

## SmithKline Beecham Wins On "Outside Salesman" Exemption

February 28, 2011 09:31

by Lawrence S. McGoldrick

The Ninth Circuit U.S. Court of Appeals (Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has added another chapter in the saga of whether pharmaceutical sales representatives (PSRs) qualify for the federal Fair Labor Standards Act's "outside salesman" exemption. The court recently ruled in *Christopher v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline* that the Glaxo PSRs *did* fall within the exemption. The decision creates a split in the federal appellate courts by finding that the exemption applied to PSRs performing duties essentially the same as those found to be non-exempt by the Second Circuit in the *Novartis* case about which we [previously reported](#).

Significantly, the Ninth Circuit also rejected arguments presented in a friend-of-the-court brief filed by the U.S. Labor Department. The court said that the brief was not entitled to controlling deference, contrary to the position taken by the Second Circuit.

### PSRs Were Selling

Adopting a common-sense approach to the exemption, the Ninth Circuit said that a "sale" in the pharmaceutical industry's context occurs with "the exchange of non-binding commitments" between a PSR and a physician by which "the manufacturer will provide an effective product [that] the doctor will appropriately prescribe." "[F]or all practical purposes, this is a sale," the court said, noting that the "primary duty" of PSRs "is not promoting Glaxo's products in general or schooling physicians in drug development," but "causing a particular doctor to commit to prescribing more of the particular drugs in the PSR's drug bag," thus increasing company sales.

The Ninth Circuit rejected the PSRs' argument that they did not transfer any medications to physicians, such that they merely promoted Glaxo's products. Instead, the court agreed with Glaxo that the phrase "other disposition" in the FLSA's definition of "sale" or "sell" is a "broad catch-all category" by which an employee is a salesperson if he or she "in some sense make[s] a sale."

### No Deference to DOL's Brief

In another significant aspect of the ruling, the Ninth Circuit refused to give "controlling deference" to a brief filed by the U.S. Secretary of Labor supporting the PSRs' position. First, the court criticized DOL's "outside salesman" exemption regulations, noting that, "instead of using its expertise and experience to formulate a regulation, [DOL] has elected merely to paraphrase the statutory language." The court said that DOL's regulations contained mere "parroting" of the FLSA's definition of the term "sale." The court said, "This clarifies nothing about the meaning of [the FLSA's definition of "sale" or "sell"]; it merely incorporates the very undefined, very un-delimited term" in the statute.

# Wage and Hour Laws



FISHER & PHILLIPS LLP  
ATTORNEYS AT LAW  
*Solutions at Work*®

Under those circumstances, the court concluded, deference to DOL's brief was not warranted: "Rather than applying the regulation to the facts presented, the Secretary has used her appearance . . . to draft a new interpretation of the FLSA's language." The court determined that it would be an undue expansion of deference to DOL "to accept the Secretary's offer, and give controlling deference even where there exists no meaningful regulatory language to interpret . . ."

The issues created by this split in the circuits might well have to be resolved by the U.S. Supreme Court.