffing routines" and, indeed, "evidence at trial showed that some class members did not work overtime" and would not be entitled to any damages in an individual action.

In its brief supporting Tyson's position, DRI demonstrates how the Eighth Circuit's decision further contributes to two especially worrying trends seen in recent class-certification decisions. First, it reflects continuing judicial willingness to let statistical generalities—what the Supreme Court has rightly called "Trial by Formula"—paper over significant dissimilarities among class members' claims that ought to preclude certification. This case included evidence about how much time a fictitious average worker would have taken to don, doff, and walk—but the money judgment will be paid to *real* workers. "Trial by Formula" is impermissible, and an average is nothing if not a formula.

Second, some of the plaintiffs who will win a money judgment based on averaging have in fact suffered no injury whatsoever, because they did not personally work any overtime. The case thus raises the question: Can a class action be litigated based on statistical evidence of injury to the "average" class member, instead of individualized proof, even when some class members are not injured at all? The Eighth Circuit dismissed those individualized issues as the kind of difference that can permissibly be disregarded by operation of the class-action mechanism. However, DRI's brief points out that the Due Process Clause protects litigants' right to present every available defense. The class-action rule cannot abridge that substantive right.

Additionally, as in previous cases, DRI's brief brings to the Court's attention practical concerns about the tendency for class-certification decisions to evade appellate review, which favor taking this case as the opportunity to resolve those important issues.

Brief co-authors William M. Jay of Goodwin Procter LLP's Washington, D.C., office, and Joshua M. Daniels of Goodwin Procter LLP's Boston office, are available for interview or expert comment through DRI's Communications Office.

For the full text of the amicus brief, click here.

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