

**SUPREME COURT COPY**

Case No. S156555

**IN THE SUPREME COURT  
OF THE  
STATE OF CALIFORNIA**

SUPREME COURT  
**FILED**

APR 20 2011

\_\_\_\_\_  
FRANCIS HARRIS, *et al.*,  
*Petitioners;*

Frederick K. Ohlrich Clerk

vs.

\_\_\_\_\_  
Deputy

THE SUPERIOR COURT OF LOS ANGELES COUNTY,  
*Respondent;*

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,  
*Real Parties in Interest*

\_\_\_\_\_  
SECOND APPELLATE DISTRICT, DIVISION ONE  
NOS. B19512/B195370  
JCCP NO. 4234 (*LIBERTY MUTUAL OVERTIME CASES*)  
THE HONORABLE CAROLYN B. KUHL

**SUPPLEMENTAL BRIEF BY LIBERTY MUTUAL  
INSURANCE COMPANY AND GOLDEN EAGLE  
INSURANCE CORPORATION**

\_\_\_\_\_  
SIDLEY AUSTIN LLP  
A Limited Liability Partnership  
Including Professional Corporations  
DOUGLAS R. HART, Cal. Bar No. 115673  
GEOFFREY D. DEBOSKEY, Cal. Bar No. 211557  
555 West Fifth Street, Suite 4000  
Los Angeles, California 90013  
Telephone: (213) 896-6122

SHEPPARD MULLIN RICHTER & HAMPTON LLP  
A Limited Liability Partnership  
Including Professional Corporations  
ROBERT J. STUMPF, JR., Cal. Bar No. 72851  
WILLIAM V. WHELAN, Cal. Bar No. 116372  
KARIN DOUGAN VOGEL, Cal. Bar No. 131768  
501 West Broadway, 19<sup>th</sup> Floor  
San Diego, California 92101-3505  
Telephone: (619) 338-6500

*Attorneys for Defendants and Real Parties in Interest*

LIBERTY MUTUAL INSURANCE COMPANY

and

GOLDEN EAGLE INSURANCE CORPORATION

Case No. S156555

**IN THE SUPREME COURT  
OF THE  
STATE OF CALIFORNIA**

---

FRANCIS HARRIS, *et al.*,  
*Petitioners;*

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,  
*Respondent;*

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,  
*Real Parties in Interest*

---

SECOND APPELLATE DISTRICT, DIVISION ONE  
NOS. B19512/B195370  
JCCP NO. 4234 (*LIBERTY MUTUAL OVERTIME CASES*)  
THE HONORABLE CAROLYN B. KUHL

---

**SUPPLEMENTAL BRIEF BY LIBERTY MUTUAL  
INSURANCE COMPANY AND GOLDEN EAGLE  
INSURANCE CORPORATION**

---

SIDLEY AUSTIN LLP  
A Limited Liability Partnership  
Including Professional Corporations  
DOUGLAS R. HART, Cal. Bar No. 115673  
GEOFFREY D. DEBOSKEY, Cal. Bar No. 211557  
555 West Fifth Street, Suite 4000  
Los Angeles, California 90013  
Telephone: (213) 896-6122

SHEPPARD MULLIN RICHTER & HAMPTON LLP  
A Limited Liability Partnership  
Including Professional Corporations  
ROBERT J. STUMPF, JR., Cal. Bar No. 72851  
WILLIAM V. WHELAN, Cal. Bar No. 116372  
KARIN DOUGAN VOGEL, Cal. Bar No. 131768  
501 West Broadway, 19<sup>th</sup> Floor  
San Diego, California 92101-3505  
Telephone: (619) 338-6500

*Attorneys for Defendants and Real Parties in Interest*

LIBERTY MUTUAL INSURANCE COMPANY

and

GOLDEN EAGLE INSURANCE CORPORATION

## I. INTRODUCTION

Defendants and Real Parties In Interest Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation submit this supplemental brief to advise the Court of two recent published opinions issued by Division Eight of the Second District Court of Appeal: *Hodge v. AON Insurance Services, et al.* (2011) 192 Cal. App. 4<sup>th</sup> 1361, *petition for review pending*, and *Taylor v. United Parcel Service, Inc.* (2010) 190 Cal. App. 4<sup>th</sup> 1001, *review denied*, February 23, 2011.

Both decisions confirm that the administrative/production worker dichotomy that Plaintiffs and the divided Court of Appeal below relied upon has little relevance when applied to modern-day service-oriented businesses such as insurance companies. These cases also make clear the administrative exemption is not limited to those who work “at the level of policy or general operations.” Instead, the plain language of Industrial Welfare Commission Wage Order 4 and the federal regulations it expressly incorporates permit the application of the administrative exemption to employees, like Plaintiffs, whose work “affects policy or whose responsibility it is to execute or carry it out.” (29 C.F.R. § 541.205(b) & (c).)

## II. NEW AUTHORITIES

### A. *Hodge v. AON Insurance Services, et al.*

In *Hodge*, decided on February 2, 2011, the Second District upheld a trial court's determination, after a full trial, that a class of insurance claims representatives were properly classified as exempt under California law. The *Hodge* case covered a class period that is almost identical to the class period at issue in the present case. Moreover, like the Plaintiffs in the instant case, the *Hodge* Plaintiffs invoked *Bell v. Farmer's Insurance Exchange* (2001) 87 Cal. App. 4<sup>th</sup> 805 ("*Bell I*") to argue that the dichotomy effectively barred them from being classified as exempt. (192 Cal. App. 4<sup>th</sup> at pp. 1366-67, *citing Bell*, 87 Cal. App. 4<sup>th</sup> at pp. 819-827.). The trial court disagreed.

On appeal, the Second District affirmed the judgment. It agreed with the trial court that "the test announced in *Bell II* [is not] the appropriate standard for determining the exempt/non-exempt status of Plaintiffs" and is "not workable" in this factual context:

We reject the suggestion that every enterprise can be subjected to a simplistic parsing of its 'primary' business function for purposes of labeling administrative versus production-level, rank-and-file workers. Instead, we agree with both state and federal courts that have held the administrative/production dichotomy is but *one analytic tool*, to be used only to the extent it clarifies the analysis.

(*Hodge*, 192 Cal. App. 4<sup>th</sup> at p. 1366). In addition, the court noted that "[e]ven *Bell II* warns against overreliance on the dichotomy":

Even *Bell II* warns against overreliance on the dichotomy, stating that many employees cannot be properly characterized in terms of the dichotomy and, of particular relevance here, that some employees perform jobs involving wide variations in responsibility that may call for finer distinctions than the administrative/production worker dichotomy provides.

(*Hodge*, 192 Cal. App. 4<sup>th</sup> at pp. 1366-67, internal citations and quotations omitted, emphasis in original.) Instead, consistent with Defendants' position in the present case, *Hodge* applied "the standards set forth in the direct language of Wage Order No. 4" and the incorporated federal regulations to conclude that the claims adjusters were properly classified as exempt. (*Id.* at p. 1366.)

Unlike the *Bell* claims adjusters whose work was expressly restricted to the "routine and unimportant," the *Hodge* court emphasized that claims adjusters performed administrative work such as "investigat[ing] claims, review[ing] evidence, determin[ing] coverage questions, set[ting] reserves, and authoriz[ing] settlement or litigation of claims." (*Hodge*, 192 Cal. App. 4<sup>th</sup> at p. 1372). It is undisputed that, in the present case, Defendants' adjusters perform the same types of administrative functions. (See, e.g., Defendants' Opening Brief at pp. 5-8.)

In *Hodge*, the court noted that in setting reserves, the adjusters are estimating the total cost of the claim over its lifespan, thereby "tying up the cash to ultimately pay the reserves, and by tying up the cash they're removing it from availability for other purposes." As "the adjusters'

authority to set reserves is essentially equivalent to the authority to allocate and spend a company's funds, " it is "of substantial importance to the general business operations of the insurance-related entities." (*Id.* at pp. 1373, 1378.)

The *Hodge* court also emphasized that even the performance of some "mundane tasks" does not remove an employee from the scope of the administrative exemption:

[T]he fact that a person doing work of 'substantial importance' to an insurer may also be required in the course of doing important work to handle mundane tasks does not remove the person from working in a position whose duties involve the performance of work directly related to the general business operations of the business. The test is whether a person is performing work related to managerial policies or the general business operations . . . . not whether the persons' job has its nits.

(*Id.* at p. 1379).

The court also noted that "claims agents and adjusters" are specifically listed as examples of those whose work may fall within the administrative exemption, a fact brushed aside by the Court of Appeal in the instant matter. (*Id.* at p. 1376, *citing* 29 C.F.R. § 541.205(c)(5).) Ultimately, the court reached exactly the same conclusion defendants urge this Court to adopt: that claims adjusters' work falls squarely within the definition of administrative work set forth in 29 C.F.R. § 541.205, which is expressly incorporated into Wage Order 4 in 2001.

**B. *Taylor v. United Parcel Service, Inc.***

In *Taylor v. United Parcel Service, Inc.* (2010) 190 Cal. App. 4<sup>th</sup> 1001, an overtime and meal and rest period case filed against United Parcel Service, the Second District affirmed summary judgment in favor of UPS on the grounds that the plaintiff was an exempt executive and administrative employee. Although *Taylor* does not concern claims adjusters, the opinion is instructive in underscoring the limited role of the administrative/production worker dichotomy in today's complex business context. In *Taylor*, the plaintiff argued he was a "production" worker because he routinely supervised employees who carried out the delivery of packages, *i.e.*, the central "product" of UPS. The court disagreed, explaining that the plaintiff "relie[d] on an unduly narrow and rigid application" of the dichotomy developed in *Bell II*. (*Id.*, at p. 1029.) As in *Hodge*, the *Taylor* court emphasized that even *Bell II* itself cautioned against placing too much reliance on the dichotomy because many jobs involve a wide range of responsibilities and require "finer distinctions" than the dichotomy provides. (*Id.*, at p. 1030.)

Rather than relying on the dichotomy, the court looked to the plain language of the applicable Wage Order and 29 C.F.R. § 541.205(c), which state that, to be engaged in administrative work, an employee "need not directly participate in 'the formulation of management policies, or in the operation of the business' enterprise as a whole":

That section provides, in pertinent part, that an employee acting in an administrative capacity directly related to the management policies or business operations of the employer need not directly participate in ‘the formulation of management policies or in the operations of the business’ enterprise as a whole. An employee whose responsibility is to ‘execute or carry’ out management policies may also be considered within the scope of the exemption, even though his or her responsibilities are limited to only ‘a particular segment of the business.’

(*Taylor*, 190 Cal. App. 4<sup>th</sup> at p. 1030, *citing* 29 C.F.R. § 541.205(c).

The analysis in *Taylor* underscores the unduly rigid and narrow view of the dichotomy the Plaintiffs assert in the present case. Indeed, far from requiring that to be exempt, administrative employees must perform work “at the level of policy or general business operations,” as the divided court of appeal held below, the exemption expressly includes those employees whose work “affects policy or whose responsibility it is to execute or carry it out.” (*Taylor*, 190 Cal.App.4<sup>th</sup> at p. 1030). Plaintiffs fall squarely within that category.

### III. CONCLUSION

Plaintiffs contend that the application of the dichotomy categorically renders them ineligible from being classified as exempt administrative employees. By contrast, *Hodge* and *Taylor* strongly support Defendants’ position that, at a minimum, there are triable issues of fact regarding whether Plaintiffs perform administrative work. For the same reasons,



these opinions also support decertification of the class. The trial court's certification order was based on the premise that the administrative/production worker dichotomy could be dispositive in this case – a premise that both *Hodge* and *Taylor* squarely reject.

Dated: April 18, 2011

Respectfully submitted,

SIDLEY AUSTIN LLP

By: 

Douglas R. Hart  
Geoffrey D. DeBoskey  
Attorneys for Defendants  
and Real Parties  
LIBERTY MUTUAL  
INSURANCE COMPANY  
and GOLDEN EAGLE  
INSURANCE  
CORPORATION

**CERTIFICATE OF COMPLIANCE  
WITH CALIFORNIA RULE OF COURT 14(c)(1)**

I, Douglas R. Hart, am an attorney licensed to practice before the courts of the State of California. I certify that in accordance with Rule 14(c)(1) of the California Rules of Court, the foregoing Respondent's Brief contains a total of 1,609 words, based on the word count program in Microsoft Word.

  
\_\_\_\_\_  
Geoffrey D. DeBoskey

1 STATE OF CALIFORNIA )  
2 ) ss  
3 COUNTY OF LOS ANGELES )

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
5 years and not a party to the within action. My business address is 555 West Fifth Street, Suite 4000,  
6 Los Angeles, California 90013-1010.

7 On April 19, 2011, I served the foregoing document described as SUPPLEMENTAL BRIEF  
8 BY LIBERTY MUTUAL INSURANCE COMPANY AND GOLDEN EAGLE INSURANCE  
9 CORPORATION on the following interested parties:

10 Please see attached Service List

11  (VIA U.S. MAIL) I served the foregoing document(s) by U.S. Mail, as follows: I placed  
12 true copies of the document(s) in a sealed envelope addressed to each interested party as shown  
13 above. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at  
14 Sidley Austin LLP, Los Angeles, California. I am readily familiar with Sidley Austin LLP's practice  
15 for collection and processing of correspondence for mailing with the United States Postal Service.  
16 Under that practice, the correspondence would be deposited in the United States Postal Service on  
17 that same day in the ordinary course of business.

18 (VIA FACSIMILE) I served the foregoing document by facsimile transmission by use of  
19 facsimile machine number (213) 896-6600 to each interested party at the facsimile machine  
20 telephone number shown. Each transmission was reported as complete and without error. A  
21 transmission report was properly issued by the sending facsimile machine for each interested party  
22 served.

23 (VIA FEDERAL EXPRESS) I caused each such documents to be sent by Federal Express for  
24 overnight delivery. I placed true copies of the document(s) in a sealed envelope addressed to each  
25 interested party as shown above. I placed each such envelope, with fees thereon fully prepaid, for  
26 collection and delivery at Sidley Austin LLP, Los Angeles, California. I am readily familiar with  
27 Sidley Austin LLP's practice for collection and delivery of express carrier package for delivery with  
28 Federal Express. Under that practice, the package(s) would be delivered to an authorized courier or  
dealer authorized by to receive document(s) on that same day in the ordinary course of business.

I declare under penalty of perjury pursuant to the laws of the State of California that  
the foregoing is true and correct.

Executed on April 19, 2011, at Los Angeles, California.

  
Brenda K. Millsap

**Service List**

<b>Party</b>	<b>Attorney</b>
Harris, Frances : Petitioner	Michael Lee Carver Law Offices of Michael L. Carver 1550 Humboldt Road, Suite 1 Chico, CA 95928
	Timothy D. Cohelan Cohelan Khoury & Singer 605 "C" Street, Suite 200 San Diego, CA 92101
	R. Ira Spiro Spiro Moss et al LLP 11377 W Olympic Blvd #1000 Los Angeles, CA 90064
	Kevin K. Green Steven W. Pepich Coughlin Stoia Geller Rudman & Robbins, LLP 655 W. Broadway, Suite 1900 San Diego, CA 92101
Brenish-Smith, Marion : Petitioner; Brickman, Steven : Petitioner; Butler-Mitchell, Adell : Petitioner; Garner, Dwayne : Petitioner; Gray, Kelly : Petitioner; McCauley, Lisa : Petitioner	Kevin K. Green Coughlin Stoia Geller Rudman & Robbins, LLP 655 W. Broadway, Suite 1900 San Diego, CA 92101
Superior Court of Los Angeles County : Respondent Frederick Bennett 111 North Hill Street Room 546 Los Angeles, CA 90012	
Liberty Mutual Insurance Company : Real Party in Interest	William V. Whelan Sheppard Mullin et al 501 W Broadway 19th Fl San Diego, CA 92101
Law Enforcement Official: Real Party in Interest	Office of the District Attorney 320 W. Temple Street, Suite 540 Los Angeles, CA 90012

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<p>Contact Name: Appellate Division Ronald A. Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102</p> <p>Contact Name: Consumer Law Section</p>
<p>Hon. Carolyn B. Kuhl, Respondent Los Angeles Superior Court 600 South Commonwealth Avenue Department 323 Los Angeles, CA 90006</p>	

