S156555

Case No. ~~S165555~~

**Supreme Court Copy**

# In The Supreme Court of the State of California

LIBERTY MUTUAL INSURANCE COMPANY and GOLDEN EAGLE INSURANCE CORPORATION,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

SUPREME COURT
FILED

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Deputy

*After a Decision by The Court Of Appeal*
*Second Appellate District, Division One*
*Civil No. B195370*
*JCCP No. 4234 –*
*Liberty Mutual Overtime Cases*

## REPLY IN SUPPORT OF PETITION FOR REVIEW


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# I. INTRODUCTION

Plaintiffs' Answer only underscores why the Court should grant review. As is often the case, the really telling points are not what plaintiffs say, but what they do not say. Four things stand out.

First, although plaintiffs begin by belaboring the facts and citing the Court of Appeal's observation that there was a "mountain of evidence" that claims adjusters mostly are engaged in the "day-to-day tasks of adjusting individual claims," nowhere do plaintiffs address the purely legal issue the petition raises, namely, whether the Court of Appeal was right in limiting the administrative exemption to employees who perform work at the level of "policy and general operations."

Second, while plaintiffs discuss at length the DLSE's opinion letters (which the Court of Appeal recognized were at most persuasive, not binding), they say nothing at all about the two key federal regulations the IWC expressly included as part of Wage Order 4-2001 – regulations that simply cannot be reconciled with the opinion below.

Third, plaintiffs make much of the fact this Court denied review in both the *Bell* and *Eicher* cases and argue that the present case "is not distinguishable." Except in the most conclusory way, however, they do not begin to say why. Even a brief comparison of issues shows they are wrong.

Finally, while plaintiffs characterize the Court of Appeal as taking a "measured approach" in interpreting the administrative exemption, they do not explain how this assertion can be squared with its holding that not even one of defendants' hundreds of claims adjusters, working across a broad spectrum of varying tasks and responsibilities, could qualify.

In the end, nothing in plaintiffs' Answer changes the fact that defendants' petition presents an important and unsettled question of law that is long overdue for definitive resolution by this Court. That the opinion was published, includes a strong dissent, and has prompted numerous amici urging review from widely varying vantage points, makes this all the more clear.[1]

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[1] Curiously, plaintiffs appear to argue that because the parties sought and obtained writ review in the Court of Appeal, that ends the discussion. Indeed, they even find it "difficult to imagine what vetting could possibly be given to the complicated issues" at hand if this Court were to grant review. (Answer, pp. 3-4.) This perspective is, to say the least, a novel theory of jurisprudence.

## II. DISCUSSION

### 1. Plaintiffs Ignore the Dispositive Issue

Plaintiffs lead with the argument the Court of Appeal "got the record right" in concluding that defendants' claims adjusters were primarily engaged in day-to-day tasks of adjusting individual claims and thus, by definition, could not be doing administrative work. They attempt to punctuate this point by arguing defendants implicitly conceded the accuracy of the Court's observation by not petitioning for rehearing. (Answer, pp. 2-3.)

With respect, it is plaintiffs who are off track. The issue the petition raises is not one of fact. Nor, indeed, does it even turn on the facts, however characterized, in this particular case. Rather, it raises a pure question of law: was the Court of Appeal right in concluding that only employees who work at the level of policy or general operations are doing "administrative" work – and that employees who carry out the "day-to-day" work, of whatever nature, cannot qualify? The petition argues this conclusion contradicts the plain meaning of the Wage Order and the applicable regulations, parts company with every federal court that has construed the same regulations, abandons what has been the established standard for more than 50 years, and ignores the IWC's stated intent to promote "uniformity of enforcement" under state and federal law.

Plaintiffs' Answer addresses none of these incongruities. Its failure to do so speaks volumes.

### 2. Plaintiffs Also Ignore Three Federal Regulations the IWC Made Part of the New Wage Order

Next, plaintiffs say the Court of Appeal's opinion is "no surprise" because it is consistent with DLSE opinion letters concluding that California follows the so-called "administrative/production worker dichotomy." (Answer, p. 7.) They also cite authority that state law may afford employees more protection than federal law, and federal law does not control unless it is more beneficial than state law. (Answer, p. 8.) There are three problems with these arguments:

First, the opinion below does not just endorse the dichotomy. It goes much farther by also limiting the administrative exemption to those relatively few employees who work at the level of policy or general operations. Therefore, regardless of its observations regarding the dichotomy, the Court of Appeal's opinion marks a startling new departure.

Second, plaintiffs do not just cite the DLSE opinion letters, which they acknowledge are not binding. They studiously ignore three federal regulations the IWC expressly made part of Wage Order 4-2001.

The first, 29 C.F.R. § 541.205(c)(5), states that the test for administrative work is met by many persons employed as "claims agents and adjusters." The second, 29 C.F.R. § 541.205(b), defines administrative work to include "work performed by so-called white-collar employees engaged in servicing a business," i.e., work most claims adjusters do every day. The third, 29 C.F.R § 541.205(c), cautions that administrative work "is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole." These federal regulations are not merely persuasive. They are part of Wage Order 4-2001 itself.

Third, and for the same reasons, plaintiffs' observations about the applicability of federal law, and their comments about picking whichever law is "more beneficial" to employees, are beside the point. When it comes to the federal regulations mentioned above, courts do not get to choose. Since the IWC has made them part of California law, they *are* California law. Plaintiffs, however, say nothing about any of these critical regulations.

### 3. The Petition Raises An Important New Issue

Plaintiffs also argue, albeit obliquely, that in denying review in *Bell* and *Eicher*, the Court has effectively already decided the issue defendants' petition raises in this case. For example, they claim the "current petition for review borders on a renewed challenge to the *Bell*[2] decisions" and note the Court also denied review in *Eicher*.[3] (Answer, pp. 5-6.)[4]

The issue defendants raise in this case, however, whether the administrative exemption is limited to employees who work at the level of policy or general operations, was not addressed in *Bell*. As defendants noted in their petition, it is one thing to apply the so-called "administrative/production worker dichotomy," to a greater or lesser degree, as one part of the analysis of determining whether the administrative exemption applies. In *Bell*, the First District applied it to the limited and "restricted record" in that case. That approach, however, is a far cry from the rule announced by the Court of Appeal below, namely, that quite apart from the dichotomy, only employees who work at the level of policy or general operations are performing administrative work.

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[2] See *Bell v. Farmers Ins. Exch.* (June 20, 2001, S096772) and *Bell v. Farmers Ins. Exch.* (May 12, 2004, S123477).

[3] See *Eicher v. Advanced Business Integrators, Inc.* (Aug. 29, 2007, S154732).

[4] Plaintiffs also claim all three cases are "harmonious and all cut in the same directions." (Answer, p. 6.) Even if this is true in the broadest sense, it is irrelevant because defendants are not seeking review based upon a split of authority in the courts of appeal.

Likewise, in denying review in *Eicher*, the Court was presented with an issue not at all like the one this petition raises. As the Court's record will confirm, *Eicher* did not involve claims adjusters. And, although it did involve the administrative exemption, the issue presented for review in *Eicher* was very different and focused on the proper interpretation of the "major [work] assignments" language in one specific federal regulation (29 C.F.R. 541.205(c)):

> If an employee's non-manual work involves major assignments affecting the business operations of his employer's customers to a substantial degree, is the first element of the administrative exemption in the California Wage Order satisfied?[5]

In short, the issue defendants present for review is not only very important, it is also one the Court has not before been asked to review.

### 4. The Court of Appeal Hardly Took a "Measured Approach"

Finally, plaintiffs argue defendants greatly exaggerate the impact the Second District's opinion will have, claiming that rather than painting with a broad brush, the opinion adopts a "measured approach" necessitating a case-by-case application. (Answer, p. 9.) This, however,

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[5] The petitioners in *Eicher* also asked the Court to review an issue regarding an award of attorney's fees under section Labor Code § 98.2, which is even farther afield.

just isn't so. As demonstrated by the letters from a broad spectrum of amici, plaintiffs are either ignoring or understating the ramifications of the opinion below.

For one thing, limiting the definition of administrative work to that performed at the level of policy or general operations in itself paints with the broadest brush by restricting the exemption to the relatively few employees who work at that high level. As several amici have noted, this novel approach comes close to abolishing this exemption, not only because few employees can qualify in the first place but also because those that do are likely already covered by the so-called "executive" exemption.

For another, the fact the Second District applied its approach in this case and reached the sweeping conclusion that not one of defendants' hundreds of claims adjusters, with widely differing job duties and responsibilities, could qualify for the administrative exemption is perhaps the most telling indication the approach is anything but measured.

## III. CONCLUSION

As the matter now stands, a respected trial judge, a two-member majority in the Court of Appeal, and a dissenting justice have all reached differing conclusions on a legal issue of great importance to employers and employees throughout California, as well as businesses that have operations all across the country. The Second District's published opinion below, which announces an unprecedented new approach that effectively abolishes the administrative exemption, opens a new chapter in a longstanding debate that will not be resolved until this Court addresses the issue.

For all these reasons, defendants respectfully urge the Court to grant review and resolve the important question it presents.

Dated: October 15, 2007

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By ______________________ FOR

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**CERTIFICATE OF WORD COUNT**

**(Cal. Rules of Court, Rule 8.504 (1)(d))**

The text of this Reply In Support of Petition For Review consists of 1,697 words, including all footnotes, as counted by the computer program used to generate this petition.

DATED: October 15, 2007

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By FDR

DOUGLAS R. HART

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111.

On **October 15, 2007**, I served the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

**See Attached Service List**

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was 213-620-1398. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2008(e), a copy of that report is attached to this declaration.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **October 15, 2007**, at San Francisco, California.

Wanda Morris

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