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Pharmaceutical Sales Representative Case Goes to Supreme Court

By Staci Ketay Rotman on November 28, 2011



In a [previous post](#) in August, I questioned whether the pharmaceutical companies were losing the exemption battle as it related to pharmaceutical sales representatives and the outside sales exemption. The Supreme Court had declined to review the Second Circuit's *Novartis* holding that pharmaceutical sales representatives do not qualify for the outside sales exemption because they do not make sales, and the District of Connecticut had recently found that Schering's pharmaceutical sales representatives did not meet the administrative exemption test in contrast to the Third

Circuit's *Johnson & Johnson* decision. Now, it looks that the Supreme Court will finally enter this battle.

This morning, the Supreme Court announced that it has granted certiorari in *Christopher v. SmithKline Beecham Corp.*, where the Ninth Circuit affirmed that Christopher, a pharmaceutical sales representative, was an "outside salesman" exempt from overtime under the FLSA. In *SmithKline*, the Ninth Circuit concluded that it owed no deference to the Secretary of Labor's current interpretation of the outside sales exemption and, in fact, disagreed with the Secretary's interpretation. This was in contrast to the Second Circuit's *Novartis* decision, which adopted the Secretary's interpretation.

The two issues on appeal are as follows:

1. Whether deference is owed to the Secretary of Labor's interpretation of the outside sales exemption and related regulations; and
2. Whether the FLSA's outside sales exemption applies to pharmaceutical sales representatives.

While I can't read tea leaves, I wonder whether the Supreme Court decided to hear the *SmithKline* case because it disagrees with the Ninth Circuit's holding. The Supreme Court had the opportunity to look at this issue with *Novartis* earlier this year and declined. On the other hand, with *SmithKline*, there is now truly a Circuit split on whether pharmaceutical sales representatives meet the outside sales exemption. I guess we will just have to wait and see how this plays out. Stay tuned.

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