No. S156555

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANCIS HARRIS, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Real Parties in Interest

Second Appellate District, Division One
Nos. B195121/B195370 (Consolidated)
Los Angeles Superior Court Nos. BC 246139 and BC 246140
JCCP No. 4234 *(Liberty Mutual Overtime Cases)*
The Honorable Carolyn B. Kuhl

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF FOR THE SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, IN SUPPORT OF DEFENDANTS-REAL PARTIES IN INTEREST LIBERTY MUTUAL INSURANCE CO. ET AL.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f), the Secretary of Labor, United States Department of Labor ("Secretary"), respectfully requests this Court's permission to file the attached brief as *amicus curiae* in support of Defendants and Real Parties in Interest Liberty Mutual Insurance Company, *et al.*

This case presents the question whether certain insurance claims adjusters qualify for California's "administrative" exemption from the state's overtime pay requirements. California law expressly incorporates most of the Department of Labor's ("DOL" or "Department") regulations addressing the federal "administrative" exemption that were in effect at the time the state's Industrial Welfare Commission promulgated Wage Order No. 4-2001 ("Wage Order 4-2001"). *See* Wage Order 4-2001, at subdiv. 1(A)(2)(f), *codified at* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(f) (2008) (incorporating 29 C.F.R. 541.201-.205, 541.207-.208, 541.210, and 541.215 (2001)). As explained below, the Secretary has a strong interest in the correct interpretation of these federal regulations. The Secretary believes that the attached *amicus curiae* brief, which presents DOL's interpretation of its own regulations, would assist this Court in deciding the question presented in this case.

A. Interest of the Secretary of Labor

The Secretary is responsible for the administration and enforcement of the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. 201 *et seq*. *See* 29 U.S.C. 204, 216(c). Pursuant to an express delegation of rulemaking authority, the Secretary has promulgated regulations that "define and delimit" the term "employed in a bona fide . . . administrative . . . capacity" for purposes of the FLSA's "administrative" exemption from the Act's minimum wage and overtime pay requirements. 29 U.S.C. 213(a)(1). These regulations, contained in 29 C.F.R. Part 541, were revised in 2004, *see* 69 Fed. Reg. 22,122, 22,137-22,148 (Apr. 23, 2004), but DOL did not make any substantive changes to the primary duty test requirements for the administrative exemption. *See id.* at 22,138 ("[T]he Department considers the primary duty test for the administrative exemption to be as protective as the existing regulations."); Wage and Hour Op. Letter at 1 (Aug. 26, 2005) (in the 2004 revisions, "there were no substantive changes in the primary duty test requirements for the administrative exemption");[1] *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 870 (7th Cir. 2008) (the 2004 revisions "did not substantively alter the old short test," but rather simply "streamline[d] the existing regulations"); *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 584 n.6 (5th Cir. 2006) ("Although the [DOL] regulations were

[1] A copy of this letter is available at: http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_08_26_25_FLSA.pdf.

revised after the pertinent events occurred, the revision did not change the criteria for the administrative exemption."). Thus, the revised regulations provide the most useful tool for interpreting the pre-2004 regulations at issue in this case.

In reaching the conclusion that the insurance claims adjusters in this case are not exempt from California's overtime pay requirements, the state appellate court misinterpreted DOL's pre-2004 regulations defining and delimiting the FLSA's administrative exemption and incorrectly concluded that DOL's 2004 revisions to those regulations are irrelevant to the court's analysis because the revisions "drastically shortened and substantively altered" the previous regulations. *Harris v. Superior Court (Liberty Mut. Ins. Co.)*, 64 Cal. Rptr. 3d 547, 564 n.11 (Cal. Ct. App. 2007).

The appellate court's holding conflicts with DOL's longstanding position that insurance claims adjusters generally perform duties that satisfy the primary duty test of the federal administrative exemption. *See, e.g.*, 29 C.F.R. 541.203(a) (2008) (insurance claims adjusters who perform specified duties "generally meet the duties requirements for the administrative exemption"); 29 C.F.R. 541.205(c)(5) (2001) ("claim agents and adjusters" meet "[t]he test of 'directly related to management policies or general business operations'"); Wage and Hour Op. Letter at 2 (Nov. 19, 2002) ("Wage and Hour has long recognized that claims adjusters typically

perform work that is administrative in nature.");[2] DOL Op. Letter at 1 (Feb. 18, 1963) ("Our position has been that the work performed by claims adjusters is directly related to management policies or general business operations (541.205(c)(5)).").[3]

The appellate court inappropriately rejected DOL's interpretation of its own regulations, as expressed in these opinion letters. The court incorrectly concluded that "DOL opinion letters are 'entitled to respect' only to the extent they have the 'power to persuade.'" *Harris*, 64 Cal. Rptr. 3d at 563 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). On the contrary, DOL's interpretation of its own regulations is entitled to controlling deference. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007) (DOL's interpretation of its own regulations set forth in an Advisory Memorandum entitled to controlling deference); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary's interpretation of her own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."); *see also Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) (an agency's permissible interpretation of its own regulation is entitled to controlling deference).

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[2] A copy of this letter is available at: http://www.dol.gov/esa/whd/opinion/FLSA/2002/2002_11_19_11_FLSA.pdf.

[3] A copy of this letter is attached in Addendum B to this brief. This copy is redacted to protect identifying information.

The California appellate court's holding also conflicts with all the relevant federal decisions, including a recent decision by the United States Court of Appeals for the Ninth Circuit, that have applied DOL's regulations and opinion letters and concluded that insurance claims adjusters generally are exempt. *See, e.g.*, *Roe-Midgett*, 512 F.3d at 873-74; *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119, 1128-29 (9th Cir. 2007); *Cheatham*, 465 F.3d at 584 n.6; *Jastremski v. Safeco Ins. Cos.*, 243 F. Supp. 2d 743, 752-53 (N.D. Ohio 2003); *Palacio v. Progressive Ins. Co.*, 244 F. Supp. 2d 1040, 1045-49 (C.D. Cal. 2002). The Secretary has a strong interest in ensuring that DOL's regulations are correctly interpreted and accorded the appropriate level of deference by the courts.

B. The Secretary's Amicus Brief Would Be Helpful to this Court

The attached brief presents arguments about DOL's interpretation of the federal regulations that have not been addressed by the parties or the courts below. Specifically, the Secretary's amicus brief emphasizes the importance of the revised regulations as the best guide to interpreting the pre-2004 regulations. It also presents the Secretary's interpretation of her own regulations, both current and former, which is entitled to controlling deference. *See, e.g., Long Island Care at Home,* 127 S. Ct. at 2349. The Secretary thus believes that the arguments set forth in the attached amicus brief would be of substantial assistance to this Court in deciding the question presented.

For the reasons stated above, the Secretary respectfully requests that this Court grant permission to file the attached *amicus curiae* brief.

Respectfully submitted,

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STATEMENT OF THE ISSUE

Whether the insurance claims adjusters in this case performed duties that qualify for California's "administrative" exemption from the state's overtime pay requirements, which incorporates the Department of Labor's ("DOL" or "Department") pre-2004 regulations defining exempt "administrative" employees under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. 201 *et seq.*

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. California law exempts employees employed in an administrative capacity from the state's minimum wage and overtime compensation requirements. *See* Cal. Indus. Welfare Comm'n Wage Order No. 4-2001 ("Wage Order 4-2001"), at subdiv. 1(A), *codified at* Cal. Code Regs. tit. 8, § 11040(1)(A) (2008).[4] The California law expressly incorporates most of DOL's pre-2004 regulations addressing the administrative exemption under the FLSA. *See* Wage Order 4-2001, at subdiv. 1(A)(2)(f), *codified at* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(f) (2008) (incorporating 29 C.F.R.

[4] California law provides for both daily and weekly overtime compensation. *See* Wage Order 4-2001, subdiv. 3(A)(1), *codified at* Cal. Code Regs. tit. 8, § 11040(3)(A)(1) (2008); *cf.* 29 U.S.C. 207(a)(1) (FLSA requires weekly overtime pay).

541.201-.205, 541.207-.208, 541.210, and 541.215 (2001)).[5] Thus, whether an employee is an exempt administrative employee under California law turns on the proper interpretation of DOL's incorporated pre-2004 regulations.[6]

2. DOL's former regulation at 29 C.F.R. 541.2(a)(1) (2001) provided that an administrative employee's primary duty must consist of "[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer or his

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[5] The DOL regulations that are not incorporated by California law related to determining an employee's "primary" duty, 29 C.F.R. 541.206 (2001), percentage limitations on nonexempt work under the "long" test for the administrative exemption, 29 C.F.R. 541.209 (2001), and the compensation requirements for the administrative exemption, 29 C.F.R. 541.211-.214 (2001). These regulations are not incorporated because they would be inconsistent with California's statutory requirements for the administrative exemption, *see* Cal. Labor Code § 515(a) (West 2000). *Compare, e.g.,* Cal. Labor Code § 515(e) (West 2000) (defining "primarily" to mean "more than one-half of the employee's worktime") *with* 29 C.F.R. 541.103 (2001) (in determining an employee's "primary duty," "[t]ime alone . . . is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion"). California law also requires that an employee "*customarily and regularly* exercise discretion and independent judgment." Cal. Labor Code § 515(a) (West 2000) (emphasis added); *see* Wage Order 4-2001, at subdiv. 1(A)(2)(b), *codified at* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(b) (2008). Under the FLSA, the "customarily and regularly" requirement only applied to the "long" test for the administrative exemption, *see* 29 C.F.R. 541.2(b) (2001), whereas the more widely used "short" test required that an employee's primary duty "*includes* work requiring the exercise of discretion and independent judgment." 29 C.F.R. 541.2(e)(2) (2001).

[6] This amicus brief addresses only Wage Order 4-2001. It does not address the earlier wage order that is also at issue in this case, Wage Order 4, which did not expressly incorporate federal regulations.

employer's customers." Section 541.205(a) defined the phrase "directly related to management policies or general business operations":

> The phrase 'directly related to management policies or general business operations of his employer or his employer's customers' describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

29 C.F.R. 541.205(a) (2001). The distinction described in the first sentence of this regulation between the "administrative operations of a business" and "production" work is commonly referred to as the "administrative/production dichotomy."

Section 541.205(b) of the former regulations provided that "[t]he administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. 541.205(b) (2001). Significantly, section 541.205(c)(5) provided that "[t]he test of 'directly related to management policies or general business operations' is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, *claim agents and adjusters*, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock

exchange firms, promotion men, and many others." 29 C.F.R. 541.205(c)(5) (2001) (emphasis added).[7]

3. These regulations were revised in 2004. *See* 69 Fed. Reg. 22,122, 22,137-22,148 (Apr. 23, 2004). However, DOL did not make any substantive changes to the primary duty test requirements for the administrative exemption. *See id.* at 22,138 ("[T]he Department considers the primary duty test for the administrative exemption to be as protective as the existing regulations."); Wage and Hour Op. Letter at 1 (Aug. 26, 2005) ("2005 Opinion Letter") ("[T]here were no substantive changes in the primary duty test requirements for the administrative exemption.");[8] *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 870 (7th Cir. 2008) (noting that DOL's 2004 revisions to the administrative exemption regulations "did not substantively alter the old short test," but rather simply "'streamline[d] the existing regulations'") (citation omitted); *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 584 n.6 (5th Cir. 2006) ("Although the [DOL] regulations were

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[7] The issue in this case relates to the proper interpretation of the "directly related" prong of the administrative exemption test. *See Liberty Mut. Overtime Cases*, JCCP No. 4234, slip op. at 5 (Cal. Super. Ct. Oct. 18, 2006); *Harris v. Superior Court (Liberty Mut. Ins. Co.)*, 64 Cal. Rptr. 3d 547, 550 (Cal. Ct. App. 2007). The other elements of the administrative exemption test, e.g., that the employee "customarily and regularly exercises discretion and independent judgment," Wage Order 4-2001, at subdiv. 1(A)(2)(b), *codified at* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(b) (2008); *see also* 29 C.F.R. 541.2(b) (2001), are not currently at issue.

[8] A copy of this letter is available at: http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_08_26_25_FLSA.pdf.

revised after the pertinent events occurred, the revision did not change the criteria for the administrative exemption."); *Robinson-Smith v. Government Employees Ins. Co.*, 323 F. Supp. 2d 12, 18 (D.D.C. 2004) ("The general criteria for employees employed in a bona fide administrative capacity are essentially the same under the August 2004 [*i.e.*, revised] Regulations as under the current [*i.e.*, pre-August 2004] regulations."); *McLaughlin v. Nationwide Mut. Ins. Co.*, No. 02-6205, 2004 WL 1857112, at *4 n.2 (D. Or. 2004) (same). The revised regulations provide examples of employees who generally meet the duties test of the administrative exemption, and include insurance claims adjusters in these examples. *See* 29 C.F.R. 541.203(a) (2008) ("[i]nsurance claims adjusters generally meet the duties requirements for the administrative exemption" if they perform specified duties).

B. Nature of the Case, Course of Proceedings, and Disposition Below

This case arises from four coordinated class actions against defendants Liberty Mutual Insurance Co. and Golden Eagle Insurance Corp. ("the insurance companies"). *See Harris v. Superior Court (Liberty Mut. Ins. Co.)*, 64 Cal. Rptr. 3d 547, 550 (Cal. Ct. App. 2007). Plaintiffs are claims adjusters who work for the insurance companies. *Id.* They allege that the insurance companies improperly classified them as "administrative" employees exempt from California's overtime compensation requirements. *Id.* The claims adjusters seek compensation

for their overtime hours in accordance with California law. *Id.* The insurance companies contend that they properly classified the claims adjusters as exempt administrative employees. *Id.*

The trial court, in a decision issued on October 18, 2006, denied the claims adjusters' motion for summary adjudication, rejecting their argument that "no person who is a claims adjuster for an insurer can be exempt . . . because claims adjusting is production work in an insurance company." *Liberty Mut. Overtime Cases*, JCCP No. 4234, slip op. at 32 (Cal. Super. Ct. Oct. 18, 2006) (hereinafter, "Super. Ct. slip op."). The trial court recommended interlocutory review pursuant to California Code of Civil Procedure section 166.1, Super. Ct. slip op. at 3, 35-37, and both parties sought review in the California Court of Appeal, Second District. *Harris*, 64 Cal. Rptr. 3d at 552. In a 2-1 decision, the appellate court reversed the trial court's decision, holding that the claims adjusters are not exempt from California's overtime pay requirements under the administrative exemption. *See Harris*, 64 Cal. Rptr. 3d at 550, 563, 567.

The insurance companies petitioned for review in this Court. *See Harris v. Superior Court (Liberty Mut. Ins. Co.)*, No. S156555, Petition for Review (filed Sept. 21, 2007). They argue that the appellate court's restrictive interpretation of the administrative exemption as only applying to work performed at the level of policy or general operations is contrary to the plain meaning of DOL's former regulations, including 29 C.F.R.

541.205(c)(5) (2001) and 541.205(b) (2001), as well as federal cases that have concluded that insurance claims adjusters generally are exempt administrative employees. This Court granted the Petition for Review to consider whether the claims adjusters in this case are exempt administrative employees under California law. *See Harris*, No. S156555, Order granting Petition for Review (Nov. 28, 2007).

C. Statement of Facts

Plaintiff claims adjusters handle claims under the insurance policies sold by the insurance companies. Super. Ct. slip op. at 4. The parties agree that claims adjusters perform, at a minimum, the following duties: gathering evidence; establishing reserves; evaluating damages and liability; reviewing policies for coverage; assessing credibility, including attempting to identify fraud; making recommendations on claims that exceed their authority limits; negotiating settlements; and collaborating with company counsel if a claim is in litigation. *Id.* Some claims adjusters have the authority to settle claims on behalf of an insurer up to $100,000. *Id.*

D. The Superior Court Decision

In considering the claims governed by California Wage Order 4-2001 (*i.e.*, those claims arising after October 1, 2000), the trial court (Judge Carolyn B. Kuhl) concluded that it was not bound by two California appellate court cases holding that insurance claims adjusters are non-exempt under a previous California wage order (Wage Order 4). *See* Super.

Ct. slip op. at 31-32 (discussing *Bell v. Farmers Ins. Exch.*, 105 Cal. Rptr. 2d 59 (Cal. Ct. App. 2001) (*Bell II*), and *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544 (Cal. Ct. App. 2004) (*Bell III*), both of which concluded that insurance claims adjusters are not exempt under Wage Order 4 because they fall on the production side of the "administrative/production dichotomy"). Rather, the court held that the federal regulations adopted by Wage Order 4-2001, especially 29 C.F.R. 541.205(c)(5) (2001), which provided that "[t]he [primary duty] test of 'directly related to management policies or general business operations' is also met by many persons employed as . . . claim agents and adjusters," "make clear that the function of a claims adjuster may be 'directly related to management policies or general business operations' even in a context where claims administration is a 'product' or service provided to the customers of the insurer." Super. Ct. slip op. at 32. The court therefore concluded that the employees' motion for summary adjudication failed to demonstrate that the employers could not prove they are entitled to rely on the administrative exemption. *Id.* at 33. In reaching this conclusion, the trial court nevertheless determined that the 2004 revisions to the federal administrative regulations, including a regulation specifically addressing the exempt status of insurance claims adjusters, 29 C.F.R. 541.203 (2008), were not relevant to interpreting the regulations in effect at the time Wage Order 4-2001 was issued. *See* Super. Ct. slip op. at 31 n.5. In addition, the court expressly declined to consider

DOL's 2002 Opinion Letter, Wage and Hour Op. Letter (Nov. 19, 2002) ("2002 Opinion Letter"), because the letter had not been written at the time the California Industrial Welfare Commission issued Wage Order 4-2001. *See id.* at 28 n.2, 31 n.5.[9]

E. The Appellate Court Decision

The California Court of Appeal, Second District, reversed the trial court's decision, holding that plaintiff claims adjusters are not exempt from California's overtime pay requirements under the administrative exemption. *Harris*, 64 Cal. Rptr. 3d at 550. Interpreting the administrative/production dichotomy language in 29 C.F.R. 541.205(a) (2001), the court concluded that "only work performed at the level of *policy* or *general* operations can qualify as 'directly related to management policies or general business operations.' In contrast, work that merely carries out the particular, day-to-day operations of the business is production, not administrative, work." *Harris*, 64 Cal. Rptr. 3d at 556-57 (emphasis in original). The court then concluded that "[t]he undisputed facts show that plaintiffs are primarily engaged in work that falls on the production side of the dichotomy, namely, the day-to-day tasks involved in adjusting individual claims. . . . None of that work is carried on at the level of management policy or general

[9] A copy of this letter is available at: http://www.dol.gov/esa/whd/opinion/FLSA/2002/2002_11_19_11_FLSA.pdf.

operations. Rather, it is all part of the day-to-day operation of defendants' business." *Id.* at 557-58.

The majority rejected the insurance companies' reliance on language in 29 C.F.R. 541.205(b) (2001) that "[t]he administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control," because "Plaintiffs' planning, negotiating, and representing are . . . not carried on at the level of policy or general operations." *Harris,* 64 Cal. Rptr. 3d at 559-60. The court also determined that the statement in 29 C.F.R. 541.205(c)(5) (2001) that "claim agents and adjusters" meet "[t]he test of 'directly related to management policies or general business operations,'" does not control in this case because "there is no evidence . . . that a single member of the class originally certified by the trial court [claims handlers or those performing claims-handling activities] is primarily engaged in administrative, as opposed to production, work." *Harris*, 64 Cal. Rptr. 3d at 561-62. The court further believed that 29 C.F.R. 541.205(c) (2001) focused exclusively on the distinct "substantial importance" requirement of 29 C.F.R. 541.205(a) (2001); thus, 29 C.F.R. 541.205(c)(5) (2001) "asserts only that many persons employed as 'claim agents and adjusters' (and in the other listed occupations) do work of substantial importance," not that they

perform administrative duties. *Harris*, 64 Cal. Rptr. 3d at 563. Finally, the court concluded that another regulation, 29 C.F.R. 778.405, which provided that "insurance adjusters" whose duties necessitate irregular hours of work may enter into contracts with their employers guaranteeing constant pay for varying workweeks under section 7(f) of the FLSA, 29 U.S.C. 207(f), "implies that [insurance adjusters] ordinarily are *not* exempt." *Harris*, 64 Cal. Rptr. 3d at 562 (emphasis in original).[10]

Like the trial court, the appellate majority expressly rejected reliance on DOL's 2002 Opinion Letter. The court determined that the opinion letter was not entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), because it contains no discussion of the administrative/production worker dichotomy; fails to acknowledge that 29 C.F.R. 541.205(c) (2001) focuses on the substantial importance requirement of 29 C.F.R. 541.205(a) (2001), rather than on the type of work performed; and ignores the reference to "insurance adjusters" in 29 C.F.R. 778.405. *Harris*, 64 Cal. Rptr. 3d at 563. The court also eschewed

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[10] Section 7(f) of the FLSA, 29 U.S.C. 207(f), provides a partial overtime exemption for employees employed pursuant to a bona fide contract or collective bargaining agreement "if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title [29 U.S.C. 206(a) or (b)] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

reliance on the 2004 revisions to DOL's administrative exemption regulations, reasoning that the "regulatory interpretation" of the "directly related" prong of the duties test "has been drastically shortened and substantively altered." *Id.* at 564 n.11. Finally, the court refused to rely on federal court decisions, including the recent Ninth Circuit decision in *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119, 1128-29 (2007), holding that claims adjusters generally perform work that is "directly related to management policies or general business operations," because these cases fail to recognize that such work meets the "directly related" requirement only if it is conducted at the level of policy or general operations. *Harris*, 64 Cal. Rptr. 3d at 564.

Judge Vogel dissented from the majority opinion. She concluded that the administrative/production dichotomy "is not a legal test but merely an analytical tool used to answer 'the ultimate question, whether work is directly related to management policies or general business operations, . . . not as an end in itself.'" *Harris*, 64 Cal. Rptr. 3d at 571 (quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002)). Relying on 29 C.F.R. 541.205(c)(5) (2001) and 541.205(b) (2001) ("'servicing' a business" included in administrative operations), as well as federal court cases addressing the exempt status of claims adjusters, Judge Vogel concluded that the claims adjusters are exempt under Wage Order 4-2001. *Harris*, 64 Cal. Rptr. 3d at 571-72.

SUMMARY OF ARGUMENT

The California appellate court incorrectly concluded that the incorporated DOL regulations defining exempt administrative employees limit the exemption to employees who perform work at the level of "policy or general operations" and that the insurance claims adjusters here, who do not perform work at this level, are therefore non-exempt. *See Harris v. Superior Court (Liberty Mut. Ins. Co.)*, 64 Cal. Rptr. 3d 547 (Cal. Ct. App. 2007). In reaching this conclusion, the appellate court erroneously concluded that DOL's 2004 revisions to its administrative exemption regulations substantively altered the previous regulations and were therefore irrelevant to interpreting those earlier regulations. The Department has consistently maintained that the revised regulations did not substantively alter the primary duty requirements of the administrative exemption. Therefore, the revised regulations provide the best indication as to the meaning of the pre-2004 regulations incorporated by California law, and confirm that insurance claims adjusters who perform specified duties such as those performed by the claims adjusters in this case generally satisfy the duties test of the administrative exemption.

The appellate court also erred by rejecting DOL's 2002 Opinion Letter stating that the administrative exemption applies to many insurance claims adjusters, *see* 2002 Opinion Letter at 2, and ignoring a 2005 DOL Opinion Letter to the same effect. *See* 2005 Opinion Letter at 4-5. These

opinion letters are consistent with DOL's historical position, as expressed in a long line of earlier opinion letters, that insurance claims adjusters generally perform duties that are "directly related to management policies or general business operations" and, as reasonable interpretations of DOL's own regulations, are entitled to controlling deference.

Moreover, the California appellate court's decision conflicts with every relevant federal decision that addresses the exempt status of insurance claims adjusters, including a recent decision by the United States Court of Appeals for the Ninth Circuit that concludes that claims adjusters generally perform duties that satisfy the administrative exemption under DOL's pre-2004 regulations. *See Miller v. Farmers Ins. Exch.*, 481 F.3d 1119, 1124 (9th Cir. 2007). Indeed, one federal district court expressly addressed the exempt status of insurance claims adjusters under California's Wage Order 4-2001 and concluded that the adjusters' duties were "directly related to management policies or general business operations" under that wage order. *See Palacio v. Progressive Ins. Co.*, 244 F. Supp. 2d 1040, 1045-47 (C.D. Cal. 2002).

Finally, the appellate court also incorrectly interpreted the "administrative/production dichotomy" described in DOL's regulations. Contrary to the appellate court's interpretation, the dichotomy does not preclude employees, such as the claims adjusters in this case, who contribute to the running of the business by advising management,

planning, negotiating, and representing the company, from performing work "directly related to management policies or general business operations" under the administrative exemption. *See* 29 C.F.R. 541.205(b) (2001).

ARGUMENT

THE CALIFORNIA APPELLATE COURT INCORRECTLY CONCLUDED THAT THE INSURANCE CLAIMS ADJUSTERS IN THIS CASE DO NOT SATISFY THE DUTIES TEST OF THE ADMINISTRATIVE EXEMPTION

A. DOL's Current Regulations Provide the Best Guide to the Meaning of the Former Regulations and Confirm that Insurance Claims Adjusters Generally Are Exempt Administrative Employees

1. Because there were no substantive changes to the primary duty requirements of the administrative exemption in the 2004 revisions, the Department's revised regulations provide the best guide for interpreting the meaning of the pre-2004 regulations incorporated into Wage Order 4-2001. The appellate court should have considered those revised regulations.

One of the Department's revised regulations directly addresses the exempt status of insurance claims adjusters, with specific reference to duties, 29 C.F.R. 541.203(a) (2008). The current regulation provides:

> Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of

> a claim; negotiating settlements; and making recommendations regarding litigation.

29 C.F.R. 541.203(a) (2008). The Department stated in the preamble to the 2004 Final Rule that this provision "is consistent with existing section 541.205(c)(5) [2001]," which states that "claim agents and adjusters" meet the "directly related to management policies or general business operations" test. *See* 69 Fed. Reg. at 22,144.[11] The Department's interpretation of its own regulations in the preamble is entitled to controlling deference, *see Rucker v. Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir. 2006) (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)), and confirms that insurance claims adjusters such as the employees in this case meet the duties requirement of the administrative exemption under both the current and former regulations.[12]

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[11] Thus, contrary to the appellate court's conclusion, the reference to claim adjusters in the former regulation was not limited to the "substantial importance" requirement of the administrative exemption. *See* 29 C.F.R. 541.205(a) (2001). Rather, the plain language in the former regulation established that claim agents and adjusters not only generally perform work of substantial importance, but also generally meet the test of "directly related to management policies or general operations." *See* 29 C.F.R. 541.205(c)(5) (2001). This is consistent with the current regulation, which makes clear that insurance claims adjusters who perform certain duties "generally meet the duties requirements for the administrative exemption." 29 C.F.R. 541.203(a) (2008).

[12] The appellate court concluded that the insurance claims adjusters in this case are not exempt based in part on a DOL regulation that Wage Order 4-2001 does not expressly incorporate, 29 C.F.R. 778.405 (listing insurance adjusters as an example of the type of employees whose duties may necessitate irregular hours of work for purposes of FLSA section 7(f), 29

Indeed, the Ninth Circuit relied on DOL's current regulation regarding the exempt status of insurance claims adjusters in *Miller v. Farmers Insurance Exchange*, 481 F.3d 1119 (2007), which addresses pre-2004 claims by insurance claims adjusters for overtime compensation under the FLSA (as well as various state laws not including California). *See id.* at 1128, 1133-34. While acknowledging that the amended regulation was not in effect at the time the lawsuits were filed, the court nonetheless held that 29 C.F.R. 541.203 (2007) "bears directly on our analysis." *Id.* The Ninth Circuit explained that "§ 541.203 does not represent a change in the law," *id.* (citing 69 Fed. Reg. at 22,144), and further noted that "DOL's position on claims adjusters – as articulated in § 541.203 – has been consistent over the years." *Id.* at 1129. Other courts have similarly applied DOL's revised regulations in addressing the exempt status of insurance claims adjusters under the pre-2004 regulations. *See, e.g., Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 870 (7th Cir. 2008) (noting that DOL's revised regulations, including 29 C.F.R. 541.203(a) (2008), are "informative" in a case

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U.S.C. 207(f), *see supra* note 10). Contrary to the appellate court's conclusion, the reference to "insurance adjusters" in section 778.405 is not inconsistent with the Department's recognition in the Part 541 regulations that insurance claims adjusters generally are exempt administrative employees. The reference in 29 C.F.R. 778.405 simply acknowledges that, where an insurance adjuster is not exempt from the FLSA's minimum wage and overtime pay requirements – for example, because he or she is not paid a requisite salary or does not exercise discretion and independent judgment – he or she may be eligible to enter into a contract under section 7(f) of the FLSA, 29 U.S.C. 207(f), which provides a partial overtime exemption.

addressing whether insurance claims adjusters are FLSA-exempt administrative employees under the former regulations because the 2004 revisions "did not substantively alter the old short test," but rather simply "'streamline[d] the existing regulations'") (citation omitted).

While job titles alone are not dispositive, *see* 29 C.F.R. 541.2 (2008), the duties of the claims adjusters in this case, as stipulated by the parties, correspond to the exempt duties described in the Department's current regulations. *See* 29 C.F.R. 541.203(a) (2008).[13] Thus, the claims adjusters satisfy the "directly related" test of the federal regulations incorporated into Wage Order 4-2001.[14]

2. The revised regulations also clarify that contrary to the appellate court's holding, the administrative duties test is not limited to work performed at the level of "*policy* or *general* operations." *Harris*, 64 Cal.

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[13] Courts have noted that, unlike insurance claims adjusters, insurance appraisers may not meet the administrative exemption's duties test. *See Farmers Ins. Exch.*, 481 F.3d at 1128-29 (explaining that appraisers may be distinguished from adjusters); *Reich v. American Int'l Adjustment Co.*, 902 F. Supp. 321, 325 (D. Conn. 1994) ("AIAC is in the business of resolving damage claims[,]" and automobile damage appraisers "perform the day-to-day activities of the business through their fact finding and damage evaluations").

[14] Of course, the claims adjusters in this case may nonetheless be non-exempt if they fail to meet the other requirements of the administrative exemption, including the "discretion and independent judgment" element of the test. *See* Wage Order 4-2001, subdiv. 1(A)(2)(b), *codified at* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(b) (2008); 29 C.F.R. 541.200(a)(3) (2008); 29 C.F.R. 541.2(b) (2001).

Rptr. 3d at 556 (emphasis in original). In revising the regulations in 2004, DOL made only one wording change to the "directly related to management policies or general business operations" test of the administrative exemption. The revision deleted the word "policies" in the phrase "management policies." *Compare* 29 C.F.R. 541.2(a)(1) (2001) (exempt administrative work must be "directly related to management policies or general business operations of his employer or his employer's customers") *with* 29 C.F.R. 541.200(a)(2) (2008) (exempt administrative work must be "directly related to the management or general business operations of the employer or the employer's customers"). However, DOL explained in the preamble to the 2004 Final Rule that the revised test remained as "protective" as the previous test, because section 541.205(c) of the previous regulations recognized that "exempt administrative work includes not only those who participate in the formulation of management policies or in the operation of the business as a whole, but it 'also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.'" 69 Fed. Reg. at 22,138 (quoting 29 C.F.R. 541.205(c) (2001)). Thus, employees "servicing" the business, such as by "representing the company," can qualify as exempt administrative employees. *Id.* As noted, *supra*, DOL's interpretation in the

preamble of its own regulations is entitled to controlling deference. *See Rucker,* 471 F.3d at 12.

B. DOL Opinion Letters Consistently Have Concluded that Insurance Claims Adjusters Generally Satisfy the "Directly Related" Prong of the Administrative Exemption, and these Interpretations Are Entitled to Controlling Deference

1. As the Ninth Circuit noted in *Farmers Insurance Exchange*, 481 F.3d at 1129, DOL's position that insurance claims adjusters generally meet the duties requirements for the administrative exemption if they perform the duties specified in 29 C.F.R. 541.203(a) (2008) has been consistent over the years. For example, DOL's 2002 Opinion Letter – which the preamble to the revised regulations states is consistent with 29 C.F.R. 541.203(a) (2008), *see* 69 Fed. Reg. at 22,144 – emphasizes that DOL "has long recognized that claims adjusters typically perform work that is administrative in nature." 2002 Opinion Letter at 2. This letter explains that 29 C.F.R. 541.205(c)(5) (2001), which "specifically identif[ied] claims agents and adjusters as jobs that ordinarily satisfy the test for exempt administrative work. . . . [wa]s based on the 1940 Stein Report, which followed a series of public hearings relating to the scope of the [FLSA's] Section 13(a)(1) exemptions." 2002 Opinion Letter at 2. The letter concludes that insurance claims adjusters who gathered facts; determined coverage, liability, and total value of the claim; set reserves; negotiated settlements; and advised the company regarding litigation, qualified as

exempt administrative employees under DOL's regulations. *Id.* at 2-3. The claims adjusters in this case perform exactly these duties. *See Harris*, 64 Cal. Rptr. 3d at 557.

While the 2002 Opinion Letter was not in effect when Wage Order 4-2001 was issued, it dispositively interprets the DOL regulations that were expressly incorporated into the Wage Order. In analogous circumstances, the Supreme Court has held that such an agency interpretation of the agency's own regulations, even if issued after the relevant events took place or after the litigation commenced, is entitled to controlling deference. *See Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.") (citing *Auer v. Robbins*, 519 U.S. 452 (1997)); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007) (DOL's interpretation of its own regulations set forth in an Advisory Memorandum issued after litigation commenced entitled to controlling deference); *Auer*, 519 U.S. at 461 (Secretary's interpretation of her own regulations set forth in a legal brief is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks and citation omitted). The appellate court therefore erred in applying the less deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and concluding that the

2002 Opinion Letter is not persuasive. *See Harris*, 64 Cal. Rptr. 3d at 563-64.

Indeed, the appellate court's decision is contrary to a number of federal court decisions that have found the 2002 Opinion Letter persuasive in concluding that claims adjusters were exempt administrative employees under the pre-2004 regulations. *See Farmers Ins. Exch.*, 481 F.3d at 1128-29; *McLaughlin v. Nationwide Mut. Ins. Co.*, No. 02-6205, 2004 WL 1857112, at *6 (D. Or. 2004); *Jastremski v. Safeco Ins. Cos.*, 243 F. Supp. 2d 743, 752-53 (N.D. Ohio 2003).

The appellate court also erred in ignoring DOL's 2005 Opinion Letter addressing the exempt status of insurance claims adjusters. This letter concludes that insurance claims adjusters whose primary duty "is servicing the employer's customer's business through the performance of claims adjusting duties, which involve work directly related to the management or general business operations in such functional areas as insurance, safety and health, personnel management, human resources, legal and regulatory compliance," satisfy the "directly related" requirement of the administrative exemption. 2005 Opinion Letter at 4.[15] The

[15] The letter nonetheless concludes that one group of claims adjusters, "Claims Specialist I's," were not exempt administrative employees because their work "is so closely supervised" that they do not exercise "the requisite degree of discretion and independent judgment with regard to matters of significance." 2005 Opinion Letter at 6. The Department determined that

Department expressly stated that its response regarding whether insurance claims adjusters qualify for the federal administrative exemption "is applicable under both the old and revised version of the regulations, as there were no substantive changes in the primary duty test requirements for the administrative exemption." *Id.* at 1. Like the 2002 Opinion Letter, DOL's 2005 Opinion Letter is entitled to controlling deference and should have been considered by the appellate court. *See, e.g., Long Island Care at Home*, 127 S. Ct. at 2349; *Auer*, 519 U.S. at 461.

2. DOL's interpretation of its regulations in the 2002 and 2005 Opinion Letters is consistent with its historical interpretation of its regulations as applied to insurance claims adjusters. For example, in a 1985 Opinion Letter, DOL concluded that "Field Service Representatives" for an insurance company who investigate the circumstances of an accident, gather whatever facts are necessary to evaluate the claim, settle claims up to a specified amount, and make recommendations regarding settlements that exceed that amount, performed work "directly related to management policies or general business operations of the employer or the employer's customers." Wage and Hour Op. Letter at 1-2 (Oct. 29, 1985). Likewise, in a 1963 Opinion Letter addressing whether insurance claims adjusters qualified for the administrative exemption, DOL stated, "Our position has

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the other claims adjusters did exercise the requisite degree of discretion and independent judgment and therefore were exempt. *Id.* at 7.

been that the work performed by claims adjusters is directly related to management policies or general business operations (541.205(c)(5))." DOL Op. Letter at 1 (Feb. 18, 1963). A 1957 opinion letter addressing the exempt status of insurance claims adjusters makes the same statement. *See* DOL Op. Letter at 1 (Oct. 24, 1957) ("[I]t is our current position that claims agents and adjusters are employees who perform work directly related to management policies or general business operations. Part 541, Section 541.205(c)(5)."). These uniform opinion letters, like the more recent opinion letters discussed above, are entitled to controlling deference. *See, e.g., Long Island Care at Home*, 127 S. Ct. at 2349; *Auer*, 519 U.S. at 461.[16]

C. The California Court of Appeal's Decision Conflicts with Every Relevant Federal Court Decision Addressing the Exempt Status of Insurance Claims Adjusters Under the Administrative Exemption

The California appellate court's decision that the insurance claims adjusters in this case do not qualify for the administrative exemption directly conflicts with every relevant federal court decision that has addressed the exempt status of insurance claims adjusters under DOL's pre-2004 regulations, including a recent decision by the Ninth Circuit. *See Farmers Ins. Exch.*, 481 F.3d at 1124 (insurance claims adjusters perform exempt administrative duties as described in 29 C.F.R. 541.203 (2008)); *see*

[16] Copies of these three opinion letters are attached in the addendum to this brief. These copies are redacted to protect identifying information.

also Roe-Midgett, 512 F.3d at 872-73, 875 (insurance claims adjusters are exempt administrative employees; their primary duties involved matters "directly related to management policies or general business operations"); *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 585 (5th Cir. 2006) (insurance claims adjusters who advised the management, represented the company, and negotiated on its behalf performed exempt administrative duties); *McLaughlin*, 2004 WL 1857112, at *10 (insurance claims representatives perform "work that is directly related to defendants' management policies and business operations"); *Jastremski*, 243 F. Supp. 2d at 751-53 (insurance claims adjuster performed exempt administrative duties).

Significantly, the appellate court's conclusion expressly contradicts the federal district court decision in *Palacio v. Progressive Ins. Co.*, 244 F. Supp. 2d 1040, 1045-49 (C.D. Cal. 2002), which addresses whether a claims adjuster was exempt under *both* the FLSA and California law, including Wage Order 4-2001. *Id.* at 1044, 1051. In considering the plaintiff's exempt status under the FLSA, the court concluded that plaintiff's primary duties – which included assessing liability, weighing evidence, determining credibility, reviewing insurance policies, negotiating with attorneys and claimants, and making recommendations to management – were directly related to management policies and general business operations. *Id.* at 1045-46. With respect to the plaintiff's exempt status under Wage Order 4-2001, the court noted that "the analysis of Wage[]

Order 4-2001 mirrors the analysis under the FLSA," and therefore concluded that the defendant had satisfied its burden of establishing that the plaintiff performed work "directly related to management policies or general business operations" under Wage Order 4-2001 as well. *Id.* at 1051. While not binding on this Court, this decision is persuasive authority establishing that claims adjusters such as plaintiffs in this case satisfy the "directly related" test under Wage Order 4-2001.

D. The Appellate Court Incorrectly Interpreted the Administrative/ Production Dichotomy

The Department's revised regulations provide that, to meet the "directly related" requirement of the administrative exemption, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. 541.201(a) (2008). This distinction, known as the administrative/production dichotomy, has its origins in language in the 1949 DOL hearing report on the Part 541 regulations. *See* 69 Fed. Reg. at 22,141 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541,* at 63 (June 30, 1949)). While the language of the current regulation differs slightly from the language of the prior regulation, *see* 29 C.F.R. 541.205(a) (2001) (the

"directly related" requirement "describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work"), DOL explained in the preamble to the 2004 Final Rule that under the revised regulation, the dichotomy remains "a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption." 69 Fed. Reg. at 22,141; *see* 2005 Opinion Letter at 3.

The 2004 Final Rule clarifies that the administrative/production dichotomy has never been the dispositive test for the administrative exemption except where the work falls clearly on the production side of the dichotomy. *See* 69 Fed. Reg. at 22,141; *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) ("[T]he dichotomy is but one analytical tool, to be used only to the extent that it clarifies the analysis. Only when work falls squarely on the production side of the line, has the administrative/production dichotomy been determinative.") (internal quotation marks and citations omitted). Nevertheless, it is "useful to the extent that it is a helpful analogy in the case at hand, that is, to the extent it elucidates the phrase 'work directly related to the management policies or general business operations.'" *Schaefer v. Indiana Mich. Power Co.*, 358 F.3d 394, 402-03 (6th Cir. 2004) (citation omitted).

As applied to insurance claims adjusters, the Department has made clear in the preamble to the 2004 Final Rule that it agrees with the district

court's analysis in *Palacio*, 244 F. Supp. 2d at 1047, which concluded that claims adjusters do not fall on the "production" side of the dichotomy. *See* 69 Fed. Reg. at 22,145. The court in *Palacio* explained that the insurance company "is not in the business of claims handling. Rather, it is in the business of writing and selling automobile insurance. . . . Claims handling occurs within a functional department as a type of ancillary customer service." 244 F. Supp. 2d at 1047. Thus, "[a]s a claims representative, Palacio did not produce the very goods or services that Progressive offered to the public." *Id.*; *see Renfro v. Indiana Mich. Power Co.*, 370 F.3d 512, 517-18 (6th Cir. 2004) (ancillary "servicing" duties fall on the administrative side of the dichotomy). Nothing in this case justifies deviating from the analysis in *Palacio*.

The appellate court rejected the court's reasoning in *Palacio* and similar cases because it concluded that these cases were "based on the mistaken assumption that producing the employer's product is a necessary condition for doing 'production' work within the meaning of 29 C.F.R. § 541.205(a)." *Harris*, 64 Cal. Rptr. 3d at 565. To be sure, an employee may be non-exempt even if she does not actually "produce" her employer's product. In *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004), for example, the court acknowledged that while production work cannot be administrative, all work that is not production is not necessarily exempt administrative work, such as work performed by

janitorial staff, security guards, and cooks in the company cafeteria. But the appellate court failed to understand that an employee who performs duties that support managing a business, such as certain claims adjusters, may be exempt. *See Palacio*, 244 F. Supp. 2d at 1047 ("[A]n employee who negotiates with clients and settles damage claims on behalf of an employer engages in duties consistent with the servicing of a business even though those activities can be viewed as ancillary to the provision of a good or service."). In rejecting *Palacio* and similar cases, and in contrasting administrative (work performed at the level of policy or general operations) and production (day-to-day operations of the business) as it did, the appellate court applied too narrow a view of "administrative" work and too broad a view of "production" work. As the Ninth Circuit has explained, the administrative/production dichotomy "distinguishes between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Bothell*, 299 F.3d at 1127 (quoting *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990)).

The claims adjusters in this case were performing exempt duties of "advising the management, planning, negotiating, [and] representing the company." 29 C.F.R. 541.205(b) (2001). Thus, they satisfy the "directly related" test of the federal administrative exemption.

CONCLUSION

For the reasons stated, the judgment of the appellate court should be reversed.

Respectfully submitted,

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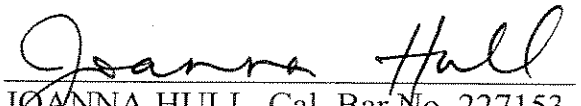

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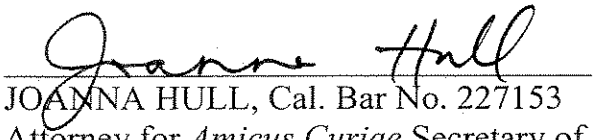
CERTIFICATE OF WORD-COUNT COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the foregoing *Amicus Curiae* Brief for the Secretary of Labor was prepared using 13-point proportional Times New Roman font, and contains 7,042 words as determined by the Microsoft Office Word 2003 software used to prepare this brief.

Dated: July 1, 2008



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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States, over the age of 18 years and not a party to or interested party in the within action; my business address is 200 Constitution Ave., N.W., Washington, D.C. 20210.

2. That on July 1, 2008, I served a true copy of the foregoing Application For Leave To File *Amicus Curiae* Brief and *Amicus Curiae* Brief For The Secretary of Labor in a sealed envelope, utilizing the U.S. postal service, postage-prepaid for first-class mail, upon the following interested parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct, this1st day of July 2008, at Washington, D.C.

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ADDENDUM A

U.S. Dep't of Labor Opinion Letter (Oct. 24, 1957)

October 24, 1957.

John A. Hughes, Regional Attorney
New York, New York

C. Ira Funston, Assistant Solicitor

This will reply to your memorandum of August 13, 1957, in which you request an opinion as to whether certain insurance adjusters employed by the subject firm are exempt as administrative employees under section 13(a)(1).

The adjusters investigate claims of losses and claims in respect to damages and injuries suffered in automobile accidents, including collision, theft, fire, etc. They also investigate inland marine losses, workmen's compensation and burglary. The employees investigate all the facts surrounding a claim. They do not settle claims but forward the facts with their recommendations to the insurance company. Their recommendations are usually followed. In the case of automobile loss adjusters, recommendations may run from $50 to $5,000.00. Recommendations may run much higher in other cases such as bodily injury, theft, marine losses, etc.

The problem of whether a particular employee is exempt as an administrative employee is a factual one. As you know, it is our current position that claim agents and adjusters are employees who perform work directly related to management policies or general business operations. Part 541, Section 541.205(c)(5). Therefore, if these employees meet the other requirements of Part 541.2, they would be exempt as administrative employees. As you point out in your memorandum, the primary problem facing us in this particular situation is whether the adjusters exercise the type of discretion and independent judgment contemplated by the Regulations.

Automobile damage appraisers whose function is to inspect damaged motor vehicles in order to estimate the cost of the necessary repairs, and who also reach an agreed price with the repair shop on the cost of the repairs, do not customarily and regularly exercise discretion and independent judgment as required by Regulations, Part 541.2 (FOH 22d00a) Their work consists essentially of the determination of facts, and in making their estimates they are guided primarily by their skill and experience and by written manuals of established labor and material costs. This same reasoning would seem to apply to those adjusters who work at determining automobile losses due to collision, fire or theft. The available information

indicates that they make extensive use of the "National Automobile Parts and Labor" manual as well as the Blue Book in arriving at the amount of loss sustained by the insured. They are primarily engaged in employing a skill and procedure gained by experience. See Regulations Part 541.207(c)(1) and (c)(2). If, on the other hand, these adjusters are given reasonable latitude in carrying on negotiations with the insured, the results of which form the basis of their recommendations, they may be exercising the kind of discretion and judgment to qualify for the exemption. 541.207(d)(2).

The duties of those adjusters engaged in the bodily injury and workmen's compensation phase of the business would probably qualify as exempt work under the administrative exemption. In such cases, many considerations have to be weighed before making a recommendation and more likely than not large sums are involved. This necessarily would involve considerable negotiations with the injured party. It seems that under the circumstances described above, these adjusters would employ the discretion and independent judgment required by the Regulations. Of course, if these adjusters had authority to make settlements this would be stronger evidence of their exercise of discretion and independent judgment, but as you know, their recommendation need not be final. Part 541.207(e)(1).

What has been said with respect to those adjusters engaged in bodily injury and workmen's compensation activities would seem to apply with equal vigor to the adjusters assessing inland marine losses. As you point out, those adjusters who negotiate relatively minor losses probably would not be exempt since their exercise of discretion and independent judgment would be unduly limited. The adjuster's decisions should relate to matters of significance. Regulations Part 541.207(d)(1) and (2).

Attachment: File

ADDENDUM B

U.S. Dep't of Labor Opinion Letter (Feb. 18, 1963)

February 18, 1963

Ernest N. Votaw, Regional Attorney
Chambersburg, Pennsylvania

Harold C. Nystrom
Associate Solicitor for Interpretations and Opinions

This is in reply to your memorandum of December 18, 1962 in which you request an opinion as to whether insurance claims adjusters employed by the above firm are exempt as administrative employees under Section 13(a)(1) as defined by 541.2 of the Code of Federal Regulations.

The adjusters in question are employed by a Adjustment agency which provides services for four insurance companies. Some of the adjusters are concerned exclusively with bodily injury claims, others with property damage claims which include automobile claims, and the remainder with both types of claims. Two of the adjusters have "unlimited" authority to settle claims but any checks in excess of $500 require either an additional signature or approval of the home office. All the other adjusters have authority to settle claims up to $500 and any settlement over this amount must be taken up with immediate superiors. The adjusters recommendations are not routinely accepted but often rejected. Two adjusters settle claims by mail or telephone from the office and do not work in excess of 40 hours a week; one divides his time between the office and the field and states he works at least 60 hours a week; the rest are field men most of whom work overtime. None are paid overtime. While the salaries of these adjusters range from $82.50 to $135 a week, there does not seem to be any correlation between the amount of wages paid and the type of claim handled (see attached chart outlining types of claims handled by these adjusters, hours worked, salary, etc.).

Our position has been that the work performed by claims adjusters is directly related to management policies or general business operations (541.205(c)(5)). In considering the application of the administrative exemption under 13(a)(1), the primary question, therefore, is whether the adjusters exercise discretion and judgment within the meaning of 541.2.

As you point out, we have attempted to distinguish between automobile damage adjusters and bodily injury adjusters (Funston to Hughes 10/24/57 re). Appraisers who merely inspect damaged vehicles to estimate the cost of labor and

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materials and to reach an agreed price for repairs with the repair shop have not been considered as the type of employees who customarily and regularly exercise discretion and independent judgment as contemplated by Section 541.2. In making their estimates, they are guided primarily by their skill and experience and by written manuals of established labor and material costs (FOH 22 d 01).

For the most part, however, the duties and methods employed by the adjusters in the various fields of claim work including property damage are very similar. Regardless of the type of claim he is handling, an adjuster must usually analyze an assignment and familiarize himself with the provisions of the assured's policy. An investigation of the circumstances surrounding the accident is generally conducted by him. This may include an inspection of the location of the accident and the damaged vehicle or vehicles, interviews with the assured and witnesses, inspection of relevant records, and discussion with the examining physicians, as the case may be. From all available information, he must be able to cull out the facts from the misrepresentations and decide whether a case should be litigated or settled. If settlement is indicated, he effects it.

Thus where the adjuster investigates the validity and the extent of liability of a claim and negotiates settlement, it would seem that he is exercising discretion and independent judgment as contemplated under Section 541.2 irrespective of whether the claim is one for property damage or for personal injury.

Furthermore, the fact that most of the claims adjusters of the subject company cannot settle a claim in excess of $500 without the approval of a supervisor and the fact that more than 75% of the claims fall in this category does not mean that they are not exercising discretion within the meaning of the administrative exemption. It is not necessary that their decisions be final; decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action (Regulations 541.207(e)(1)).

Aside from the above, I do not believe that the exercise of discretion and independent judgment of adjusters whose independent settlement may be limited to $500 is "unduly limited." When we used this term in the October 24, 1957 opinion, we were talking about "relatively minor losses." If most of the settlements were in this category, we would not be inclined to allow the exemption notwithstanding the $500 latitude. However, we do not have to resolve this point since more than 75% of the claims handled are above $500.

Finally, the adjusters who earn less than the $95 permissible minimum under 541.2 would not, of course, be exempt as administrative employees and should receive overtime.

Attachment

Name of Claims Adjuster	Type of Claim Handled	Monetary Limit on Authority	Office or Field Work	Work Hours Per Week	Weekly Salary
	Bodily injury	$500	Field	45	$120
	?	$500	Field	55	$ 95 (or $195 ?)
	Bodily injury and property damage		Field	40 - 50	$135
	Property damage (also supervises 5 girls)	$500	Office	35	$120
	"all" claims in area	Unlimited but drafts over $500 must be issued by home office	Office and Field	60 ≠	$115.38 ≠ expense account
	Property damage ("Assistant claims manager")	Unlimited but drafts over $500 require another signature	Office	40 or less	$100
	Bodily injury and Property damage	$500	Field	50	$82.50
	"automobile and O.L.T."	$500	Field	40 - 50	$100 ≠ car ≠ expense
	"Multiple line claims adjusting"	$500	Field	48	$120

ADDENDUM C

Wage and Hour Opinion Letter (Oct. 29, 1985)

10/29/85

Dear:

This is in response to your letters of May 6 and May 30 in which you request our opinion as to whether a Field Service Representative (FSR) for an insurance company is exempt from the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA) as a bona fide administrative employee. You provided further information regarding the FSR in telephone conversations with a member of my staff. We regret the delay in responding to your inquiry.

You indicated that the FSR, in the event of an accident, would go to the scene to investigate the circumstances of the event. Normally, the FSR would take photographs, take on-the-scene reports, and gather whatever facts are necessary to evaluate the claim. The FSR is authorized to settle claims up to $2,500 for losses involving the insured party, $3,500 for single losses involving a third party, and $6,000 for multiple claims for third parties. The recommendations of the FSR with respect to higher amounts are often approved by the FSR's supervisor. Automobile damage claims take about 40 percent of the FSR's time. The FSR receives a weekly salary of $542.

The FLSA is the Federal law of most general applications concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the current minimum wage at $3.35 an hour for all hours worked and overtime pay of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541. An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.2 of the regulations, are met. In this instance, pursuant to section 541.2(a)(2), an employee who is paid on a salary basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

10/29/85

It is clear from the information you provided that the FSR is engaged in office or nonmanual work, and that such work is directly related to management policies or general business operations of the employer or the employer's customers. See section 541.205(a)(5) of the regulations. Therefore, the FSR meets this test of section 541.2(e)(2) of the regulations.

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after various possibilities have been considered. Pursuant to section 541.207 of the regulations, the term implies that the employee has the independent choice, free from immediate direction or supervision, to act or decide with respect to matters of significance. The term must be distinguished from the use of skills or techniques, or the application of known standards or established procedures beyond which the employee is not authorized to deviate. Based on the information provided, it is apparent that the FSR exercises discretion and independent judgment. He investigates the claims, determines the extent of the damages, negotiates the settlements within the parameters of the established monetary limits, and makes recommendations with respect to larger case settlements.

Based on the information you furnished, it is our opinion that the FSR in question would qualify for exemption under section 13(a)(1) of FLSA as a bona fide administrative employee. We trust that the above information will be of assistance to you.

Sincerely,

Herbert J. Cohen
Deputy Administrator