No. S156555

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANCIS HARRIS, ET AL
PETITIONERS,

V.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL,
REAL PARTIES IN INTEREST,

Second Appellate District, Division One,

Nos. B195121/B195370

JCCP No. 4234 (*Liberty Mutual Overtime Cases*)

The Honorable Carolyn B. Kuhl

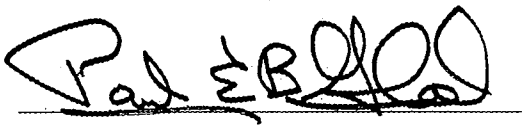
APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

In Support of LIBERTY MUTUAL INSURANCE COMPANY, ET AL,
REAL PARTIES IN INTEREST

Paul E. B. Glad (SBN 79045)
Gayle M. Athanacio (SBN 130068
Virginia K. Young (SBN 174384)
SONNENSCHEIN NATH & ROSENTHAL LLP
525 Market Street, 26th Floor
San Francisco, CA 94105
Telephone: (415) 882-5000
Attorneys for Amicus Curiae
ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES; PERSONAL INSURANCE FEDERATION OF CALIFORNIA; AND PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES

CERTIFICATE OF INTERESTED PARTIES OR PERSONS

Counsel for Amicus Curiae hereby certifies that the Association of California Insurance Companies, Personal Insurance Federation Of California, and Pacific Association Of Domestic Insurance Companies know of no other entity or person that must be disclosed under California Rule of Court 8.208(e), subdivision (1) or (2).



Paul E.B. Glad

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Under California Rule of Court 8.520(f), the Association of California Insurance Companies ("ACIC"), Personal Insurance Federation Of California ("PIFC"), and Pacific Association Of Domestic Insurance Companies ("PADIC") respectfully request permission from the Chief Justice of the Supreme Court of the State of California to file the attached amicus curiae brief. This brief is written to assist the Court and to support Real Parties in Interest Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation.

By way of background, ACIC represents more than 300 property/casualty insurance companies doing business in California. Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation are members of ACIC. ACIC member companies write 41.8 percent of all property and casualty insurance in California, including 57.3 percent of private passenger automobile insurance, 40 percent of homeowners insurance and 43.4 percent of private workers' compensation insurance. ACIC is affiliated with the Property Casualty Insurers Association of America ("PCI"). With more than 1,000 member companies, PCI represents the broadest cross-section of insurers of any

national trade association.

Among other things, ACIC and PCI strive to ensure that the laws and regulations affecting insurance companies are fair, rationally based and do not needlessly add to the costs of providing insurance to California's consumers. ACIC has filed numerous amicus briefs before California courts, including in connection with two cases currently pending before the California Supreme Court: *Welcher v. Workers' Compensation Appeals Board*, California Supreme Court Case No. S147030 (142 Cal. App. 4th 818 (2006)) and *Shin v. Ahn,* California Supreme Court Case No. S146114 (141 Cal. App. 4th 726 (2006)). ACIC does not file an amicus brief in connection with every appeal that may have some impact on the insurance industry. Rather, ACIC provides amicus support in only those instances where a particular judgment could have a tangible, deleterious impact on its member companies or the operation of the courts. ACIC joins as amicus here because the judgment on appeal has a potentially adverse impact on the efficient operation of its member insurance companies.

Personal Insurance Federation of California ("PIFC") is a California-based trade association that represents insurers who write approximately 40 percent of the personal lines insurance sold in California. PIFC represents the interests of its members on issues affecting homeowners, earthquake,

and automobile insurance before the California Legislature, the California Department of Insurance, and the California courts.

Pacific Association of Domestic Insurance Companies (PADIC) represents small to mid-sized property and casualty insurers and related business and consumer interests in the western United States, including about a dozen property and casualty carriers domesticated in California. PADIC works with consumers, policyholders, media, regulators, and legislators to improve consumer understanding of insurance issues and policies, keep costs and prices at a reasonable level, and improve the competitive business environment.

ACIC, PFIC, and PDAC have reviewed the Court of Appeal's opinion and the briefs the parties have filed with this Court and is familiar with the arguments contained therein. ACIC, PFIC, and PDAC believe the caselaw and Department of Labor regulations and opinion letters provide a context to the issues presented here which have not been fully analyzed by the parties' briefs. Because ACIC, PFIC, and PDAC and their members have a profound interest in these issues, ACIC, PFIC, and PDAC therefore submit this amicus brief to expand the briefing before the Court and to discuss how the outcome of this appeal will impact the insurance industry generally.

The central issue in this appeal is whether claims adjusters employed by insurance companies fall within the administrative exemption (Cal. Code Regs., tit. 8, section 11040) to the requirement that employees are entitled to overtime compensation. The Court of Appeal failed to focus upon the plain language of the applicable regulations and relevant cases and agency opinions which include claims adjusters within the definition of employees whose work is "directly related to management policies or general business operations" and therefore within the scope of the administrative exemption. Instead the Court of Appeal imposed a different standard, requiring adjusters to "perform work *at the level of* policy or general operations," on the basis that such work is "production" work and therefore not within the "administrative operations of the business." In doing so the appellate court impermissibly imposed a standard that differs from the regulations. If the Court of Appeal had focused on the plain language of the regulations and relevant cases and agency opinions, it would understand that its opinion was wrongly decided.

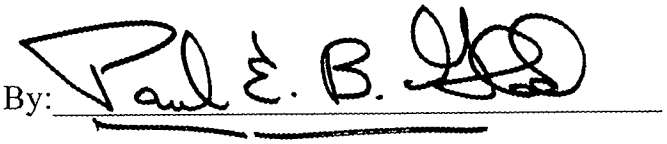
This case provides the Court with a unique and important opportunity to clarify the requirements for the administrative exemption under California law. Because such clarification will greatly enhance the predictability of California law on employee classification issues, ACIC,

PFIC, and PADIC respectfully submit the following *amicus curiae* brief on behalf of their members.

Dated: July 2, 2008

Respectfully Submitted,

SONNENSCHEIN NATH & ROSENTHAL LLP

By: 

Paul E.B. Glad

Attorneys for Amicus Curiae

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, PERSONAL INSURANCE FEDERATION OF CALIFORNIA, AND PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES

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ISSUE ADDRESSED BY AMICUS CURIAE

Do claims adjusters employed by insurance companies fall within the administrative exemption (Cal. Code Regs., tit. 8, section 11040) to the requirement that employees are entitled to overtime compensation?

The plain language of Wage Order 4-2001, the longstanding opinions of the Department of Labor ("DOL") (the agency charged with drafting the applicable regulations) and the vast body of relevant case law all answer this question in the affirmative. The appellate court, however, acted contrary to this wealth of authority and instead created a new standard for assessing the exemption status of claims adjusters and effectively concluded no adjusters are exempt. This Court should overrule the appellate court and direct the trial court to reinstate its order denying plaintiffs' motion for summary adjudication. Additionally, this Court should order the trial court to decertify the class.

AMICUS CURIAE'S INTERESTS IN THIS APPEAL

The Association of California Insurance Companies ("ACIC") represents more than 300 property/casualty insurance companies doing business in California. Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation are members of ACIC. ACIC member companies write 41.8 percent of all property and casualty insurance in California, including 57.3 percent of private passenger automobile insurance, 40 percent of homeowners insurance and 43.4 percent of private

workers' compensation insurance. ACIC is affiliated with the Property Casualty Insurers Association of America ("PCI"). With more than 1,000 member companies, PCI represents the broadest cross-section of insurers of any national trade association.

Among other things, ACIC and PCI strive to ensure that the laws and regulations affecting insurance companies are fair, rationally based and do not needlessly add to the costs of providing insurance to California's consumers. ACIC has filed numerous amicus briefs before California courts, including in connection with two cases currently pending before the California Supreme Court: *Welcher v. Workers' Compensation Appeals Board,* California Supreme Court Case No. S147030 (142 Cal. App. 4th 818 (2006)) and *Shin v. Ahn,* California Supreme Court Case No. S146114 (141 Cal. App. 4th 726 (2006)). ACIC does not file an amicus brief in connection with every appeal that may have some impact on the insurance industry. Rather, ACIC provides amicus support in only those instances where a particular judgment could have a tangible, deleterious impact on its member companies or the operation of the courts. ACIC joins as amicus here because the judgment on appeal has a potentially adverse impact on individual insurers.

Personal Insurance Federation of California ("PIFC") is a California-based trade association that represents insurers who write approximately 40 percent of the personal lines insurance sold in California. PIFC represents

the interests of its members on issues affecting homeowners, earthquake, and automobile insurance before the California Legislature, the California Department of Insurance, and the California courts.

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ACIC, PIFC and PADIC have a profound interest in the outcome of this case. The plain language of the federal regulations relating to the administrative exemption, longstanding DOL opinions, and the vast majority of case law addressing those regulations, include claims adjusters within the definition of employees whose work is "directly related to management policies or general business operations." Despite the express incorporation of those federal regulations into the California Wage Order, however, the appellate court created a different standard, purporting to eliminate the exemption for all adjusters who do not "perform work *at the level of* policy or general operations," on the basis that such work is

"production" work and therefore not within the "administrative operations of the business."

This case provides the Court with a unique and important opportunity to clarify the requirements for the administrative exemption under California law. Because such clarification will greatly enhance the predictability of California law on employee classification issues, ACIC, PIF, and PADIC respectfully submit the following amicus curiae brief on behalf of its members.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The factual background of this matter is well stated in the parties' briefs and, accordingly, is not repeated in detail here.

Generally, this case involves four coordinated class actions in which Plaintiffs, claims adjusters employed by Defendants, assert that Defendants misclassified them as exempt employees under California law and seek to recover allegedly unpaid overtime. The trial court initially certified the class, relying on the First Appellate District's holding in *Bell v. Farmers Ins. Exch.*, 87 Cal.App.4th 805 (2001) ("*Bell II*"), which analyzed the applicability of the administrative exemption to insurance claims adjusters under Wage Order 4-2001's predecessor, Wage Order 4-1998. The *Bell II* Court determined that under the undisputed facts of that case, where the adjusters performed "routine and unimportant" work that fell squarely on the "production" side of the "production/administration dichotomy," the

exemption was inapplicable. Tellingly, the trial court here noted that the production/administration dichotomy might not be dispositive, in which case it would be necessary to revisit the issue of class certification. *Harris v. Sup. Ct.*, 154 Cal.App.4th 164 at 169-171.

Later, upon motions for summary adjudication and a defense motion to decertify the class, the trial court determined that the production/administrative dichotomy was not dispositive of claims arising under Wage Order 4-2001, which, unlike Wage Order 4-1998, expressly incorporates certain federal regulations. Those regulations, the trial court correctly concluded, "compel the conclusion that claims adjusters can be exempt administrative employees notwithstanding the administrative/production worker dichotomy." *Harris*, at 171. The trial court decertified the class for claims arising after October 1, 2000 (the date an Interim Wage Order much like Wage Order 4-2001 was in effect) and denied Plaintiffs' motion for summary adjudication of Defendants' affirmative defense of the administrative exemption, which was also based on the argument that Plaintiffs were not exempt because they are "production" workers.

On interlocutory review, the appellate court granted Plaintiffs' writ of mandate, directing the trial court to vacate its earlier orders, grant Plaintiffs' motion for summary adjudication, and deny Defendants' motion to decertify the class. The appellate court held that the

production/administrative dichotomy precludes application of the administrative exemption to all employees except those who "perform at the level of policy or general operations." *Harris*, at p. 177.

LEGAL ARGUMENT

I. Introduction

At issue in this case is whether the work of insurance claims adjusters is "directly related to management policies or general business operations of [their] employer" as required for the administrative exemption under California Wage Order 4-2001 (8 CCR 11040). As discussed below, the plain language of the Wage Order itself, longstanding opinions from the Department of Labor ("DOL"), the agency charged with drafting the applicable regulations, and the bulk of relevant case law, answer this question in the affirmative.

The appellate court, however, answered this question in the negative, and in doing so (1) contravened the plain language of the Wage Order; (2) relied on a judicially created test that is completely at odds with the plain language of the Wage Order; 3) relied on an irrelevant federal regulation which is not part of California law; and (4) dismissed the bulk of authority which uniformly finds that claims adjusters meet the "directly related to" test as well as the other requirements of the administrative exemption.

As discussed below, the appellate court's opinion is incompatible

with the plain language of Wage Order 4-2001 and indeed created a new test for the exemption which has *no* basis in the applicable regulations. This Court should, therefore, reverse the appellate court's opinion.

II. The Plain Language Of Wage Order 4-2001 Includes Claims Adjusters Within The Scope Of The Administrative Exemption.

To qualify for the administrative exemption in California, an employee must:

- Perform office or non-manual work directly related to the management policies or general business operations of his or her employer or the employer's customers; and
- Customarily and regularly exercise discretion and independent judgment; and
- Regularly assist a proprietor or bona fide executive or administrator, or perform under only general supervision work along specialized or technical lines requiring special training experience, or knowledge, or execute special assignments under only general supervision; and
- Be "primarily engaged" in exempt activities; and
- Earn a salary of at least twice the state minimum wage for full-time employment.

Wage Order 4-2001, §1(A)(2) (emphasis added).

Wage Order 4-2001 (8 CCR 11040) is the product of the California Industrial Welfare Commission's ("IWC")'s 2000 "review of the duties that meet the test of the exemption" as mandated by California Labor Code § 515(a). To guide analysis of the requirements for the exemption, the IWC expressly incorporated into the Wage Order certain sections of the Code of Federal Regulations ("CFR") as they existed in January, 2001: "[t]he activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215." Wage Order 4-2001 § 1(A)(2)(f).

Relevant here, 29 CFR 541.205 defines the phrase "directly related to management policies or general business operations," the first of the requirements of the administrative exemption. The definition of the phrase includes two parts. First, the "work must relate to the administrative operations of the business as distinguished from production." Second, the work must be of "substantial importance to the management or operation of the business of [the] employer or [the] employer's customers." Under the express language of the regulation, claims adjusters meet both these parts.

First, 29 CFR 541.205(b) expressly lists exactly the type of work adjusters do as work that is included in the administrative operations of the

business:

> The administrative operations of the business include the work performed by so-called white collar employees engaged in 'servicing' a business as, for example, *advising the management*, planning, *negotiating*, *representing the company*, purchasing, promoting sales, and business research and control. (emphasis added).

Second, 29 CFR 541.205c(5), which discusses the "substantial importance" part of the definition, expressly lists claims adjusters as an example of an advisory specialist or consultant whose work can meet the "directly related to ..." test:

> The test of 'directly related to management policies or general business operations' is also met by many persons employed as advisory specialists and consultants of varying kinds, ...*claim agent and adjusters* ... and many others. (emphasis added).

As a result, this regulation, which is expressly incorporated into the Wage Order, by definition includes claims adjusters and the work they do within the scope of those employees whose work is "directly related to management policies or general business operations." Indeed, the express language of the regulation should end the inquiry as to whether insurance claims adjusters meet the "directly related" component of the administrative exemption, allowing analysis of the exempt status of any particular claims adjuster to shift to the other requirements of the exemption. At minimum, the express language of the regulation shows that the appellate court's requirement that work be "performed at the level of policy or general

operations," discussed below, is incorrect.

III. The Appellate Court's Creation Of The "Performed At The Level Of Policy Or General Operations" Standard Is Inconsistent With The Plain Language Of The Applicable Regulations.

In the face of express regulatory language to the contrary, the appellate court used a judicially created test to hold that only employees whose work is "performed at the level of policy or general operations," can meet the "directly related to" requirement. *Harris*, 164 Cal.App.4th 164, 177. Using this test, the court held that the work of insurance claims adjusters, "adjusting individual claims, investigating, making coverage determinations, setting reserves, and negotiating settlements," is "production" work, and therefore not within the definition of the "administrative operations of the business." *Harris*, at 179-180.

This central holding of the appellate court's decision is in direct conflict with 29 CFR 541.205(b). Moreover, it ignores Section 205(c)(5)'s express identification of claims adjusters as employees whose work is "directly related to management policies or general business operations." Additionally, the appellate court's holding is expressly contradictory of other language in 29 CFR 541.205(c):

> [a]s used to describe work of substantial importance to the management or operations of the business, the phrase 'directly related to management policies or general business operations' is not limited to persons who participate in the

> formulation of management policies or in the operation of the business as a whole. Employees whose work is 'directly related' to management policies or to general business operations include those [whose] work affects policy or whose responsibility it is to execute or carry it out.

Performing work that *affects* policy, or performing the work of *executing* or *carrying* out policy, is not the same as performing "at the level of policy or general operations." If the drafters of the regulation had meant to limit the exemption to those employees whose work is "at the level of policy or general operations," they would have used those words in the regulation. Simply put, the appellate court's holding impermissibly changes the standard.[1]

In sum, not only is this "performed at the level of" test not present in the applicable regulations, it is flatly inconsistent with applicable regulations. This alone mandates reversal of the appellate opinion.

Indeed, the cases on which the appellate court relies to set its novel standard fail to support the creation of this higher standard for analyzing the exemption for claims adjusters. First, the phrase "*at the level of* policy or general operations" does not appear in these cases. Second, most of the cases the appellate court relies on do not involve claims adjusters but rather different types of employees. *See, Eicher v. Advanced Business Integrators, Inc.*, 151 Cal.App.4th 1363 (2007) (computer consultant);

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[1] For example, the regulations expressly mention the cashier of a bank as an employee who "performs work at a responsible level and may be and may therefore be said to be performing work 'directly related to management policies or general business operations." 29 CFR 541.205(c)(1). However, it is difficult to imagine that a cashier would satisfy the "at of level of" test articulated by the appellate court.

Bothell v. Phase Metrics, Inc., 299 F.3d 1120 (9th Cir. 2002) (field service engineers for data processing company); *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990) (probation officers); *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3d Cir. 1991) (sales and purchasing agents for electrical supply company). Third, the sole claims adjuster case, *Bell II*, is factually and legally distinguishable and in any event does not suggest the heightened standard the appellate court adopted here was warranted.

In *Bell II* the court ultimately held that the claims adjusters in that case were non-exempt production workers. In so concluding the court relied on the defendants' own description of the employees' work, which the court concluded defeated any claim that the employees were properly designated as exempt:

> In short, the record as a whole confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to "*the routine and unimportant.*" On matters of relatively greater importance, they are engaged only in conveying information to their supervisors-again primarily a "routine and unimportant" role. This characterization of their role in the company places the plaintiffs in the sphere of rank and file production workers. More precisely stated, the plaintiffs render a service within an important component of the FIE business organization, i.e., the branch claims offices, which this component of the organization exists to produce. Following federal precedents, we hold that this characterization of the plaintiffs' role in the business organization places them clearly outside the category of administrative workers. We therefore conclude that the trial court properly ruled, as a matter of law, that the plaintiffs were not employed in "administrative capacities" within the

> meaning of the language of subdivision 1(A) of wage order No. 4.

Bell II, 87 Cal.App.4th at p. 828 (emphasis added).

The *Bell II* Court did not adopt, or even suggest, that the wholesale adoption of the production/administration dichotomy is the dispositive analytical tool. It did not hold that claims adjusters' work in general is not "directly related to the management policies or general business operations." Certainly, *Bell II* cannot be read to require that only claims adjusters who "perform at the level of policy or general operations" perform work that meets the "directly related to" test.

In contrast, here, the appellate court imposed a new "performed at the level of policy or general operations" test to determine whether work is "directly related to management or general business operations." Not only is that test not found in the applicable regulations, it plainly contradicts them with respect to claims adjusters. This Court should follow the plain meaning of the applicable regulations and reverse the appellate court's opinion.

IV. The Appellate Court's Reliance On 29 CFR 778.405 Is Entirely Inappropriate.

Despite acknowledging that it is "not at liberty to ignore ... regulatory requirements," (*Harris*, at p. 188), the appellate court relies heavily on 29 CFR 778.405, a regulation which is *not* incorporated into

Wage Order 4-2001. As the appellate court acknowledges, section 405 interprets section 207(f) of the FLSA, a section which states that some non-exempt employees who have irregular hours may allow an arrangement for a guaranteed weekly payment of at least a fixed amount based on his regular hourly rate as an exception to the general principles that the payment of overtime to non-exempt employees must be made based on the regular rate of pay. This arrangement is known as a "Belo" Contract. By referring to section 405, the appellate court considers a regulation which (1) is not part of Wage Order 4-2001; and (2) the California Division of Labor Standards Enforcement ("DLSE") has stated is inconsistent with California law.

First, 29 CFR 778.405 is simply not incorporated into the Wage Order. The IWC was clear about which of the federal regulations it wanted to incorporate into the Wage Order and which ones it did not. The IWC chose 29 CFR 541.205 as a statement of California law. It did not choose 29 CFR 778.405.

Further, the DLSE has expressly stated 29 CFR 778.405 as inconsistent with California law:

> The Supreme Court's ruling in the original case of *Walling v. Belo*, 316 U.S. 624 (1942) does not interpret the FLSA as it stands today. Congress felt that the interpretation of the *Belo* court was less than satisfactory and reluctantly felt compelled to change the FLSA in response to that interpretation so as to limit the so-called Belo Contract exception. The same is true as to the Regulations adopted by the Department of Labor.

> Those regulations are based on a specific exception in the FLSA (§207(f)) which, to repeat, does not exist in California law.

See, www.dir.ca.gov, California Division of Labor Standards Enforcement Policy Manual, ("DLSE Manual"), June 2002, page 48-4.

Nonetheless, the appellate court found this regulation relevant because it includes insurance adjusters as employees who, if non-exempt, might qualify for such an arrangement: According to the *Harris* Court, "[t]he implication is that insurance adjusters are not exempt employees - otherwise, the provision concerning varying workweek contracts would have nothing to do with them." *Harris*, 176. Such an 'implication' does not logically follow from the regulation and additionally is an impermissible application of a regulation which is not part of California law. Section 778.405, unlike section 541.205, does not in any way examine or provide guidance on the administrative exemption. It discusses a way to determine the regular rate of pay of a non-exempt employee. That it mentions claims adjusters as employees who, *if non-exempt*, might be eligible for the 207(f) payment arrangement is of no relevance. A claims adjuster could be non-exempt for any number of reasons based on the particular facts relevant to that adjuster, such as where the employee is not paid on salary basis (or is not paid a high enough salary), or because that particular adjuster does not exercise discretion or independent judgment. To 'imply' that the agency which drafts the regulations considers insurance

claims adjusters non-exempt based on this regulation simply defies logic, especially in light of longstanding DOL opinions, discussed below, that claims adjusters *are* exempt administrators.

Thus, the appellate court's decision in this action is fundamentally flawed for the additional reason that it is predicated on a regulation that has no relevance, and indeed has been described by the DLSE as inconsistent with California law. Further support for the conclusion that the appellate court's decision must be set aside is found when one considers the body of relevant law on the subject of claims adjusters' status as exempt employees.

V. The Department Of Labor And The Vast Majority Of Courts Conclude That Claims Adjusters Are Exempt Administrators.

The DOL has on numerous occasions opined that claims adjusters meet the requirements for the administrative exemption.[2] The DOL's letter dated November 19, 2002 is particularly instructive as it expressly states that the job of claims adjuster ordinarily satisfies the test to be classified as exempt:

> Significantly, our regulations specifically identify claims agents and adjusters as jobs that ordinarily satisfy the test for exempt administrative work. See 29 C.F.R. § 541.205(c)(5). This regulation is based on the 1940 Stein Report, which followed a series of public hearings relating to the scope of the Section 13(a)(1) exemptions. Thus, Wage and Hour has long recognized that claims adjusters typically perform work

[2] DOL opinions are entitled to this Court's deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

that is administrative in nature.

2002 WL 32406601 (DOL WAGE-HOUR) November 19, 2002.

Indeed, DOL opinions that claims adjusters meet the "directly related to" test date back fifty years. *See* WH Admin. Opinion (October 24, 1957) ("it is our current position that claim agents and adjusters are employees who perform work directly related to management policies or general business operations"); WH Admin. Opinion (February 18, 1963) ("Our position has been that the work performed by claims adjusters is directly related to management policies or general business operations"); WH Admin. Opinion (May 1, 1963) ("it is clear that claims adjusters for insurance carriers fall within the general classes of employees that may meet the requirement of the administrative exemption."); *See, also*, WH Admin. Opinion (October 25, 1968); WH Admin. Opinion (April 18, 1980); WH Admin. Opinion (October 29, 1985). There can be no doubt, therefore, that the agency that drafted the regulations which are incorporated into the Wage Order intended that the work of claims adjusters be included in the definition of the phrase "directly related to management or general business operations."[3]

Additionally, as noted in the *Harris* dissent, most of the courts interpreting the federal regulations also have held that claims adjusters meet the "directly related to" requirement, and indeed all the other requirements for the administrative exemption. *Harris*, at 196, *citing Miller v. Farmers Ins. Exch.* (9th Cir. 2006) 2006 U.S.App. LEXIS 26671; *Roe-Midgett v. CC Services, Inc.* (S.D., Ill. 2006) 2006 WL 839443; *Blue v. The Chubb Group*, N.D. Ill. 2005) 2005 WL 1667794; *McLaughlin v. Nationwide Mut. Ins.*

[3] The Department of Labor's Wage/Hour opinion letters are attached as Exhibits A-G to *Amici*'s Motion for Judicial Notice, filed herewith.

Co., D. Ore. 2004), 2004 WL 1857112; *Cheatham v. Allstate Ins. Co.*, (5th Cir. 2006) 465 F.3d 578; *Marting v. Crawford &Co.*, 2006 WL 681060; *In Re Farmers Ins. Exchange Claims Rep. Overtime Pay*, 336 F.Supp.2d 1077 (D. Ore. 2004); *Fichtner v. American Family Mut. Ins. Co.*, (D. Or. 2004) 2004 WL 3106753; *Jastremski v. Safeco Ins. Companies*, (N.D. Ohio 2003), 243 F.Supp.2d 743; *Munizza v. State Farm Mut. Ins. Co.* (W.D. Wash. 1995), 1995 WL 17170492.[4]

The appellate court, however, chose to ignore this vast consistent body of precedent. Its reasoning, however, is flawed. The appellate court's main criticism of the DOL opinion letters is that they do not discuss the administrative/production worker dichotomy. *Harris*, at 185-186. As the dissent in Harris aptly notes, and as even the *Bell II* court recognizes, "[t]he so-called dichotomy is not a legal test but merely an analytical tool used to answer 'the ultimate question, whether work is 'directly related to management policies or general business operations' ... not as an end in itself." *Harris*, at p. 195, (citations omitted); *See also, Bell II*, at 828. Moreover, a California appellate court has recently held that the trial court's refusal to apply the dichotomy in analyzing the exemption under Wage Order 4-2001 was proper. *See, Combs v. Skyriver Communications, Inc.* 159 Cal.App.4th 1242, 1259 (2008). The appellate court's choice here to ignore the longstanding opinions of the DOL, the holdings of nearly every court to consider the administrative exemption as it relates to insurance adjusters on the basis of the administrative/production dichotomy "test" is indefensible.

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[4] Even though many of the court cases were decided following the amendment of the federal regulations in 2004, they analyze the regulations in existence prior to the amendment, the same regulations which are incorporated into Wage Order 4-2001, and are therefore relevant.

The appellate court's other criticisms of the relevant DOL and court opinions are similarly misguided. The appellate court states that "[t]he regulatory reference to 'many persons' [29 CFR 541.205(c)(5)] cannot substitute for evidence that plaintiffs before us actually do the required amount of the required type of work." *Harris*, at p. 183. Of course, individual inquiry is always required. However, that the regulation uses the words "many persons" certainly does not support the appellate court's changing the standard in the applicable regulations to eliminate the exemption for all except those who perform "at the level of" policy.

The appellate court's statement that this authority "fail[s] to recognize ...the focus ..on substantial importance rather than the type of work that fits the exemption" (*Harris*, at pp. 185, 187) is similarly unfounded. Careful reading of these authorities shows that the DOL and the courts do, in fact, address both the "administrative operations of the business" and the "substantial importance" parts of the definition of the "directly related to" phrase. *See, e.g.*, 2002 WL 32406601 (DOL WAGE-HOUR) November 19, 2002; *Roe-Midgett*, at p.13; *Jastremski*, at p. 751-753; *Blue*, at p. 10-11; *McLaughlin*, at p. 3-5, *Murray*, at p. 5-7.

Finally, the appellate court's criticisms of this authority for not addressing 29 CFR 778.405 (*Harris*, at p.185, 187) is, as discussed above, misplaced. To begin, use of that regulation in the analysis of the exemption under California law is inappropriate. Even if it were somehow appropriate, the court's idea that 29 CFR 778.405 implies that adjusters are non-exempt, as also discussed above, is simply incorrect.

In sum, the vast majority of authority considering the applicable regulations finds that adjusters meet the requirements of the administrative exemption. The appellate court's decision to reject these authorities is

unfounded.

VI. CONCLUSION.

The IWC took great care to review the requirements of the administrative exemption and include certain federal regulations within the Wage Order that sets forth the requirements for that exemption. Courts must follow the plain language of those regulations and cannot create additional or inconsistent requirements. The DOL itself and most courts considering the exemption with respect to claims adjusters have done just that. However, the appellate court here ignored the plain meaning of the regulations and instead imposed its own inconsistent test. This Court should reverse the appellate court and order the trial court to reinstate its order denying Plaintiffs' motion for summary adjudication of the affirmative defense of the administrative exemption. Additionally, to the extent the trial court certified the class based on the premise that the production/administrative dichotomy is dispositive, this Court should order

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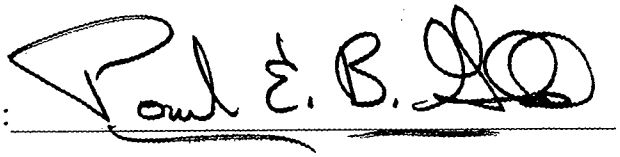
the trial court to decertify the class.

Dated: July 2, 2008 Respectfully Submitted,

SONNENSCHEIN NATH & ROSENTHAL LLP

By: 

Paul E.B. Glad

Attorneys for Amicus Curiae

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, PERSONAL INSURANCE FEDERATION OF CALIFORNIA, AND PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES

CERTIFICATION OF COMPLIANCE

Counsel for Amicus Curiae hereby certifies that the foregoing Amicus Curiae Brief is produced in 13-point type and contains 4,677 words, including footnotes, but not including the cover pages, table of contents, table of authorities, and this Certification. The undersigned relies on the word count of the computer program used to prepare this document.

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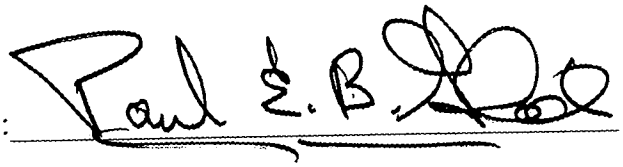
By: 

Paul E.B. Glad

Attorneys for Amicus Curiae

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, PERSONAL INSURANCE FEDERATION OF CALIFORNIA, AND PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES