No. 07-56577

In The United States Court Of Appeals For The Ninth Circuit

GINA D'ESTE,

Plaintiff-Appellant,

v.

BAYER CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. CV07-3206-JFW (PLAx)

BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING APPELLEE

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INTERESTS OF AMICUS CURIAE

1. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It has an underlying membership of over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. The Chamber has been a voice for the business community for more than ninety years. To fulfill this role, the Chamber frequently files *amicus curiae* briefs in cases of vital concern to the nation's business community.[1]

2. The Chambers' members are subject to federal, state, and local laws respecting the wages paid and hours worked by their employees. These laws are best able to serve the needs of employers and employees alike when the rules that govern their application are well-defined and easily understood. Accordingly, the Chamber's members and their employees have a vital interest in cases like this one, in which important questions regarding the meaning and application of wage and hour laws are posed.

3. Plaintiff Gina D'Este, formerly a Pharmaceutical Sales Representative (PSR) for Bayer Corporation, claims to have been denied mandatory overtime compensation to which she was allegedly entitled under the California Labor Code

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[1] The parties to this appeal have given their consent to the filing of this *amicus* brief.

§§ 201 *et seq.* The relevant provisions of California law have been addressed thoroughly by the parties and by the brief *amicus curiae* filed by the California Employment Law Council; the Chamber does not intend to retrace that ground in this brief.

Both parties to this case and the district court, however, have referred extensively, both in the district court and in this Court, to the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), its interpretive regulations, and to cases decided under that Act in interpreting the pertinent provisions of California law. This reliance was entirely appropriate: "California courts have recognized that California's wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance" regarding the application of California law. *Monzon v. Schaefer Ambulance Serv., Inc.*, 224 Cal. App. 3d 16, 31 (1990).[2]

While the parties have referred to federal law in advancing their interpretations of California law, they naturally have devoted most of their energies to discussing the relevant state law. Because the Chamber and its members across

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[2] *Accord Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805, 105 Cal. Rptr. 2d 59 (Cal. App. 1 Dist. (2001) (state courts regularly "look to federal [wage and hour] law . . . for insights and a general methodology in construing" overtime exemptions); *Reynolds v. Bement*, 36 Cal. 4th 1075, 116 P.3d 1162 (2005) ("[f]ederal decisions have frequently guided our interpretation of state labor provisions the language of which parallels that of federal statutes").

the country have a vital interest in ensuring that the provisions, policies, and history of the FLSA not be misunderstood or given short shrift in this context, it provides this brief to explicate those matters more fully.

I. THE ANIMATING "PURPOSE" OF MANDATORY OVERTIME LEGISLATION IS NOT AS ONE-DIMENSIONAL AS D'ESTE MAINTAINS

A. Legislatures Act By Compromise, And Appeals To Broad, Unnuanced Notions of Legislative Purpose Are Unwarranted

D'Este's argument rests in substantial part on the claim that the mandatory overtime provisions of the FLSA, and by extension, California's own overtime provision, must be construed "liberally" in a manner that is consistent with "the purpose of the overtime laws in the first instance." App. Br. at 31.[3] D'Este's contention — that legislation as complex as either the FLSA or the California Labor Code had but one objective and thus might be distilled to a single "plaintiff wins" bromide — is misguided.

The legislative acts at issue here, both federal and state, extend coverage to some employees and expressly exclude others from coverage. Both aims — extending coverage to some, exempting others — were essential components of the legislative "purpose [behind] the overtime laws" on which Plaintiff relies, and a court determined to divine the legislature's "purpose" must consider both equally.

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[3] *See also id.* at 11 ("the remedial purpose of the Labor Code . . . is to be liberally construed"); *id.* at 30 (same).

If the legislature intended both to grant coverage to some and deny it to others, respect for only one "purpose" skews the analysis and undermines rather than furthers the legislative scheme.

Thus, only by considering "the purposes of the *entire* statute considered *as a whole*" — in this case, considering equally those provisions that extend coverage and those that exempt from coverage as embodying legislative "purpose" — can the legislature's true aim be determined. *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1408 (9th Cir. 1995).[4] The Supreme Court has explained that searching for a single, homogenized purpose in a complicated legislative scheme is a fool's errand:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990) (emphasis in original), *quoting Rodriguez v. U.S.*, 480 U.S. 522 (1987); *accord Andes v. Ford Motor Co.*, 70 F.3d 1332, 1335 (D.C. Cir. 1995) ("reliance on free-floating notions of the 'purposes' of [a piece of legislation] is not an acceptable method of statutory

[4] *See also U.S. v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999) (court may only "consider the purpose of the statute 'in its entirety'"), *quoting Alarcon v. Keller Indus., Inc.*, 27 F.3d 386, 389 (9th Cir. 1994).

interpretation."). Legislation like the FLSA and the California Labor Code represents a set of interlocking and co-dependent policy trade-offs made by hundreds of individual legislators for myriad reasons, and courts "have an obligation to respect the product of [such] legislative compromise[s] as well as policy decisions [they] wholeheartedly endorse." *U.S. v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 149 n. 12 (1978).

"It therefore will not do, when interpreting a statute embodying conflicting demands, for courts grandly to resort to a single 'broad purpose' of a statute and then employ a judicially idealized 'goal' to drive the interpretive process." *Continental Air Lines, Inc. v. Department of Transp.* 843 F.2d 1444, 1451 (D.C. Cir. 1988). As the Supreme Court has explained:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986), at 373-74.

B. To The Extent That The Legislative Record Reflects A Congressional "Purpose" Regarding FLSA Coverage, It Shows That Congress Had No Interest In Extending Mandatory Overtime Coverage To Individuals Such As Plaintiff

Even if one were determined to distill a single legislative purpose behind the FLSA (and the California Labor Code provisions patterned after the FLSA), one would search in vain for evidence that Congress intended to give its exemption language the grudging construction offered by D'Este. Indeed, to the extent that Congress' intent regarding individuals like D'Este can be divined, it plainly was to *exclude* rather than *include* them from the FLSA's coverage.

The FLSA was enacted in 1938 as a centerpiece of President Franklin Roosevelt's New Deal program against the back-drop of economic crisis, massive unemployment, and oppressive labor conditions. In relevant part, it established a minimum living wage for covered workers and, through the mandatory overtime pay provisions, gave employers a powerful incentive to reduce unemployment by hiring additional workers rather than asking incumbent employees to work longer hours.[5] Congress declared that together, these measures were intended to redress Depression-era "labor conditions [that were] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. § 202(a). *See also* Garrett Reid Krueger, *Straight-Time,*

[5] *See generally Mechmet v. Four Seasons Hotels, Inc.*, 825 F.2d 1173, 1175-76 (7th Cir. 1987).

Overtime and Salary Basis: Reform of the Fair Labor Standards Act, 70 Wash. L. Rev. 1097, 1098 (1995); *Statutory History Of The United States: Labor Organization,* 396 (Robert F. Koretz ed., 1970); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 *Law & Contemp. Probs*. 464, 465-66 (1939)).

In his letter to Congress proposing the legislation, President Roosevelt declared that his "objective [was] to improve . . . the standard of living of those who are now undernourished, poorly clad, and ill-housed." S. Rep. No. 884, 75th Cong., 1st Sess. (1937). The Senate Report for the bill that ultimately became the FLSA emphasized that "[i]t is *only* those low-wage and long-working industrial workers, who are helpless victims of their own bargaining weakness, that the bill seeks to assist to obtain a minimum wage." *Id.* (emphasis added).[6] Roosevelt specifically acknowledged the "wisdom of distinguishing labor conditions which are clearly oppressive" — the statute's target — "and those which are not as fair or as reasonable as they should be under [the] circumstances." *Id.* The bill established only "a few rudimentary standards," baselines so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.*

[6] The minimum wage and mandatory overtime requirements extend to the same workers.

In 1949, when amendments to the FLSA were proposed, Congress again explained that "the objectives sought to be achieved by Congress when it enacted that act in 1938 [were to] promote economic justice and security *for the lowest paid of our wage earners*[,] to protect this Nation from the evils and dangers resulting from wages too low to buy the *bare necessities of life* and long hours of work injurious to health. [Thus, the Act closed] the channels of interstate commerce to goods produced under conditions which do not meet rudimentary standards of a civilized society." S. Rep. No. 640, 81st Cong., 1st Sess. (1949) (emphasis added); *see also id.* ("President Roosevelt . . . urged the enactment of [the FLSA] for those 'who toil in [the] factory'").

This historical perspective was reinforced more recently by the federal Department of Labor in 2004 when it revisited its regulatory standards for exemptions including the "outside sales" exemption. DOL explained that well-paid jobs like the PSR position at issue here simply were not part of Congress' design:

> The [FLSA's] legislative history indicates that the [white collar and outside sales] exemptions were premised on the belief that *the workers exempted typically earned salaries well above the minimum wage*, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, *setting them apart from the nonexempt workers entitled to overtime pay*. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other

> workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.

69 Fed. Reg. 22,122, 22,123-24 (2004) (emphasis added).

PSRs are not "low-wage [or] long-working industrial workers," they are not "helpless victims of their own bargaining weakness," they do not suffer from "wages too low to buy the bare necessities of life," "oppressive" working conditions, or "long hours of work injurious to health." CNN/Money.com recently ranked the PSR position among the "Best Jobs In America" and reported *median* pay (base salary and commissions) to be $93,700.[7] An *entry level* PSR can expect to make more than $66,000 a year in salaries and commissions[8] — more than six times the "poverty line" threshold.[9] More senior PSRs can expect to earn into six figures.[10] These figures understate the PSR's true compensation, as they commonly (and increasingly) receive substantial non-cash benefits and incentives

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[7] *See* Jennifer Merritt, Carolyn Bigda, and Donna Rosato. "Young and Restless – top 20 jobs." http://money.cnn.com/galleries/2007/moneymag/0703/gallery.bestjobs_young.moneymag/16.html (last visited February 19, 2008)

[8] *See* Bob Davenport, Carrie Fisher, and Dylan Galaty. "Salesforce Suvey 2008." http://license.icopyright.net/user/viewFreeUse.act?fuid=Nz10MTUz (last visited January 29, 2008)

[9] *See* "The 2007 HHS Poverty Guidelines." http://aspe.hhs.gov/poverty/07poverty.shtml (last visited February 19, 2008)

[10] Davenport, *supra*.

such as stock options, company cars or car allowances, computers and other technological devices, and company-paid vacations.[11]

None of the foregoing, of course, would serve as a legitimate basis for judicially creating a new overtime exemption for highly compensated workers that does not exist. Nor can such a review of legislative purpose, even when it seems so clear, artificially extend the "outside sales representative" exemption beyond the reach of its language. Well-paid individuals do not become exempt for that reason alone, even though the record shows quite clearly that President Roosevelt and the 75th Congress would have exempted them had they only considered the question. As always, the text of the statute is the final arbiter.

But it is equally true that an artificially constricted reading of the exemption language cannot be justified by a desire to effectuate legislative "purpose." The available evidence — in the statute's own declaration of purpose, in the legislative history and indeed in the text of the exemption itself — make plain that the 75th

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[11] *Id.* Moreover, the PSR position is precisely the sort of job to which the DOL pointed in describing why Congress sought to exclude outside sales jobs from the exemption: "the type of work . . . performed [is] difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium." PSRs work irregular hours away from any management employee; keeping an accurate and reliable accounting of those hours for overtime purposes would be an oppressive, if not impossible, logistical burden for employers.

Congress would have been shocked by the view that the FLSA was intended to provide mandatory overtime for workers making six figures.

C. Courts Construe Wage And Hour Exemptions Realistically, And Are Not Compelled By A Naïve Conception Of The "Liberal Construction" Rule To Constrict Exemptions Unnaturally

Notwithstanding the rather unambiguous history of wage and hour protections in this country, D'Este suggests that one must view any exemption claim with a jaundiced eye because Congress and the California Legislature would have wanted it that way. It is true that the employer bears the burden of establishing that an exemption applies in a particular case; an employer's claim to the exemption must be grounded in the test of the statute. That, however, is very different from claiming, as D'Este seems to do here, that an employer's reliance on an exemption must be rejected if any non-frivolous argument against it exists.

Such an approach to statutory construction would be flawed. Rather, the Court is obliged to apply a statute as it is written, and where the language used leaves room for a difference of opinion, it is required to construe the language in a fashion that effectuates the legislature's evident design for the *entire* legislative act.

Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173 (7th Cir. 1987), is instructive. There, the plaintiffs worked in the catering department of a large hotel. The question posed by the case was whether service charges added by the hotel to

banquet bills could be construed as "commissions"; if they were considered commissions, the plaintiffs would be exempt from the FLSA, but if they were not, the plaintiffs would be entitled to time-and-one-half for overtime hours worked.

Judge Posner, writing for the court, rejected resort to simplistic dictionary definitions of "commissions" because many semantically permissible constructions of the term exist. Observing that plausible arguments might be made for both FLSA coverage and exemption given the language of the statute, he surveyed the various goals Congress sought to achieve in enacting the FLSA (*e.g.*, increasing employment among low-wage workers by discouraging overtime and establishing minimum acceptable wage standards) and concluded "that none of the purposes that we have identified for the overtime provisions would be served by holding the [overtime] provisions applicable" to the plaintiffs. *Id.* at 1176. The service charges at issue, while arguably not commissions in the classical sense, were "more like a commission (which in common parlance often just means a percentage-based charge or fee) than a gratuity; and to classify it as a commission not only fits the language of the statute comfortably but also carries out the statute's purposes." *Id.* at 1177.

This construction would not have been possible had the mode of statutory analysis proposed by D'Este prevailed. In her view, once the court had concluded that non-frivolous arguments exist supporting both sides, the court should have

reflexively "liberally construed" the statute in plaintiffs' favor. The Seventh Circuit, however, explained:

> We realize that the Supreme Court has said that exemptions from the Fair Labor Standards Act, because it is "humanitarian and remedial legislation," must be narrowly construed. . . . But . . . generalizations about interpretation, such as that exemptions from remedial statutes should be narrowly construed, are at best tie-breakers (and not even that, if some offsetting "canon of construction" is in play, as normally there will be).

Id. at 1177-1178 (citations omitted).

Similarly, in *Gieg v. DRR, Inc.*, 407 F.3d 1038 (9th Cir. 2005), the plaintiff claimed that the "retail or service establishment" exemption did not apply to his work for a car dealership because he sold insurance and warranty products, not cars, *i.e.*, he was not engaged in the defendant's primary retail business. And, indeed, the district court had concluded, based on the "humanitarian purposes" of the FLSA, that only unarguable claims to exempt status were legally sufficient: "While defendants' interpretation is not without some logic, I am mindful of the admonition that exemptions from the FLSA overtime requirement are to be narrowly construed and their application limited to those plainly and unmistakably within their terms and spirit." *Id.* at 1043 n. 9.

This Court reversed. Rather than focusing on the "liberal construction" rule or on the "humanitarian" goals of the statute, the Court focused its attention on "[t]he legislative purpose of . . . *the exemption*." *Id.* at 1045 (emphasis added).

Based on the legislative rationale behind the exemption, and finding the analogies offered by the defendant more persuasive than those offered by the plaintiff, the court held the work to be exempt, a result not possible if D'Este's conception of the defendant's burden were adopted.[12]

There is no basis in the legislative record for adopting Plaintiff's cramped view of the role exemptions play in administering wage and hour law and, indeed, there is abundant, consistent and compelling evidence to the contrary. Congress anticipated that the FLSA would be applied where it was needed — to assist those among us who are the victims of oppressive conditions and rates of pay too low to provide the means to live. There is no basis *at all* for the believing that the 75th Congress would have considered PSRs to be among that number, and thus no reason to stretch to achieve that result.[13]

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[12] *See also Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993). The plaintiff in *Harker*, a prison inmate, argued that "because the definition of employee must be read broadly . . . and because the Act does not specifically exempt prisoners, the Act applies to participants in [state prison work] programs." *Id.* at 133. The court rejected that analysis, finding "no indication that Congress provided FLSA coverage for inmates engaged in prison labor programs like the one in this case." *Id.*

[13] It is worth noting that Congress has twice considered — and twice rejected — the argument that the outside salesman exemption be eliminated. On both occasions, the legislation was defeated when organizations representing sales persons opposed them "because [they ran] counter to the best interests of the salesman." *See* James A. Williams, *Salesman Differ on Wage-Hour Aid: Two Groups Agree, However, That Payment for Overtime is Out of the Question*, N.Y. Times, May 29, 1949. A spokesman for one such group explained that FLSA

(continued...)

II. CONGRESS AND THE DEPARTMENT OF LABOR BOTH ANTICIPATED THE MYRIAD WAYS IN WHICH "SALES" COULD OCCUR AND USED THE BROADEST POSSIBLE LANGUAGE TO EMBRACE THEM ALL

A. PSRs Have All The Attributes Of Outside Sales Persons

Although not all pharmaceutical companies structure their sales forces in precisely the same way, the record in this case amply demonstrates that PSRs are virtually indistinguishable from any other group of traveling sales people. Pharmaceutical companies fill the positions with individuals that have sales experience, whether in the pharmaceutical industry or elsewhere.[14] Once hired, they are given sales-related titles and get in depth sales training on sales techniques and how to close a sale. *See* D'Este Br. at 5. They are then assigned sales territories, given sales quotas or goals, and their compensation is determined to a substantial degree based on how well they meet those goals.[15] They spend their time traveling their territories to see decision-makers (primarily doctors in private

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(...continued)

coverage would "work to the salesman's disadvantage" and "be impossible to administer." *Id.* Obviously, Congress' policy decision to exempt sales representatives from the FLSA is long-standing and deeply held; it should not be given grudging application.

[14] *See, e.g.*, "Experienced hires." http://us.gsk.com/html/career/jobsearch.html (last visited February 19, 2008); "Online Recruitment Center." http://www.astrazeneca-us.com/content/careers/careerOpportunites.asp (last visited February 19, 2008)

[15] *See also* M. Goldberg and B. Davenport, *In Sales We Trust*, Pharmaceutical Executive, Jan. 1, 2005.

practice, hospitals, and clinics), meeting with them in the office or at lunches and dinners, and attempting to overcome barriers to sale.

But there is one feature of pharmaceutical sales that readily distinguishes the PSR from those who sell appliances or electronics: prescription drugs cannot be purchased without a prescription, and thus pharmaceutical companies cannot effectively sell to end-users.[16]

First, in many settings — such as hospitals, clinics, and urgent care centers — the end-user is frequently not even aware that they have "purchased" a drug or that it is being administered to them. The drug is not really "sold" to such an individual in any recognizable or generally understood way; there is no sales call, no sales pitch, indeed, no volitional act on the part of the customer.

Even when a patient gets a prescription from a doctor in his or her office, the patient is more of a passive consumer than a traditional "customer." The typical patient often knows little about the science underlying a course of treatment or the efficacy, interactions or contraindications until he or she learns it from the doctor. In the great run of cases, the patient will simply accept the doctor's prescription drug of choice.

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[16] Pharmaceutical companies can and do *market* or promote their drugs indirectly to end users, as they do through television advertisements and other forms of marketing materials. Most sizeable pharmaceutical companies have significant marketing and promotions departments; those employees are not involved in this suit.

Just as a typical patient has no real basis for selecting among various brands of pacemakers, sutures, or artificial limbs (leaving the doctor, for all intents and purposes, to make the purchasing decision on the patient's behalf),[17] the doctor determines what drugs will be purchased on behalf of the patient.[18]

Prescription drugs account for $250 billion in domestic retail sales a year.[19] If the PSR is not making these "sales," no one is. D'Este insists that this is, in fact, the case.

B. There Is No Basis In The FLSA Or The Applicable Regulations For Excluding The PSR's Work From The Definition Of "Sales"

These sales — $250 billion a year — make themselves, D'Este insists, because PSRs engage solely in promotional and educational activity, not sales. Physicians, she explains, write prescriptions instead of checks, and while the

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[17] *Medtronic, Inc. v. Benda*, 689 F.2d 645, 648 (7th Cir. 1982) ("physicians were the 'real' purchasers of the pacemakers").

[18] In other industries, manufacturers might attempt to stimulate interest in their products by advertising, but depend largely on retail sales staff to "close" the sale with the end user. Again, this model cannot work in the pharmaceutical industry, where the retailer — the pharmacist — has no contact with the end user until *after* the purchase decision has been made (*i.e.*, after the prescription is written). The pharmacist cannot second-guess the physician and recommend a different mode of treatment and, for all practical purposes, must dispense the drugs as directed by the doctor. Thus, if the pharmaceutical companies are to have any influence on that initial choice, it must direct its attention to the doctor.

[19] In 2006 (the last year for which complete data are available, prescription drugs accounted for $249.8 billion in retail sales. *See* Statistical Abstract of the United States: 2008, The National Data Book (127th ed. U.S. Census Bureau).

PSR's customers (physicians) may *control* the sales process, they neither pay for nor inventory the product. For this reason, the physician does not "buy" the drugs or make a commitment, personally, to buy drugs, and thus, D'Este insists, no "sale" is consummated by the PSR.[20] D'Este's narrow reading of the term, however, cannot reasonably be reconciled with the FLSA's text or the implementing regulations.

Indeed, it would be difficult to imagine how Congress might have crafted a more sweeping definition of the word "sales" than the one it employed:

> "Sale" or "sell" includes *any* sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 203(k) (emphasis added).

This self-referential and partly circular definition — defining "sale" to include "any sale" — makes patent Congress' desire to sweep broadly in defining the sorts of activities that would qualify for exemption. It *begins* by including within the "sales" definition prototypical "sales," *i.e.*, the kinds of activities on which D'Este focuses, but goes on from there to list other permutations that would

[20] While most patients obtain their drugs from pharmacies and not directly from physicians, some of the PSR's customers *do* pay for and inventory their drugs themselves. Hospitals buy for their own account, as do some clinics and specialists. Thus, while it is often true that the physician does not "buy" or inventory the drugs sold by the PSR in a traditional sense, that is not invariably true.

also be included: any other "exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." If "sales" for purposes of the exemption were limited to the sort of direct money-for-products exchange D'Este demands, the rest of the statutory definition would be rendered meaningless.

In particular, Congress' use of the phrase "or other disposition" unmistakably casts an exceptionally broad net, and obviously was designed to bring within the scope of the definition a range of sales activities that do *not* qualify as an "exchange, contract to sell, consignment for sale, [or] shipment for sale" but nonetheless bear indicia of sales activity.

The unmistakably broad sweep of that definition was confirmed by the Department of Labor in 2004 when it revised aspects of the outside sales exemption regulations. The exemption applies, DOL explained, whenever the employer can demonstrate "that the employee, *in some sense*, has made sales." 69 Fed. Reg. 22,162 (April 23, 2004). Conversely, DOL explained, the outside sales exemption does not apply to an employee "who does not *in some sense* make a sale." *Id.*[21] The italics here — "*in some sense*" —were DOL's; the definition of "sales" was intended to sweep up all of the possible permutations of the sales

[21] The quotation originally comes from a report issued in 1940 called *"Executive, Administrative, Professional, Outside Salesman" Redefined*, Wage and Hour Div., U.S. Dept. of Labor, Report and Recommendations of the Presiding Hearing Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940).

environment, excluding only purely marketing and advertising work: "If [the employee's] efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales [the employee's] activities are not exempt." *Id.* at 22,163.

Thus, the outside sales exemption is intended to embrace not just "sales" — direct money-for-product exchanges — but also "other dispositions" that are sales "in some sense." It embraces not merely those that are "sales in a traditional sense" or a "formal sense" or a "prototypical sense," as D'Este demands. If the definition of "sale" were limited to activities directed at consummating "exchanges" or "contracts to sell," the balance of the statutory definition — including "other dispositions" — would be superfluous. That is not an option; the Court is obliged to "give effect to each word." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). To read the exemption as narrowly as D'Este suggests would do violence to Congress' evident desire to be as inclusive and flexible as possible in defining its conception of "sales."[22]

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[22] *Cf.* 69 Fed. Reg. 22,162 (variability in industry-specific methods through which "orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales.")

Given this context, there is no doubt that PSRs engage in sales activities.[23] They target specific customers (physicians rather than television audiences or all attendees at a trade show) with specific products, often for specific types of patients,[24] in order to induce the physician to make a commitment to write a prescription — the functional equivalent of a purchase order[25] — later to be redeemed at a fulfillment center (a drug store). The PSR is not interested in "stimulating the sales of his company generally," as a marketing employee might at a convention or an employee in the advertising department might when writing copy for a magazine display ad; the PSR wants to sell specific drugs, often to specific types of patients to accounts in *her* territory so that prescriptions will be

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[23] These activities, of course, are conducted in a manner that is fully consistent with the physician's own non-delegable duty to ensure that, in the physician's judgment, any prescription written is medically appropriate. For example, the nation's leading pharmaceutical companies have voluntarily adopted a rigorous code of conduct for pharmaceutical sales called the PhRMA Code which ensures compliance with this inviolable characteristic of the physician/PSR relationship. That Code has repeatedly been cited by the Department of Health and Human Services' Office of Inspector General as an important tool "for reviewing and structuring these relationships." 68 Fed. Reg. 23,631, 23,737 (May 5, 2003); *see also* 67 Fed. Reg. 62,057, 62,063 (Oct. 3, 2002) (Code is "useful guidance for evaluating relationships with physicians and other health care professionals").

[24] Although PSRs are not allowed access to patient names or records, 45 C.F.R. § 164.508, they will often engage doctors in discussions about the efficacy of treatment options for unnamed patients with certain histories. Thus, the PSR's activities are directed not just at specific physicians, but also at specific (though anonymous) patients of those physicians.

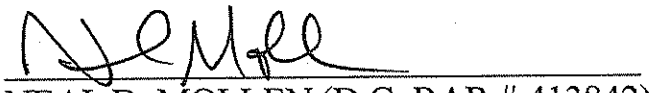
[25] As Bayer notes in its principal brief, a prescription is an "order" according to California Business and Professions Code §§ 4019 and 4040.

written and credited to *her* physician account and increase *her* commissions or other variable compensation. Although the PSR's sales model may be non-traditional — because of government mandate, not industry convenience — it is, at a minimum, an "other disposition" that is "in some sense sales," and thus it falls squarely within the exemption.

CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment should be affirmed.

Respectfully submitted,



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February 20, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), undersigned counsel hereby certifies that the accompanying brief contains 5,242 words, exclusive of the tables of authorities and contents, and this certificate of counsel.

NEAL D. MOLLEN

CERTIFICATE OF SERVICE

On February 20, 2008, I hereby certify that true and correct copies of the foregoing Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America Supporting Appellee were served upon the following counsels of record, by overnight UPS delivery:

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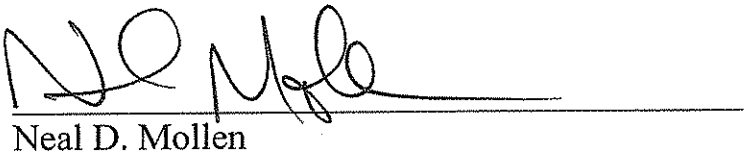

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