Christopher v. SmithKline Beecham Corp: Supreme Court Grants Pharmaceutical Sales Representatives Exempt Status Under the FLSA's Overtime Provision

On June 18, 2012 the Supreme Court, in *Christopher v. SmithKline Beecham Corp.*,[1] held in a 5-4 decision that pharmaceutical sales representatives are "outside salesm[e]n" for purposes of the Fair Labor Standards Act ("FLSA"), and thus their employer is not required to pay them overtime pay under the FSLA. In so holding, the Supreme Court resolved a circuit split between the United States Courts of Appeals for the Ninth Circuit[2] and Second Circuit,[3] and addressed a larger question regarding the appropriate level of deference due to an administrative agency's interpretation of its own regulations. The Court emphasized that in order for an agency's interpretation to receive controlling deference, it must be clear and established enough to provide the parties subject to the regulation "fair warning of the conduct [it] prohibits or requires."[4] The Court concluded that with respect to the regulations at issue here the Department of Labor's ("DOL") interpretation failed to provide such notice, and thus was not entitled to deference.

I. Background and Procedural History

Michael Christopher and Frank Buchanan worked for roughly four years for SmithKline Beecham Corporation ("the Company"), a pharmaceutical company, as sales representatives. During this time their primary job was to "provide information to physicians about [their employer's] products in hopes of persuading them to write prescriptions for the products in appropriate cases."[5] If persuasive, they would obtain a nonbinding commitment from the physician to prescribe the drug. As the job regularly required them to work more than 40 hours per week, Christopher and Buchanan sued the company for violating the FLSA, which, among other things, requires employers to compensate employees for overtime.[6] The Company moved for summary judgment, contending that Christopher and Buchanan were employed "in the capacity of outside salesm[e]n" for purposes of the Act, and thus exempt from the overtime pay provision.[7]

The United States District Court for the District of Arizona concluded that the claimants were indeed outside salesmen and granted the Company's motion. Christopher and Buchanan then filed a motion to amend the judgment, arguing that the District Court did not accord proper deference to the DOL's interpretation of what an outside salesman is. The Court denied the motion. The Ninth Circuit affirmed, agreeing that the DOL's interpretation did not merit controlling deference and holding that pharmaceutical sales representatives are outside salesmen for purposes of the exemption.

---

[1] No. 11-204, slip op. (June 18, 2012). Citations to the Court's opinion in this case are to the slip opinion.

[2] *See Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011) (lower court opinion in this case holding that pharmaceutical sales representatives are outside salesmen for purposes of the FLSA).

[3] *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2011) (holding that pharmaceutical sales representatives are not outside salesmen for purposes of the FLSA).

[4] Slip Opinion at 10-11 (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

[5] *Id.* at 5.

[6] *See* 29 U.S.C. § 207(a).

[7] *Id.* § 213(a)(1).

II. "Outside Salesman" and the Supreme Court's Decision

The FLSA does not define "outside salesman," but rather instructs the DOL to "'defin[e] and delimi[t]' the term" by promulgating regulations.[8] Three regulations were relevant to this case: the "general regulation,"[9] the "sales regulation,"[10] and the "promotion-work regulation,"[11] as termed by the Supreme Court. Most significant to the Supreme Court's discussion was the "general regulation," which defines an outside salesman as "any employee . . . [w]hose primary duty is . . . making sales within the meaning of [§ 203(k) of the FLSA]" and "[w]ho is customarily and regularly engaged away from the employer's place of business in performing such primary duty."[12] The referenced statute in turn provides that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."[13] The Supreme Court's task in this case was to determine whether a nonbinding commitment between a physician and a pharmaceutical sales representative constitutes a "sale" as so defined.

A. Deference to the DOL?

In both the Ninth Circuit and the Supreme Court (as well as in other cases on this issue) the DOL submitted *amicus* briefs urging that the FLSA regulations be interpreted to say that pharmaceutical sales representatives are not outside salesmen for purposes of the FLSA, and thus are entitled to its overtime pay protections. The first issue the Supreme Court had to address was how much, if any, deference was due to the DOL's interpretation of its own regulations as articulated in these briefs.[14] The Court[15] noted that *Auer v. Robbins*,[16] "ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief."[17] Certain circumstances, however, warrant deviation from this general rule, the Court observed. One such circumstance was present here, which was that neither the text of the statute and regulations nor the DOL's practice under such regulations had given "the pharmaceutical industry . . . [much] reason to suspect that its longstanding practice of treating [sales representatives] as exempt outside salesmen transgressed the FLSA."[18] As a result, "defer[ring] to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires,'"[19] and "would result in precisely the kind of 'unfair surprise' against which [the Court's] cases have long warned."[20] The Court further held that even outside the context of the *Auer*

[8] Slip Opinion at 2 (alteration in original) (quoting 29 U.S.C. § 213(a)(1)).

[9] 29 CFR §§ 541.500(a)(1)-(2).

[10] 29 CFR § 541.501(b).

[11] 29 CFR § 541.503(a).

[12] Slip Opinion at 2-3 (alteration in original) (quoting §§ 541.500(a)(1)-(2)).

[13] *Id.* at 3 (alteration in original) (quoting 29 U.S.C. § 203(k)).

[14] The Court distinguished this issue from the issue of determining how much deference is due to an agency's regulations implementing a Congressional statute, which falls under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[15] Justice Alito wrote the majority opinion, which was joined by Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas.

[16] 519 U.S. 452 (1997).

[17] Slip Opinion at 10.

[18] *Id.* at 12.

[19] *Id.* at 10-11 (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

[20] *Id.* at 11 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007)).

doctrine the DOL's interpretation did not warrant any deference because it was not subject to public comment and its most recent articulation was "flatly inconsistent with the [text of the] FLSA."[21]

B. Sales Representatives as Outside Salesmen

Declining to defer to the DOL's interpretation of its regulations, the Supreme Court moved on to the issue at hand to determine, using "traditional tools of interpretation," "whether petitioners [were] exempt outside salesmen."[22] The Court began with the FLSA itself, concluding that while its text does not ultimately offer clarity on the issue, the language "in the capacity of," which precedes "outside salesman," in general "counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works."[23]

This idea of function over form colored the remainder of the Court's analysis as it derived a broad conception of what constitutes a "sale" from the regulations and § 203(k). The Court began its reading of § 203(k) by noting that it defines a "sale" in an inclusive rather than exhaustive way, so as to encompass more than what it expressly lists. Next, the Court focused on the word "any," which § 203(k) uses to modify the list of activities that constitute a "sale" in a way that, from the Court's perspective, "include[s] . . . transactions that might not be considered sales in a technical sense . . . ."[24] Finally, the Court examined the catchall phrase "other disposition" in § 203(k)'s definition of "sale," which it read to indicate Congress' intention that "sale" be conceived of "in a broad manner," instead of in the narrow way the petitioners advanced.

Considered against this textual backdrop, the Court concluded, nonbinding commitments, "in the unique regulatory environment within which pharmaceutical companies must operate, comfortably fall[] within [the definition of a 'sale']."[25] The Court further supported its conclusion by observing that pharmaceutical sales representatives "bear all of the external indicia of salesmen"[26] and "are hardly the kind of employees that the FLSA was intended to protect."[27]

III. The Dissent[28]

The dissent accepted that the DOL's interpretation should not be accorded deference, but argued that the plain language of the statute and accompanying regulations clearly established pharmaceutical sales representatives' status as nonexempt employees: "[u]nless . . . the words of the statute and regulations [are given] some special meaning, a [pharmaceutical sales representative]'s primary duty is not that of 'making sales' or the equivalent."[29] In fact, their primary duty is to obtain a nonbinding commitment from a physician to prescribe a certain drug, which, in the dissent's eyes, in no way constitutes a sale as the regulations define the term. All the nonbinding commitment is, the dissent wrote, is "a commitment to *advise* a client to buy a product," but is not in

[21] *Id.* at 15.

[22] *Id.* at 16.

[23] *Id.* at 17.

[24] *Id.* at 18.

[25] *Id.* at 21.

[26] *Id.* at 21.

[27] *Id.* at 22.

[28] Justice Breyer wrote the dissent, which was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan. *Christopher v. SmithKline Beecham Corp.*, No. 11-204, slip op. (June 18, 2012) (Breyer, J. dissenting) ("Dissent").

[29] Dissent at 3.

itself a purchase or a commitment to purchase.[30] This is primarily because, given the nature of the pharmaceutical industry, pharmacies, not physicians, are in a position to actually make purchases. What pharmaceutical sales representatives do, the dissent reasoned, is akin to advertising for their employers, which is a job that the DOL's "promotion-work" regulation expressly states does *not* fall within the outside salesman exemption.[31]

IV. Significance of the Decision

The Supreme Court's decision resolved a circuit split between the Second and Ninth Circuits as to the issue of whether pharmaceutical sales representatives are exempt from the FLSA's overtime pay requirement. In holding that they are, the Supreme Court also, unanimously, articulated a method by which it will determine when it is appropriate to defer to an administrative agency's interpretation of its own regulations.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

[30] *Id.* at 5.

[31] *See id.* at 5 (citing 29 CFR § 541.503(a)).