

CASENOTE

CHRISTOPHER V. SMITHKLINE BEECHAM CORPORATION: LABOR DISPUTE OR PUBLIC HEALTH ISSUE?

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I. INTRODUCTION

In 2008, spending on prescription drugs in the United States totaled \$234.1 billion.¹ By 2019, this figure will likely rise to

1. Janet Lundy, *Prescription Drug Trends*, THE HENRY J. KAISER FAMILY FOUNDATION 1, 1 (May 2010),

\$457.8 billion.² Given the enormous revenue the pharmaceutical industry generates, it is not surprising that disputes arise over the sharing of that revenue. Nor is it surprising that concerns over unethical conduct within the pharmaceutical industry have surfaced. Beginning in 2008, plaintiffs brought a number of cases in federal district courts that address these issues, either explicitly or implicitly. These cases challenge the industry's method of compensating one of its most effective marketing tools: the pharmaceutical sales representative.³

The pharmaceutical industry employs as many as 100,000 sales representatives.⁴ These employees are generally college graduates with science backgrounds who undergo extensive sales training.⁵ Pharmaceutical sales representatives earn salaries that range from \$85,000 to \$110,000 a year, with opportunities for bonuses when sales quotas are met.⁶ These employees often work fifty to sixty hours per week, and yet are not paid overtime because the industry considers them "outside salesmen," which are exempt from overtime pay requirements under federal law.⁷ In 2009, two employees of the pharmaceutical company SmithKline Beecham Corporation challenged the industry's classification of its sales representatives as outside salesmen⁸ and sought overtime pay for the hours they had worked in excess of the forty hour maximum mandated by the Fair Labor Standards Act for nonexempt employees.

While the pharmaceutical industry uses a number of avenues for the promotion and sales of its products—television advertising, journal articles, direct mailings—one of the most important methods is the face-to-face meeting between the pharmaceutical sales representative and the doctor.⁹ The

<http://kaiserfamilyfoundation.files.wordpress.com/2013/01/3057-08.pdf>.

2. Lundy, *supra* note 1, at 8.

3. See Steven I. Locke, *The Fair Labor Standards Act Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 BARRY L. REV. 1 (2009) (reviewing a number of these cases tried in district and appellate courts in recent years).

4. *Id.* at 2.

5. *Id.*

6. *Id.*

7. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2164 (2012).

8. *Infra* Section III(B) (providing a definition of "outside salesman").

9. Lars Noah, Esq., *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives?*, 47 FOOD & DRUG L.J. 309, 312 (1992).

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pharmaceutical sales representative plays a particularly important role in the marketing and sales of pharmaceutical company products, in large part because of the unique regulatory environment within which the companies operate.¹⁰ Since federal statutes prohibit pharmaceutical companies from selling their products directly to the end user, they have “long focused their direct marketing efforts, not on the retail pharmacies that dispense prescription drugs, but rather on the medical practitioners who possess the authority to prescribe the drugs in the first place.”¹¹ The pharmaceutical sales representative is the tool pharmaceutical companies use to market to medical practitioners.¹²

This paper will discuss the opinion from the Supreme Court of the United States that settled the dispute over the employment classification of pharmaceutical sales representatives. Section II will examine the factual background of the case, setting forth the Court’s holding. Section III introduces the legislative and regulatory context within which the case was decided. Section IV summarizes the Court’s reasoning and the reasoning of the dissent, while Section V looks at the policy implications underlying both of these lines of reasoning. Finally, Section VI briefly concludes.

II. FACTS AND HOLDING

Christopher v. SmithKline Beecham Corporation originated in the United States District Court for the District of Arizona.¹³ The petitioners were employed as pharmaceutical sales representatives—commonly known as PSRs or “detailers”—by respondent.¹⁴ Respondent SmithKline Beecham is a pharmaceutical company engaged in the business of developing, manufacturing, and selling pharmaceutical products such as

10. The Durham–Humphrey Amendment to the Federal Food, Drug, and Cosmetic Act (1951) provides that drugs “not safe for use except under the supervision of a practitioner” may be dispensed “only . . . upon a . . . prescription of a practitioner licensed by law to administer such drug.” 21 U.S.C. § 353(b) (2004).

11. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2163-64 (2012).

12. *Id.*

13. *Christopher v. SmithKline Beecham Corp.*, No. CV–08–1498–PHX–FJM, 2009 WL 4051075 at *1 (D. Ariz. Nov. 20, 2009), *aff’d sub nom. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012).

14. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2163-64 (2012).

prescription drugs.¹⁵ The core issue in this case was the status of employees like petitioners under the Fair Labor Standards Act of 1938 (FLSA).¹⁶ The FLSA establishes the minimum wage and the forty-hour work week, and provides that employees covered by the Act must be paid one-and-one-half times their base salary for hours worked beyond forty hours per week.¹⁷ The FLSA, however, exempts employees employed “in the capacity of outside salesmen” from the minimum wage/maximum hour requirements.¹⁸ The petitioners argue that under the FLSA they do not qualify as outside salesmen, and are therefore entitled to overtime pay when they work more than forty hours per week.¹⁹ The respondent asserts, to the contrary, that the petitioners are indeed outside salesmen under the pertinent provisions of the FLSA, and are therefore not entitled to overtime pay.²⁰

During the four-year period they were employed by the respondent, the petitioners, like other sales representatives in the pharmaceutical industry, “were responsible for calling on physicians in an assigned sales territory to discuss the features, benefits, and risks of an assigned portfolio” of prescription drugs.²¹ The petitioners attempted to obtain a nonbinding commitment from physicians to prescribe appropriate drugs in appropriate cases.²² The “[p]etitioners spent about 40 hours each week in the field calling on physicians . . . an additional 10 to 20 hours each week attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks.”²³

In 2009, the petitioners brought suit alleging that the respondent had violated the FLSA by failing to properly pay them

15. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2163 (2012).

16. *Id.* at 2161; *see also* 29 U.S.C. §§ 201-262 (2011).

17. 29 U.S.C. §§ 206-207 (2011).

18. *Id.* § 213(a)(1).

19. *Christopher v. SmithKlein Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075 at *3 (D. Ariz. 2009), *aff'd sub nom. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012) (summarizing petitioners’ argument: “Despite job descriptions and job duties that incorporate standard sales training and methodology, plaintiffs contend that they do not fit within the outside sales exemption because they do not actually execute sales within the meaning of the FLSA.”).

20. *Id.*

21. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2164 (2012).

22. *Id.*

23. *Id.*

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for the overtime hours they worked.²⁴ The petitioners sought back-pay for uncompensated overtime hours and liquidated damages as relief.²⁵ The respondents answered that the petitioners were not entitled to overtime pay because under FLSA they qualified as outside salesmen, and therefore were exempt from the minimum wage/maximum hour regulations.²⁶

The district court granted summary judgment to the respondents, finding that the petitioners clearly fit within the letter and the spirit of the FLSA exemption.²⁷ The district court outlined a number of features of the pharmaceutical sales representatives' job—they are not hourly workers, but instead earn salaries; they receive bonuses as an incentive for increased effort and longer work hours; their work is largely unsupervised; keeping track of their hours worked is difficult and unrealistic²⁸—and, the court noted, the pharmaceutical sales representatives' "primary objective was convincing physicians to prescribe GSK products to their patients."²⁹ In light of these factors, the district court concluded that pharmaceutical sales representatives are "the functional equivalent of an outside salesmen and to hold otherwise is to ignore reality in favor of form over substance."³⁰ In defending its broadening of the term "salesman," the court noted that "[t]he statute and supporting regulations defining the outside sales exemption were adopted in 1938, long before the development of the pharmaceutical sales industry" and that the "statute and regulations are intended to broadly address a multiplicity of industries found in the national economy and accordingly provide flexibility in the definition of a 'sale.'"³¹

The "[p]etitioners filed a motion to alter or amend the judgment, contending that the [d]istrict [c]ourt had erred in

24. *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075 at *1 (D. Ariz. Nov. 20, 2009), *aff'd sub nom.* *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

25. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2164 (2012).

26. *Id.*; 29 U.S.C. § 213(a)(1) (2004) (provides that §§ 206-207 (the minimum wage / maximum hour provisions) do not apply to any employee employed in the capacity of outside salesman).

27. *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075 at *5 (D. Ariz. Nov. 20, 2009), *aff'd sub nom.* *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

28. *Id.*

29. *Id.* at *2.

30. *Id.* at *5.

31. *Id.*

failing to accord controlling deference to the [Department of Labor's] interpretation of the pertinent regulations."³² The Department of Labor announced that interpretation in an *amicus* brief filed in a similar action then pending in the Second Circuit.³³ In that brief, the Department of Labor argued that pharmaceutical sales representatives do not meet the primary duties' test for the outside sales exemption because they do not "in some sense make the sales."³⁴ The brief continued, explaining that sales representatives do not sell drugs or obtain orders for drugs, but rather try to obtain from the physicians a nonbinding commitment to prescribe drugs to their patients when appropriate.³⁵ Since pharmaceutical sales representatives do not meet the regulation's plain and unmistakable requirement that their primary duty must be "making sales," they do not qualify for the outside salesman exemption.³⁶ According to the Department of Labor, sales in the pharmaceutical industry occur between the company and wholesale distributors, then between distributors and retail pharmacies, and finally between pharmacies and their customers, with the pharmaceutical sales representative playing no role in that chain of transactions.³⁷ Insofar as a detailer's work may increase a pharmaceutical company's sales, it is nonexempt promotional work "designed to stimulate sales that will be made by someone else."³⁸ The district court rejected this argument and denied the motion.³⁹

The petitioners appealed to the United States Court of Appeals for the Ninth Circuit.⁴⁰ The Ninth Circuit affirmed for two reasons. First, it agreed that the Department of Labor's

32. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2159 (2012); see *Auer v. Robbins*, 591 U.S. 452, 461 (1997) (holding that a secretary's interpretation of his own regulations is controlling unless it is "plainly erroneous or inconsistent with the regulation").

33. See *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010).

34. *Id.* at 153.

35. *Id.* at 154.

36. *Id.*

37. *Id.* at 153-54.

38. Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 9, *In Re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010) (No. 09-0437), 2009 WL 3405861 (citing 29 C.F.R. § 541.503(b) (2004)).

39. *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075 at *5 (D. Ariz. Nov. 20, 2009), *aff'd sub nom.* *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

40. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

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interpretation was not entitled to controlling deference because “instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”⁴¹ Second, it held that the statutory language itself, and the Department of Labor’s own regulations, were broad enough to include pharmaceutical sales representatives.⁴²

The Ninth Circuit’s decision was in conflict with that of the Second Circuit, which held that the Department of Labor’s interpretation of the regulations was entitled to controlling deference, and that pharmaceutical sales representatives are not outside salesmen under the FLSA.⁴³ The Supreme Court granted certiorari to resolve this split.⁴⁴ In *Christopher v. SmithKline Beecham Corporation*, the Supreme Court affirmed the Ninth Circuit’s ruling, and held that the petitioners qualify as outside salesmen under the most reasonable interpretation of the Department of Labor’s regulations.⁴⁵

III. BACKGROUND

A. THE FAIR LABOR STANDARDS ACT OF 1938

In 1938, the United States Congress passed The Fair Labor Standards Act.⁴⁶ In its declaration of policy, Congress noted “the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” and declared its policy to be “to correct[,] and as rapidly as practicable[,] to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.”⁴⁷ In light of these stated policy goals, Congress established, among other things, the minimum wage and the forty-hour work week.⁴⁸ The FLSA further establishes that, except as otherwise provided, employees working more than forty hours per week receive time-

41. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 393, 401 (9th Cir. 2011) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)), *aff’d*, 132 S. Ct. 2156 (2012).

42. *Id.* at 400-01.

43. *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010).

44. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 760 (2011) (mem.).

45. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2174 (2012).

46. 29 U.S.C. §§ 201-262 (2011).

47. *Id.* § 202(a)-(b).

48. *Id.* §§ 206-207.

and-a-half pay.⁴⁹

While the minimum wage and maximum hour provisions are perhaps the most significant provisions of the Fair Labor Standards Act, they do not apply to everyone.⁵⁰ Congress created several exceptions, and persons who fall within the parameters of these exceptions are not entitled to the protections.⁵¹ Notably, individuals employed as executives or administrators, professionals, or outside salesmen, are exempt from the provisions of §§ 206 and 207.⁵² While Congress did not define the term “salesman,” instead charging the Department of Labor with that task, it did provide some guidance in the “definitions” section of the Act: “Sale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”⁵³ The definition of “sale” or “sell” provided by Congress is critical in the case at bar because whether or not pharmaceutical sales representatives are indeed outside salesmen, and thus qualify for the outside salesmen exemption, turns on whether or not they actually make sales as defined in this provision.

B. DEPARTMENT OF LABOR REGULATIONS

In keeping with its responsibility to “define and delimit” these terms, the Department of Labor has promulgated regulations, three of which are especially pertinent for this case.⁵⁴ In its “General rule for outside sales employees[,]” the Code of Federal Regulations provides that:

49. 29 U.S.C. §§ 207 (2011). Time and a half pay is “rate of pay at one and a half times the normal rate.” THE NEW SHORTER OXFORD ENGLISH DICTIONARY (4th ed. 1993).

50. 29 U.S.C. § 213(a) (2011).

51. *Id.* § 213(a)(1).

52. *Id.*

53. *Id.* § 203(k).

54. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22, 122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541). In 2003, noting that the minimum salary level had not been updated in almost 30 years, and that the job duty requirement had not been changed in the regulations in almost 55 years, the Department of Labor announced that it was proposing rule changes. *Id.* A ninety day public comment period was held; subsequently, revised regulations were issued. *Id.* It has been noted, however, that the regulations with respect to the outside salesman exemption are “nearly identical in substance to the regulations issued in the years immediately following the FLSA’s enactment.” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012).

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The term “employee employed in the capacity of outside salesman” in section 13(a)(1) of the Act shall mean any employee: (1) [w]hose primary duty is: (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) [w]ho is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.⁵⁵

The Code of Federal Regulations, in a section entitled “Making Sales or obtaining orders,” further provides:

Section 541.500 requires that the employee be engaged in: (1) [m]aking sales within the meaning of section 3(k) of the Act, or (2) [o]btaining orders or contracts for services or for the use of facilities Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that “sale” or “sell” includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.⁵⁶

It is to be noted that, while the regulations define the term “salesman,” the term “sales” itself is only vaguely defined. The regulation refers back to the original FLSA for its definition of “sales” and merely adds that it “include[s] the transfer of title to tangible property”⁵⁷ These Department of Labor regulations thus give little guidance as to the meaning of “sales” beyond what Congress originally provided in 1939.

One other Department of Labor regulation is pertinent. The Code of Federal Regulation section entitled “Promotion work” addresses the status of work that is related to sales, but that is not actual sales in and of itself.⁵⁸ The regulation defines promotion work as work that is “performed incidental to and in conjunction with an employee’s . . . outside sales.”⁵⁹ Examples of promotion work include visiting chain stores, “putting up displays

55. 29 C.F.R. § 541.500(a) (2013).

56. *Id.* § 541.501(a)-(b).

57. *Id.*

58. *Id.* § 541.503.

59. *Id.* § 541.503(a).

and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise."⁶⁰ This type of work is exempt from minimum wage/maximum hour regulations if it is carried out incidental to and in conjunction with an employee's own outside sales.⁶¹ If the promotion work carried out is incidental to and in conjunction with the sales of another employee, however, it is not exempt under the FLSA.⁶²

C. THE DURHAM–HUMPHREY AMENDMENTS TO THE FEDERAL FOOD, DRUG AND COSMETIC ACT

While the Fair Labor Standards Act and the subsequent Department of Labor regulations play a pivotal role in the litigation leading to the Court's granting of *certiorari* and its ultimate decision, there is another congressional Act informing the dispute. The Durham–Humphrey Amendments to the Federal Food Drug and Cosmetic Act require that potentially unsafe drugs only be dispensed by prescription of a licensed practitioner.⁶³ “The amendments had a two-fold objective: to protect the public from abuses in the sale of potent prescription drugs, and to relieve pharmacists and consumers from burdensome and unnecessary restrictions on the dispensing of drugs that can be taken safely without the supervision of a physician.”⁶⁴

The parties did not dispute, nor even addressed, any aspect of the Durham–Humphrey Amendments. However, the Court acknowledged, at least implicitly, that Durham–Humphrey is, in some ways, the true source of the controversy.⁶⁵ After all, it is Durham–Humphrey that prohibits pharmaceutical sales representatives from selling in the way that other so-called outside salesmen do. Additionally, were it not for Durham–Humphrey, it is unlikely that the dispute as to whether pharmaceutical sales representatives are outside salesmen would exist at all.

60. 29 C.F.R. § 541.503(b)-(c) (2013).

61. *Id.* § 541.503(a).

62. *Id.*

63. 21 U.S.C. § 353(b) (2004).

64. Francis B. Palumbo, Ph.D., J.D. & C. Daniel Mullins, Ph.D., *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 FOOD & DRUG L.J. 423, 426 (2002).

65. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 (2012).

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IV. THE SUPREME COURT'S DECISION

The Court's holding that pharmaceutical sales representatives are outside salesmen, and therefore are exempt from the minimum wage/maximum hour requirements of the Fair Labor Standards Act, unfolded in three sections.⁶⁶ First the Court addressed whether the Department of Labor's interpretation of its own regulations, and of the pertinent FLSA language, is owed deference under *Auer v. Robbins*.⁶⁷ Second, the Court analyzed the Department of Labor's reasoning on its own merits and explained why it is unpersuasive.⁶⁸ Third, the Court undertook its own analysis of the pertinent FLSA provisions and Department of Labor regulations.⁶⁹ This third section consists primarily of a close reading of the language of the law, a comparison of the primary duties of the pharmaceutical sales representative to those of the traditional outside salesman, and a discussion of Congress's purpose in creating the outside salesman exemption.⁷⁰ Fourth, the Court refuted several arguments advanced by the petitioners and by the dissent.⁷¹

Discussing the Court's majority opinion, Section IV(A) will address deference to the Department of Labor; Section IV(B) will discuss the lack of merit in the Department of Labor's interpretation; Section IV(C) will detail the Court's reading of the statutory language and regulations; and, Section IV(D) will discuss the majority's analysis and rejection of arguments advanced by the petitioner and by the dissent. Lastly, Section IV(E) will discuss the dissenting opinion by Justice Breyer.

A. DEFERENCE TO THE DEPARTMENT OF LABOR

The Court began its discussion noting "the parties disagree sharply about whether the [Department of Labor]'s interpretation of the regulations is owed deference under *Auer v. Robbins*."⁷² This was a necessary first step because, should the Court decide

66. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165-74 (2012).

67. *Id.* at 2165-69; *See supra* text accompanying note 32.

68. *Christopher*, 132 S. Ct. at 2169-70.

69. *Id.* at 2170-73.

70. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170-73 (2012).

71. *Id.* at 2173-74.

72. *Christopher*, 132 S. Ct. at 2165. Under *Auer v. Robbins*, the Court must defer to an agency's interpretation of its own ambiguous regulation except under certain circumstances. 519 U.S. 452 (1997). These circumstances are discussed below.

to give deference to the Department of Labor's interpretation, there would have been no need to proceed.

Before entering into its discussion of *Auer* itself, the Court underscored inconsistencies in the Department of Labor's interpretive pronouncements.⁷³ Specifically, the Court pointed out that while the Department's position never changed—pharmaceutical sales representatives are not outside salesmen—the reasoning behind their interpretation did change.⁷⁴ In its briefs to the Second and Ninth Circuit Courts of Appeal, the Department of Labor stated that a “sale” requires a “consummated transaction.”⁷⁵ In its brief to the Supreme Court, however, the Department changed course and announced that an employee is not an outside salesman “unless he actually transfers title to the property at issue.”⁷⁶ The Court speculated that the Department of Labor changed its position because of the ambiguity of the term “consummated transaction.”⁷⁷ After this initial problematizing of the Department's credibility, the Court moved on to address the requirements of *Auer* deference.

The Court acknowledged that *Auer* “ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief.”⁷⁸ *Auer* deference to an agency's interpretation is not owed in all cases, however, and the Court pointed to a number of decisions in which deference to an agency's interpretation is unwarranted.⁷⁹ Reasons cited by the Court for withholding deference include interpretation that is “plainly erroneous or inconsistent with the regulation,”⁸⁰ interpretation that “does not reflect . . . fair and considered judgment on the matter in question,”⁸¹ interpretation that conflicts with a prior interpretation, or interpretation that serves merely as a

73. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165-66 (2012).

74. *Id.* at 2165.

75. *Id.* at 2165-66; Brief for the Secretary of Labor, *supra* note 38, at 10.

76. *Christopher*, 132 S. Ct. at 2166 (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 13, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (No. 11-204), 2012 WL 379584).

77. *Id.*

78. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

79. *Id.*

80. *Id.* at 2166 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

81. *Id.*

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“convenient litigating position.”⁸² The conclusion that emerges is that the Court may withhold *Auer* deference when it has adequate reasons for doing so.⁸³ The Court considered that strong reasons for withholding deference existed in the case at bar in that the Department of Labor’s interpretation would constitute an “unfair surprise” for the pharmaceutical industry, one that would impose massive liability.⁸⁴

B. LACK OF MERIT IN THE DEPARTMENT OF LABOR’S INTERPRETATION

The Court next critiqued the Department of Labor’s interpretation of the relevant statutory and regulatory provisions.⁸⁵ The majority found that the interpretation lacked the “hallmarks of thorough consideration” because, since it was announced “in a series of *amicus* briefs, there was no opportunity for public comment.”⁸⁶ Moreover, the Department’s initial interpretation proved untenable, and so it was changed in the brief to the Supreme Court.⁸⁷ The Court also held that the Department’s interpretation was inconsistent with the language of the FLSA and with the Department’s own regulations.⁸⁸ In response to the Department’s insistence that a transfer of title must occur in order for a sale to take place, the Court noted that the FLSA’s definition of “sale” includes “consignment for sale,” and consignment for sale does not necessarily involve the “transfer of title.”⁸⁹ Moreover, 29 C.F.R. § 541.501(b), in which the Department defines “sale,” states that “sales *include* the transfer of title to tangible property.”⁹⁰ The Court emphasized the use of the word “includes” and stressed that this leaves room for transactions that do not include transfer of title.⁹¹ Finally, the Court found that the Department’s “promotion work”

82. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

83. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012).

84. *Id.* at 2167 (noting that “[t]o defer 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’”).

85. *Id.* at 2169-70.

86. *Id.* at 2169.

87. *Id.*

88. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012).

89. *Id.*; 29 U.S.C. § 203(k) (2006).

90. *Christopher*, 132 S. Ct. at 2169 (emphasis added by the Court).

91. *Id.*

argument—that pharmaceutical sales representatives do promotion work in conjunction with another’s sale, not their own—was a flawed tautology insofar as it is only a valid argument if one accepts *a priori* that pharmaceutical sales representatives do not make sales.⁹² As the Court pointed out, this interpretation of the promotion work regulation is dependent on the Department of Labor’s transfer of title definition of sale.⁹³ And, as already noted, the Court rejected this definition of sale.

C. THE COURT’S READING OF THE STATUTORY LANGUAGE AND REGULATIONS

Following its determination that the Department of Labor is not owed deference, and that, in any case, its reasoning is unpersuasive, the Court undertook its own reading of the outside salesman exemption in the FLSA and corresponding regulations.⁹⁴ The Court noted that it would be using traditional tools of interpretation.⁹⁵ In this vein, the Court examined the words used in the statute, the law as applied to the relevant facts, and the presumed intent of Congress in creating the exemption.⁹⁶

The Court began its analysis of the statutory language with the word “capacity.”⁹⁷ Noting that Webster’s dictionary defines capacity as an “[o]utward condition or circumstances; relation; character; position,” the Court argued that this suggests that the inquiry into the meaning of the term should be “functional, rather than formal.”⁹⁸ In other words, Congress was more interested in the substance of an employee’s work and in the employee’s responsibilities than in whether the employee’s work meets any special formal criteria.⁹⁹ The Court next pointed out that, in the FLSA definition of sales, Congress used a list that was preceded by the word “includes.”¹⁰⁰ For the Court, this indicates that the

92. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (noting that “the DOL’s conclusions that pharmaceutical detailers perform only nonexempt promotion work is only as strong as the reasoning underlying its conclusion that those employees do not make sales”).

93. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

94. *Id.* at 2170-74.

95. *Id.* at 2170.

96. *Id.* at 2170-74.

97. *Id.* at 2170.

98. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012); WEBSTER’S NEW DICTIONARY 396 (2d ed. 1934).

99. *Christopher*, 132 S. Ct. at 2170.

100. *Id.*; 29 U.S.C. § 203(k) (2006).

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list is meant to be “illustrative.”¹⁰¹ Had Congress used the word “means,” it would indicate a desire to be more restrictive.¹⁰² Finally, the Court noted, Congress used the “broad catchall phrase: ‘other disposition,’” a term which lends itself to a broad range of interpretive possibilities, such as alienation, relinquishment, a getting rid of, or arranging.¹⁰³ For the Court, this term was clearly employed in order to broaden the scope of the term “sale.”¹⁰⁴ The majority also argued that to follow the rule of *ejusdem generis*—as suggested by the Department of Labor—thus restricting “disposition” to “‘contracts for exchange of goods or services in return for value,’ . . . would defeat Congress’ intent to define ‘sale’ in a broad manner.”¹⁰⁵

The Court next transitioned to a demonstration of ways pharmaceutical sales representatives are like outside salesmen.¹⁰⁶ The majority noted that they are hired for their “sales experience”; that they are “trained to close each sales call by obtaining the maximum commitment possible”; that “they work away from the office, with minimal supervision”; that they are “rewarded for their efforts with incentive compensation”; and that there are others who work in exactly the same way except that they sell vaccines and other products used in doctors’ offices directly to the doctors themselves.¹⁰⁷ These latter are considered outside salesmen.

The Court further stated that its interpretation is consistent with the apparent purpose of the FLSA’s exemption.¹⁰⁸ That purpose, the majority points out, is to exempt employees who “typically [earn] salaries well above the minimum wage” and enjoy benefits that set them apart from nonexempt workers.¹⁰⁹ Moreover, these exempt employees perform work that is “difficult to standardize to any time frame and [that] could not be easily

101. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

102. *Id.*

103. *Id.* at 2171.

104. *Id.*

105. *Id.*; see Brief for the United States, *supra* note 76, at 20.

106. *Christopher*, 132 S. Ct. at 2172-73.

107. *Id.*

108. *Id.* at 2173.

109. *Id.*; see Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122-01, 22124 (Apr. 23, 2004).

spread to other workers after the 40 hours in a week.”¹¹⁰ In short, pharmaceutical sales representatives are not the kind of employees the minimum wage/maximum hour provisions were intended to protect.

**D. MAJORITY ANALYSIS AND REJECTION OF ARGUMENTS
ADVANCED BY THE PETITIONER AND BY THE DISSENT**

In its final section, the Court addressed several arguments advanced by the petitioners and by the dissent. The petitioners argued that pharmaceutical sales representatives engage in promotion work on behalf of their employers, but that other employees make the actual sales.¹¹¹ The Court viewed this characterization as a formalistic approach which can be readily reconciled with neither the language of the statute nor the Department of Labor’s past practices.¹¹² For the Court, characterizing pharmaceutical sales representatives as only promotion workers is akin to saying that car salesmen are not salesmen because, after closing a deal, they have their assistants fill out the paperwork.¹¹³ The Court also rejected the argument that pharmaceutical sales representatives do not qualify as outside salesmen because they are equivalent to individuals who sell a concept.¹¹⁴ The petitioners gave the example of Army recruiters, who have been deemed by the Department of Labor’s Wage and Hour Division, as well as by lower court decisions, to sell a concept and to be nonexempt from wage and hour requirements.¹¹⁵ The Court distinguished this example, saying that the Army is not selling at all, but rather buying because the Army pays for the services of the individuals being recruited.¹¹⁶ Lastly, the dissent put forth the argument that the detailer’s job is to provide the physician with information so that he may make a well informed decision and keep the pharmaceutical company’s product in mind when it is appropriate to prescribe it.¹¹⁷ The majority stated it is simply not true that detailers only provide

110. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2173 (2012)

111. *Id.*

112. *Id.* at 2174.

113. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2173-74 (2012).

114. *Id.* at 2173-74.

115. *Id.* (referring to *Clements v. Serco, Inc.*, 530 F.3d 1224, 1229 n.30 (10th Cir. 2008) argued in petitioner’s brief).

116. *Id.* at 2174; *Clements*, 530 F.3d at 1229 n.30.

117. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2174 (2012).

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information and that they do not attempt to convince doctors to prescribe their companies' drugs.¹¹⁸

E. THE DISSENT

Writing for the dissent, Justice Breyer noted two general reasons why pharmaceutical sales representatives do not qualify as outside salesmen.¹¹⁹ First, under a more narrow reading of the term "sale," pharmaceutical sales representatives do not meet the primary duties' test of "making sales."¹²⁰ Second, examination of pharmaceutical company publications and of two relevant Department of Labor Wage and Hour Division reports reveal that pharmaceutical sales representatives engage in nonexempt promotional work, rather than in sales, on behalf of their employers.¹²¹

The dissent began by arguing that the pharmaceutical sales representative's job can only be characterized as sales if one gives some "special meaning" to "the words of the statute and regulations."¹²² Sales, the dissent argued, only occur when there is a "transfer of property or title for price," and pharmaceutical sales representatives do not transfer property or title for price.¹²³ The dissent rejected the Court's notion that the FLSA definition of sales is written broadly enough to accommodate the professional activities of the detailers because, the dissent pointed out, detailers do not engage in these more broadly defined activities either:

the detailer does not "sell" anything to the doctor Nor does he, during the course of that visit or immediately thereafter, "exchange" the manufacturer's product for money or anything else. He enters into no "contract to sell" on behalf of anyone. He "consigns" nothing "for sale." He "ships" nothing for sale. He does not "dispose" of any product

118. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2174 (2012).

119. *Id.* at 2174-80 (Breyer, J., dissenting).

120. *Id.* at 2176.

121. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2178 (2012). The Department of Labor Wage and Hour Division reports cited by the dissent are distinct from the remarks in the Federal Register cited by the majority. *See* DEP'T. OF LABOR, WAGE AND HOUR DIVISION, REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (1940); DEP'T. OF LABOR, WAGE AND HOUR DIVISION, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, pt. 541, at 82 (1949).

122. *Christopher*, 132 S. Ct. at 2176 (Breyer, J., dissenting).

123. *Id.* (citing BLACK'S LAW DICTIONARY 1454 (9th ed. 2009)).

at all.¹²⁴

Justice Breyer bolstered his argument that pharmaceutical sales representatives do not make sales in any sense of the word by citing pharmaceutical industry literature. The dissent noted that the Pharmaceutical Research and Manufacturers of America's "Code on Interactions with Healthcare Professionals" (PhRMA Code) describes the detailers' job as "delivering accurate, up to date information to healthcare professionals." The dissent further insisted that nowhere does the PhRMA code refer "to detailers as if they were salesmen, rather than providers of information."¹²⁵ The dissent concluded its discussion of the PhRMA code by again emphasizing that since the pharmaceutical sales representative's primary duty is informational, detailers should not, and likely do not, see obtaining a nonbinding commitment to prescribe a particular medication as their primary duty, because such a commitment should have no bearing on a doctor's prescribing decisions, which are driven entirely by patient needs.¹²⁶

Finally, in support of its opinion, the dissent cited two Department of Labor Wage and Hour Division reports which describe "sales promotion men" and sales promotion work.¹²⁷ The Department of Labor Wage and Hour Division published this report at the time the Department of Labor was crafting the regulations in response to the FLSA. It describes sales promotion men and refers to them as individuals who do not make sales themselves, but rather "pave the way" for sales of others.¹²⁸ These individuals often interact with retailers who are not themselves the actual customers of their employers, but instead customers of customers.¹²⁹ Moreover, they are more focused on

124. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2176 (2012) (Breyer, J., dissenting).

125. *Id.* at 2177 (citing Pharm. Research and Mfr. of Am., *Code on Interactions with Healthcare Professionals* 1, 14 (2008), <http://www.natap.org/2008/HIV/PhRMAMarketingCode2008.pdf>).

126. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2177 (2012) (Breyer, J., dissenting).

127. *Id.* at 2178-79.

128. *Id.* at 2178 (citing DEP'T. OF LABOR, WAGE AND HOUR DIVISION, REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (1940)).

129. *Id.*

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sales by the retailers than sales to the retailers.¹³⁰ The dissent pointed out that pharmaceutical sales representatives deal with doctors, who are likewise not the actual customers of their employers, and that the pharmaceutical sales representatives are likewise “interested in sales authorized *by* the doctors, not [sales] *to* the doctors.”¹³¹ According to the 1940 report, employers who work in this way are not outside salesmen.¹³²

The dissent also cited a 1949 report by the Wage and Hour Division, entitled “Report and Recommendations on Proposed Revisions of Regulations.”¹³³ This Report specifically addresses the difference between exempt sales promotion work and nonexempt sales promotion work.¹³⁴ The dissent cited text from the Report to the effect that sales promotion work is only exempt if it is directed toward the consummation of the employee’s own sales.¹³⁵ If the employee’s efforts are directed toward stimulation of the company’s sales in general, his work is not exempt from the minimum wage/maximum hour requirements.¹³⁶ For the dissent, this language accurately describes the activity of the pharmaceutical sales representative.

IV. ANALYSIS

The Court’s opinion is, by and large, well reasoned. One can quibble with various details of the analysis, but when all is said and done, the language of the statute, and of the regulations, lends itself to the broad interpretation advanced by the Court.¹³⁷

While the majority opinion is persuasive, the dissent’s

130. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2178 (2012) (Breyer, J., dissenting).

131. *Id.* (emphasis by the dissent).

132. *Id.*

133. *Id.*; DEPT. OF LABOR, WAGE AND HOUR DIVISION, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, pt. 541, at 82 (1949).

134. *Christopher.*, 132 S. Ct. at 2178.

135. *Id.* (citing DEPT. OF LABOR, WAGE AND HOUR DIVISION, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, pt. 541, at 82 (1949)).

136. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2178 (2012).

137. The Court’s argument, for example, that a narrow construction of the term “disposition” to “contracts for exchange of goods or services in return for value” would defeat Congress’s intent to define “sale” in a broad manner is only valid if one has already accepted that Congress intended the term to be construed broadly. *Id.* at 2171. This is the same type of tautological argument the Court criticized in the dissent.

argument is not without merit. The notion that sales in the pharmaceutical industry take place between the manufacturer and the wholesaler, and therefore pharmaceutical sales representatives are promotion workers, not outside salesmen, is perfectly reasonable if one accepts that the statutory language should be construed narrowly. A 5–4 split along conservative/liberal lines is not, however, simply about whether a statute should be construed broadly or narrowly. Nor does such a split result from one side finding the correct legal rationale for its reading and the other side finding the wrong one. The Court’s argument that its reading is consistent with the policy goals of the 1938 Congress is neither more nor less convincing than the dissent’s mobilization of Department of Labor documentation drafted around the time the pertinent regulations were promulgated. Ultimately what is at stake here, whether or not the Court and the dissent would care to acknowledge it, is whose interests are being protected and which policy goals are being furthered. Instead of arguing again the points taken up by the two sides in *Christopher*, this section will examine a key area overlooked by both the Court and the dissent: the Durham–Humphrey Amendments; the policy goals of Durham–Humphrey as they relate to the marketing and sales practices of the pharmaceutical industry; and the policy implications of the Court’s decision and of the dissent in the context of Durham–Humphrey. This analysis will conclude that, however well-reasoned the majority opinion is, it is incorrect, and while the dissent arrives at the correct conclusion, it does so while neglecting an area of major importance.

Section IV(A) will discuss the Durham–Humphrey Amendments, Section IV(B) will detail the policy goals and the practices of the pharmaceutical industry, and Section IV(C) will discuss the policy implications of the majority decision and dissent.

A. THE DURHAM–HUMPHREY AMENDMENTS

The key area overlooked by both the Court and the dissent was the business and regulatory environment giving rise to this litigation. That regulatory environment was not one stemming from the Fair Labor Standards Act because, as the district court noted, “the statute and supporting regulations defining the outside sales exemption were adopted in 1938, long before the

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development of the pharmaceutical sales industry.”¹³⁸ Congress did not have in mind pharmaceutical sales representatives when it passed the FLSA for the simple reason that the job did not exist. While the majority would likely not have disagreed with this, its argument was that Congress intentionally crafted the statute broadly enough so as “to accommodate industry-by-industry variations in methods of selling commodities” and to include “those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity.”¹³⁹ The majority would be correct on this point had not a subsequent Congress passed legislation explicitly intended to regulate the activity of the pharmaceutical sales representative.

The Congress of 1951 did have pharmaceutical sales representatives in mind, and it was this Congress that created the regulatory environment in which pharmaceutical sales representatives operate. The Durham–Humphrey Amendments to the Federal Food, Drug and Cosmetic Act of 1951 made it illegal to sell prescription drugs without the authorization of a licensed practitioner.¹⁴⁰ In other words, pharmaceutical sales representatives are not salesmen, in the strict sense of the word, because Congress prohibits it. For pharmaceutical sales representatives to be salesmen, in the narrow sense, is illegal. While the legality of sales would seem to be of paramount importance in determining whether pharmaceutical sales representatives are salesmen, the Court, in what is perhaps the most disconcerting sentence of the opinion, and one relegated to a footnote, dismissed it as a technicality: “when an entire industry is constrained by law or regulation from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based on technicalities.”¹⁴¹ One might just as well reason that when an entire industry is constrained by law from selling its products in the ordinary manner it is because Congress does not want them selling those products in the ordinary manner. Indeed, by requiring the authorization of a licensed practitioner for the sale of prescription drugs, Congress is

138. *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075, at *5 (D. Ariz. Nov. 20, 2009), *aff'd sub nom. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

139. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171-72 (2012).

140. 21 U.S.C. § 353(b) (2004).

141. *Christopher*, 132 S. Ct. at 2172 n.23.

attempting to remove persuasive sales and profit motive from the distribution of prescription drugs and replace them with objective information and sound medical science. The Court's decision to treat the pharmaceutical sales representative like any other salesman is contrary to this congressional intent.

B. POLICY GOALS AND THE PRACTICES OF THE PHARMACEUTICAL INDUSTRY

Moreover, Congress did not pass the Durham–Humphrey Amendments, and thus restrict the activities of the pharmaceutical sales representatives, merely to create technicalities. The amendments set forth a clear policy goal: “[T]o protect the public from abuses in the sale of potent prescription drugs.”¹⁴² A ban on selling pharmaceutical products in the ordinary manner was clearly a cornerstone of the protection Congress sought to provide. In light of this ban, and of its policy goals, one can see a tension between what pharmaceutical sales representatives actually do, and what they are supposed to do within the context of Durham–Humphrey. The district court notes that the pharmaceutical sales representative's

compensation is designed to encourage him to work during his lunch hour and into the evening, hosting meals, meetings, and presentations, all for the purpose of increasing the sales of his assigned products in his territory, with a payoff in the form of bonuses.¹⁴³

The district court was describing a pharmaceutical sales representative focused primarily on the company's bottom line and on his own commissions or bonuses. This emphasis on compensation, and especially on bonuses, has been the subject of congressional scrutiny for decades.¹⁴⁴ During congressional hearings held in the 1970s, for example:

witnesses described an environment punctuated by the pressure to sell, where the encounter between physician and salesman is condensed into a short period of time, where gifts

142. Palumbo, *supra* note 64, at 426 (citing S. REP. 82-946 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2454, 2454).

143. Christopher v. SmithKlein Beecham Corp., No. CV-08-1498-PHX-FJM, 2009 WL 4051075 at *5 (D. Ariz. Nov. 20, 2009), *aff'd sub nom*; Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

144. *See generally* Noah, *supra* note 9, at 312 (noting that “Congressional interest in pharmaceutical detailing dates back at least to the early 1960s”).

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and gimmicks are used to win the physician's favor as well as that of his nurse and receptionist, where samples are freely given as an inducement to use a product, and where side effects are often downplayed in favor of benefits.¹⁴⁵

More recent scandals have again focused public attention and congressional scrutiny on the pharmaceutical industry's marketing practices.¹⁴⁶ Observers have pointed to ethical violations at every stage of the marketing process.¹⁴⁷ Researchers in communication ethics have taken particular note of the pharmaceutical company Merck, and the sales techniques taught to its sales representatives. Merck manufactured and sold the prescription drug Vioxx. Between 2000 and 2004, some 60,000 patients died of heart attack while taking the drug.¹⁴⁸ Congress investigated Merck, and a number of class action lawsuits are pending against it.¹⁴⁹ Researchers have emphasized four ethical problems with the sales techniques of Merck's sales representatives: (1) the representatives "focus on the economic bottom line, rather than to be informative and ethical"; (2) the representatives are taught to view the meetings with physicians as a "competitive, dangerous environment"; (3) employees are trained to view physician's medical concerns as not as important as selling more of their drug; and (4) Merck encouraged its employees "to use subtle verbal and nonverbal skills to pressure physicians to prescribe Vioxx."¹⁵⁰ Clearly, the current marketing

145. Noah, *supra* note 9, at 314.

146. See Gardiner Harris, *Pfizer to Pay \$2.3 Billion to Settle Inquiry Over Marketing*, N.Y. TIMES (Sept. 3, 2009), <http://query.nytimes.com/gst/fullpage.html?res=9500E3D8143CF930A3575AC0A96F9C8B63>.

147. See, e.g., Kalman Applbaum, *Is Marketing the Enemy of Pharmaceutical Innovation?*, ACADEMIA.EDU (2009), http://uwm.academia.edu/KalmanApplbaum/Papers/159961/Is_Marketing_the_Enemy_of_Pharmaceutical_Innovation, (noting that "There is wrongdoing in every stage of drug development and promotion."); Michael P. Pagano, P.A.C., Ph.D. *Conflict of Interest, Bias, and Manipulation: Reassessing Prescriber Education and the Learned Intermediary Doctrine*, 10 COMM. L. REV. 30 (2010), <http://commlawreview.org/Archives/CLRv10i2/Conflict%20of%20Interest,%20Bias,%20and%20Manipulation%20CLR%20v10i2.pdf> (concluding that information provided to prescribers by pharmaceutical companies is manipulative and unreliable because of the extent to which pharmaceutical companies control the testing, approval, and publication process).

148. Alexander Lyon & Julien C. Mirivel, *The Ethics of Pharmaceutical Sales Talk*, 6.2 COMMUNICATION CURRENTS (Apr. 2011), <http://www.natcom.org/CommCurrentsArticle.aspx?id=1025>.

149. *Id.*

150. Alexander Lyon & Julien C. Mirivel, *The Ethics of Pharmaceutical Sales Talk*,

practices of the pharmaceutical industry and its sales representatives are at odds with the policy goals of Durham–Humphrey.

C. POLICY IMPLICATIONS OF DECISION AND DISSENT

From a policy standpoint, the holding in this case maintains the status quo, protects the pharmaceutical industry from “massive liability,”¹⁵¹ and ensures that the nature of the position of pharmaceutical sales representative will not be significantly changed.¹⁵² Without change in the nature of the position of a pharmaceutical sales representative, the type of abuses alluded to above remain not only possible, but also likely, to recur. The Court’s justification of withholding *Auer* deference, that the massive liability imposed on the pharmaceutical industry would constitute an unfair surprise, highlights the Court’s policy preferences: protecting the bottom line of big business. The Court’s concern over an unforeseen liability seems disingenuous, however, because making the ruling prospective could prevent any liability for past performance.

On the other hand, had the dissenting opinion prevailed, the policy goals of Durham–Humphrey would likely have been advanced. Such a ruling would provide a disincentive for the pharmaceutical industry to continue its current compensation structure because paying both bonuses and overtime would likely prove costly. Any regulation or ruling that discourages commissions or bonuses is likely to further the policy goals of Durham–Humphrey. Moreover, the message to the pharmaceutical industry would be that pharmaceutical sales representatives do not qualify as outside salesmen not just because they do not transfer title to property, but also because their primary duty is not—or is not supposed to be—persuasive talk calculated to convince doctors to buy their products. Rather, detailers provide—or are supposed to provide—information in an objective, even scientific, manner. The role of the pharmaceutical sales representative is to help the doctor find the appropriate medication for his patient, not simply to sell their company’s products. Such a view of the pharmaceutical sales representative

6.2 COMMUNICATION CURRENTS (Apr. 2011), <http://www.natcom.org/CommCurrentsArticle.aspx?id=1025>.

151. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

152. *See id.* at 2173.

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is consistent with the policy objectives of the Durham–Humphrey Amendments.

VI. CONCLUSION

Christopher v. SmithKline Beecham Corporation presents itself as a labor dispute. Indeed the parties were undoubtedly concerned primarily, if not exclusively, with their respective economic interests as employers and employees. The case was argued and decided at every level, from the district court through the Supreme Court, according to the terms of the Fair Labor Standards Act. Within this context, how a court ruled depended on which features of the pharmaceutical sales representative’s job description the respective court emphasized, and whether the court construed the language of the relevant FLSA statutes narrowly or broadly. While noting that pharmaceutical sales representatives are not explicitly regulated by the provisions of the FLSA, the Court treated other legislative acts that do explicitly regulate pharmaceutical sales representatives as technicalities, void of relevant legislative purpose and unworthy even of consideration.

That pharmaceutical sales representatives are regulated by the Durham–Humphrey amendments to the Federal Food, Drug and Cosmetic Act makes this case as much about public health as it is about a labor dispute. Congress’s decision to prohibit the detailers from making direct sales to consumers was intended to protect the public from the abuses of unscrupulous companies and their salesmen. The Court’s decision to allow the pharmaceutical companies to treat their sales representatives as outside salesmen in every other respect undermines the protection Congress sought to provide. The dissent’s view is correct, not simply because it read the term “sell” narrowly, but rather because a narrow reading of “sell” effectively inscribes pharmaceutical sales representatives within the regulatory environment Congress created for them.

Time will tell whether the Court’s decision will lead to greater abuses within the pharmaceutical industry. Perhaps market forces will require the industry to regulate itself on behalf of the public interest.¹⁵³ Recent scandals in the pharmaceutical industry itself—as well as in the finance and banking sector of

153. See Noah, *supra* note 9, at 315.

the economy—however, leave room for doubt. In any case, reforms in the way the pharmaceutical industry conducts business will only come now from within the industry itself, or from Congress.

Dennis Durocher