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Drug reps had hoped to collect overtime pay, but the Supreme Court delivered a bitter pill

DEATH OF A SALESMAN'S OVERTIME

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In late June, as anticipation grew for a decision on the Affordable Care Act, the U.S. Supreme Court handed down a decision of equal importance – at least to some 90,000 pharmaceutical sales representatives across the country. In a 5-4 ruling in *Christopher v. SmithKline Beecham Corp.*, the court decided that those representatives do not qualify for overtime pay under the Fair Labor Standards Act.

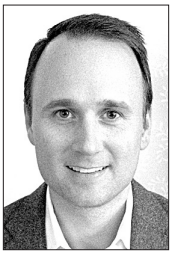
"GSK is very pleased that the Supreme Court took the issue, gave it thoughtful consideration, and came to the same

conclusion that the industry has had for many years: That pharmaceutical sales reps are subject to the outside sales exemption," said Rick Richardson, the associate general counsel of Research Triangle-based GlaxoSmith-Kline, who led the litigation team in this action.

The act requires employers to pay employees time and a half for hours worked beyond the 40-hour work week, but this requirement does not extend to outside salesmen. In recent years, more and more drug representatives claimed that they weren't outside salesmen because they didn't sell prescription drugs directly to the doctors they court as part of their job. At best, they got a nonbinding commitment from those doctors to prescribe certain drugs in appropriate cases.

Rick Richardson

Kerry Shad



Zach Ward

"About 91 separate [representative] lawsuits were pending around the country against 45 or so different pharmaceutical companies at the time this issue was decided," said Kerry Shad of Raleigh's Smith Anderson, another attorney representing GSK in the action. "The scope was huge."

Michael Christopher and Frank Buchanan were two such representatives. Both worked at GSK from 2003 until 2007. During that time they spent roughly 40 hours each week calling on doctors in their territory, promoting GSK prescription drugs. They also spent an additional 10 to 20 hours each week attending events, learning about GSK's products and attending to other tasks. They were not required to report their hours, worked with only minimal supervision, and were paid a base salary plus incentives determined by sales of their assigned drugs within their territories.

In 2008, the pair filed a collective action against GSK in Arizona federal court, alleging that the company violated the law by not paying its sales representatives overtime and seeking back pay and damages. The district court rejected that claim, finding that they were outside salesmen exempt from the act's overtime requirements, and 9th U.S. Circuit Court of Appeals affirmed.

But that ruling conflicted with a 2010 ruling from the 2nd U.S. Circuit Court of Appeals, in which the court accepted a recent Department of Labor interpretation that, because representatives did not close sales in a legal sense, they were not outside salesmen and were thus entitled to overtime pay.

The conflict in the circuits set up the appeal to the Supreme Court.

'They don't sell'

Before addressing the roles of the sales representatives, the court first considered whether it should simply defer to the Labor Department's interpretation, as the Second Circuit did, but decided that such deference wasn't warranted. All nine justices agreed that the department had changed its position while the case was pending, without the appropriate notice and comment period typically afforded regulated parties — a switch that could expose the companies to potentially massive liabilities. Nor had the department taken any enforcement action consistent with that interpretation.

"There are now approximately 90,000 pharmaceutical sales representatives; the nature of their work has not materially changed for decades and is well known; these employees are well paid; and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week," Justice Samuel Alito wrote. "Other than acquiescence, no explanation for the DOL's inaction is plausible."

That left the court to reach its own conclusion as to whether the representatives were outside salesmen. The first comment from the bench during oral argument, according to Shad, didn't bode well for GSK: "They don't sell," Chief Justice John Roberts said of the drug reps.

But the court ultimately moved away from a narrow construction of "sale," given that the act applied to "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

"The court didn't rely on a narrow reading of the statutes — that would have defied the common sense practical application that had been accepted for 70 years in the industry," said Zach Ward, an assistant general counsel for GSK who handles employment matters and aided in the defense.

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>
> **Justice Samuel Alito**

The majority looked instead to the language of the act that exempted employees acting "in the capacity of" an outside salesman. "The statute's emphasis on the 'capacity' of the employee 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," Alito said.

Pharmaceutical representatives "bear all the indicia of salesmen," he added, and should be treated as such for purposes of the act. "They [are]

trained to close each sales call by obtaining the maximum commitment possible from the physician. They work away from the office, with minimal supervision, and [are] rewarded for their efforts with incentive compensation."

More like promoters

Justice Stephen Breyer disagreed. Appearances aside, the representatives were not primarily engaged in sales, as there were too many conditions to a sale. They were more akin to promoters, he said in his dissent – joined by justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

"A [representative] might convince a doctor to prescribe a drug for a particular kind of patient," Breyer wrote. "If the doctor encounters such a patient, he might prescribe the drug. The doctor's client, the patient, might take the prescription to a pharmacist and ask the pharmacist to fill the prescription. If so, the pharmacist might sell the manufacturer's drug to the patient, or might substitute a generic version. But it is the pharmacist, not the detailer, who will have sold the drug."

GSK's Richardson called the decision a win for both the industry and its current sales representatives. "We now have certainty within the industry as to how representatives will be classified, and a whole line of litigation that had been a resource drain with really no offsetting benefit has been shut down," he said. "We have a win for our employees who can continue to have the schedule flexibility that makes these jobs so desirable."

Los Angeles attorney Eric Kingsley, one of the attorneys for Michael Christopher, said his client was disappointed in the decision, which effectively dismissed claims under the act. But he said that claims under state wage-and-hour acts should remain viable.

Representatives from the Department of Labor did not return calls for comment.