

2012

PRESCRIPTION FOR CHANGE: THIRD  
CIRCUIT DIAGNOSES PHARMACEUTICAL  
SALES REPRESENTATIVES AS EXEMPT  
FROM OVERTIME PAY IN SMITH V.  
JOHNSON & JOHNSON

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# VILLANOVA LAW REVIEW

VOLUME 56

2012

NUMBER 4

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## Issues In The Third Circuit

PRESCRIPTION FOR CHANGE: THIRD CIRCUIT DIAGNOSES  
PHARMACEUTICAL SALES REPRESENTATIVES AS  
EXEMPT FROM OVERTIME PAY IN *SMITH v.*  
*JOHNSON & JOHNSON*

BROOKE BURNS\*

“[A] title alone is of little or no assistance in determining the true importance of an employee to the employer. Titles can be had cheaply and are of no determinative value.” – Harold Stein<sup>1</sup>

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1. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, PUB. NO. 1412, "EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION 25 (1940) [hereinafter STEIN REPORT] (recognizing superficiality of job titles and arguing that an employee's job title, therefore, is not dispositive to determine exemption status under Fair Labor Standards Act (FLSA)); *see also* *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266, 2007 WL 4546100, at \*3 (D.N.J. Dec. 19, 2007) (declining to reach merits of exemption arguments but recognizing potential for plaintiffs and potential collective action members to have varied duties and responsibilities despite possessing same job title of pharmaceutical sales representative (PSR)); *Aguirre v. SBC Commc'ns, Inc.*, No. 05-3198, 2006 WL 964554, at \*7 (S.D. Tex. Apr. 11, 2006) (explaining that employees' status under FLSA may vary, even if they have same job title, if their job responsibilities and duties differ among each other). *But see* *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 46-47 (1st Cir. 2008) (discussing general function of PSRs across industry), *abrogated by* *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 694 n.14 (S.D. Ind. 2009) (summarizing cases addressing issue of PSR exemption status that have same or similar facts); *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 687 (W.D. Pa. 2009) (discussing role of PSRs), *aff'd*, 372 F. App'x 246 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010).

## I. PATIENT PRESENTS WITH CONFLICTING SYMPTOMS

Pharmaceutical companies that manufacture brand-name drugs, however, would respectfully disagree with Harold Stein because the title of pharmaceutical sales representative (PSR) comes with a multi-billion dollar price tag and provides a multi-hundred-billion dollar return on investment.<sup>2</sup> Prepared by an intensive sales training program and readied with an armamentarium of company-approved sales materials and “core messages,” the well-groomed PSR sitting in the waiting room is more than just a pretty face.<sup>3</sup> Often serving as the only direct link between physicians

2. See *IMS Health Inc. v. Mills*, 616 F.3d 7, 14 (1st Cir. 2010) (describing detailing as “a massive and expensive undertaking for pharmaceutical manufacturers, which spend billions of dollars a year to have some 90,000 pharmaceutical sales representatives make weekly or monthly one-on-one visits to prescribers nationwide” (citing Stephanie Saul, *Doctors Object to Gathering of Drug Data*, N.Y. TIMES, May 4, 2006, at A1)); Joseph Barfett et al., *Pharmaceutical Marketing to Medical Students: The Student Perspective*, 8 MCGILL J. MED. 21, 21-27 (2004), available at [http://www.medicine.mcgill.ca/MJM/issues/v08n01/orig\\_articles/barfett.pdf](http://www.medicine.mcgill.ca/MJM/issues/v08n01/orig_articles/barfett.pdf) (asserting that pharmaceutical industry in 2002 spent twenty-five percent of promotional expenditures that totaled \$21 billion (over \$5 billion) on detailing pharmaceutical products to physicians); Ashley Wazana, *Physicians and the Pharmaceutical Industry: Is a Gift Ever Just a Gift?*, 283 J. AM. MED. ASS'N 373, 373 (2000), available at <http://jama.ama-assn.org/content/283/3/373.full.pdf+html> (estimating that, of \$5 billion spent on PSRs in 2000, “\$8000 to \$13000 [was] spent per year on each physician”). But see *Ayotte*, 550 F.3d at 56 (stating that “[t]he fact that the pharmaceutical industry spends over \$4,000,000,000 annually on detailing bears loud witness to its efficacy”); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 113 tbl.159 (131st ed. 2011), available at <http://www.census.gov/compendia/statab/2011/tables/11s0155.pdf> (setting forth table, “Retail Prescription Drug Sales: 1995 to 2009,” illustrating increase in retail prescription drug sales); Puneet Manchanda & Elisabeth Honka, *The Effects and Role of Direct-to-Physician Marketing in the Pharmaceutical Industry: An Integrative Review*, 5 YALE J. HEALTH POL'Y L. & ETHICS 785, 804 (2005) (noting studies that show “detailing has a positive and significant effect on sales” and that “the effect of detailing is largest relative to other marketing instruments”).

3. See, e.g., *Smith v. Johnson & Johnson*, 593 F.3d 280, 282 (3d Cir. 2010) (discussing how pharmaceutical company provided PSR with target list of physicians to see, prepared messages to deliver, and “pre-approved” sales aid to use); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 464 (S.D.N.Y. 2008) (identifying that pharmaceutical company “developed a ‘core message’ about each drug and train[ed] P[S]Rs to relay that message on every visit”); *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 885 (E.D. Pa. 1982) (stating that pharmaceutical company provided detailers “with an extensive set of selling tools”). Although PSRs may appear as robotic “Stepford Wives,” they are highly trained and educated. See Stephanie Saul, *Gimme an Rx! Cheerleaders Pep Up Drug Sales*, N.Y. TIMES, Nov. 28, 2005, at A1, available at <http://www.nytimes.com/2005/11/28/business/28cheer.html?pagewanted=all> (“Anyone who has seen the parade of sales representatives through a doctor’s waiting room has probably noticed that they are frequently female and invariably good looking.”). But see Susan Heilbronner Fisher, Note, *The Economic Wisdom of Regulating Pharmaceutical “Freebies”*, 1991 DUKE L.J. 206, 227 (maintaining that PSRs experience “rigorous scientific training” and that pharmaceutical companies “spend[] large sums of money to train each detailer to be a combination of a scientist, a business strategist, and a communicator”); Joshua Weiss, Note, *Medical Marketing in the United States: A Prescription for Reform*, 79 GEO. WASH. L. REV. 260, 264 (2010) (explaining that PSRs “receive extensive—albeit

and the pharmaceutical companies, PSRs are responsible for “detailing” prescription products through targeted messages to physicians.<sup>4</sup> PSRs, therefore, typically have a heavy hand in influencing which prescription a patient ultimately fills at the pharmacy.<sup>5</sup>

Contrary to popular perception, PSRs do not sell pharmaceutical drugs directly to physicians.<sup>6</sup> Instead, pharmaceutical companies provide PSRs with incentive compensation based on their ability to induce physicians to prescribe their respective products to patients, resulting in a final consummated sale at the pharmacy level.<sup>7</sup> PSRs, therefore, do not comport with traditional notions of the American door-to-door salesman or

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nonmedical—training to hone their craft”); Shena T. Wheeler, Note, *Under the Influence: An Examination of the Tactics Pharmaceutical Companies Use to Manipulate Physicians*, 7 IND. HEALTH L. REV. 89, 94 (2010) (stating that PSRs are “experts regarding the drugs they sell”).

4. See ME. REV. STAT. tit. 22, § 1711-E(1)(A-2) (defining “detailing” as “one-to-one contact with a prescriber or employees or agents of a prescriber for the purpose of increasing or reinforcing the prescribing of a certain drug by the prescriber”); *Ayotte*, 550 F.3d at 46 (explaining “tailored” nature of detailing); Bernard J. Garbutt III & Melinda E. Hofmann, *Recent Developments in Pharmaceutical Products Liability Law: Failure to Warn, the Learned Intermediary Defense, and Other Issues in the New Millennium*, 58 FOOD & DRUG L.J. 269, 271 (2003) (discussing PSRs as providing important link between physicians and pharmaceutical companies).

5. See *Ayotte*, 550 F.3d at 56 (“Detailing works: that it succeeds in inducing physicians to prescribe larger quantities of brand-name drugs seems clear (even if the exact magnitude of that effect is not).” (citations omitted)); *In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637, 648-51 (S.D.N.Y. 2009) (emphasizing role of PSRs in purchase cycle of prescription drugs), *vacated*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254, 257-60 (D. Conn. 2008) (reasoning that “as result of promotional efforts of PSRs, the physicians whom they solicited may have written prescriptions that caused their patients to purchase drugs manufactured by pharmaceutical company that employed them”); GRAHAM DUKES, THE LAW AND ETHICS OF THE PHARMACEUTICAL INDUSTRY 202 (2006) (“It is recognized in the pharmaceutical industry that the traveling representative (medical visitor, detailman) is for the industry the most effective form of persuasion which it possesses.”); David Orentlicher, *Prescription Data Mining and the Protection of Patients’ Interests*, 38 J.L. MED. & ETHICS 74, 76 (2010) (discussing detailing as more persuasive than advertisements).

6. See 21 U.S.C. §§ 351-60 (2006) (detailing extensive restrictions regarding pharmaceutical products under federal Food, Drug, and Cosmetic Act (FDCA)). Because of the highly regulated nature of the pharmaceutical industry, PSRs cannot legally sell pharmaceutical products directly to physicians. See 21 U.S.C. § 353(b)(1) (prohibiting pharmaceutical companies and PSRs from transferring title to prescription products directly to doctors or patients); see also *Novartis*, 593 F. Supp. 2d at 642 (explaining that PSRs persuade “physicians to write prescriptions that are ultimately used by patients” by obtaining “non-binding commitments” from physicians).

7. See *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 396-97 (D. Conn. 2009) (describing manner in which PSRs receive incentive compensation to receive “credit” for “sale” of prescription drugs to physicians), *aff’d*, 384 F. App’x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011); *Novartis*, 593 F. Supp. 2d at 653 (reasoning that PSRs obtain commitments to prescribe and “are credited with those sales and compensated accordingly by means of incentive payments”).

the archetypal business consultant.<sup>8</sup> As a result, courts are struggling to address whether PSRs are exempt from overtime pay under the Fair Labor Standards Act (FLSA).<sup>9</sup>

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8. See Steven R. Blackburn, *In re Novartis Wage and Hour Litigation*, in *TOP 20 FOOD AND DRUG CASES, 2009 & CASES TO WATCH, 2010*, at 159, 164 (John B. Reiss ed., 2010), available at [http://www.ebglaw.com/files/39680\\_FDLI\\_s%20Top%2020%20Food%20and%20Drug%20Cases%20-%20Chap%20%2012%20Blackburn%20\(Douglas%20Weiner\).PDF](http://www.ebglaw.com/files/39680_FDLI_s%20Top%2020%20Food%20and%20Drug%20Cases%20-%20Chap%20%2012%20Blackburn%20(Douglas%20Weiner).PDF) (differentiating PSRs from “old-fashioned, door-to-door salesmen”); Lars Noah, *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives?*, 47 *FOOD & DRUG L.J.* 309, 331 (1992) (discussing how “[d]etailing is not advertising in the traditional sense”).

9. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 401 (9th Cir.) (finding PSRs “share many more similarities than differences with their colleagues in other sales fields, and we hold that they are exempt from the FLSA overtime-pay requirement”), *cert. granted*, No. 11-204, 2011 WL 3608968 (U.S. 2011); *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 686 (S.D. Ind. 2009) (determining that PSR was “acting as a sales agent” because she “sought and received commitments, albeit nonbinding commitments, from physicians” to prescribe pharmaceutical company’s drugs); *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 742 (S.D. Tex. 2009) (concluding that medical sales consultants (PSRs) function as outside salespersons because they “make ‘sales’ by securing a physician’s commitment to write a prescription”), *vacated in part*, No. 4:07-cv-3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. SACV 07-00127-CJC(MLGx), 2009 WL 3326632, at \*6 (C.D. Cal. Feb. 6, 2009) (asserting that PSRs are outside salespersons because they “are precisely the type of employees envisioned when Congress established the outside salesman exemption from the FLSA”); *Delgado v. Ortho-McNeil, Inc.*, No. SACV 07-00263-CJC(MLGx), 2009 WL 2781525, at \*6 (C.D. Cal. Feb. 6, 2009) (stating that duties and responsibilities of PSRs could not be attributed to anything besides selling); *Novartis*, 593 F. Supp. 2d at 637, 648 (reasoning that failing to interpret PSRs as outside salespersons would ignore FLSA’s “spirit, purpose, and goals”); *Rivera v. Schering Corp.*, No. 08-1743-gw(JCx), 2008 WL 6953955, at \*3 n.3 (C.D. Cal. Aug. 14, 2008) (finding that PSRs “obtain[] orders” and, therefore, satisfy OSEE); *Brody v. AstraZeneca Pharm., LP*, No. CV 06-6862 ABC (MANx), 2008 WL 6953957, at \*8 (C.D. Cal. June 11, 2008) (arguing that PSR indirectly consummated sales but that it did not detract from “sales quality of [PSR]’s work”); *Menes v. Roche Labs., Inc.*, No. 2:07-cv-01444-ER-FFMx, 2008 WL 6600518, at \*1-2 (C.D. Cal. Jan. 7, 2008) (holding that PSRs were outside salespersons even though they did not sell prescription “products to medical personnel in the classic sense”); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1264 (C.D. Cal. 2007) (refusing to ignore logic that PSRs’ sales “efforts are rationally aimed at those determining the product’s purchase rather than the directed buyers of the product”); *D’Este v. Bayer Corp.*, No. CV 07-3206-JFW (PLAx), 2007 WL 6913682, at \*4 (C.D. Cal. Oct. 9, 2007) (interpreting physician as “buyer” who “place[s] an order” with PSR). *But see Novartis*, 611 F.3d at 153 (reversing district court’s decision and finding that PSRs merely promote products that are sold by another person); *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740, 748 (N.D. Ill. 2010) (acknowledging that PSRs “bear some indicia of salesmen” but ultimately finding that reps promoted but did not make sales); *Ruggeri*, 585 F. Supp. 2d at 272, 272 n.10 (recognizing “gap between a PSR’s marketing pitch and the ultimate transfer of the drugs to an individual patient-consumer” and refusing to “back-fit the FLSA to the practices of the industry”); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 471 (S.D.N.Y. 2008) (concluding that PSR’s duties consisted of promotional work, which did not constitute making sales).

Prompted by President Roosevelt's New Deal efforts, Congress enacted the FLSA in 1938 to rejuvenate the economy and provide a better standard of living for American workers.<sup>10</sup> Seeking to "promote economic justice and security for the lowest paid of [American] wage earners," Congress enacted minimum wage and maximum hour protections, including the requirement to pay employees overtime for working in excess of forty hours per week.<sup>11</sup> These early constraints on employers have evolved to become "among the nation's most important worker protections" today.<sup>12</sup> Congress, however, identified that gradations in employment existed between workers and, therefore, precluded "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesmen" from enjoying these protections.<sup>13</sup>

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10. See Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-19 (2006) (establishing congressional finding and declaration of policy to correct and eliminate poor working conditions); *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946) (discussing FLSA's enactment in 1938 as part of New Deal to protect workers from "substandard labor conditions"), *superseded by statute*, 29 U.S.C. § 202; 81 CONG. REC. 4983 (1937) (sending initial version of bill to Congress with message that America should give workers "a fair day's pay for a fair day's work"); Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2289 (1998) (explaining that FLSA worker protections stemmed from Roosevelt administration's "strengthened . . . resolve that there was to be no collar-color distinction in the wage and hour laws").

11. S. REP. NO. 81-640 (1949), *reprinted in* 1949 U.S.S.C.A.N. 2241, 2255; *see* 29 U.S.C. §§ 206, 207 (detailing minimum wage and maximum hour protections); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) ("The FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee . . . would be protected from the evil of overwork as well as underpay." (internal quotations omitted)).

12. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,122 (Apr. 23, 2004) (discussing FLSA as preeminent tool for enforcing and protecting employees' rights and wages). The current FLSA protections provide for minimum wages and overtime pay, requiring payment of time-and-a-half for every hour worked over forty hours per week. *See* 29 U.S.C. §§ 206, 207 (detailing minimum wage and maximum hour requirements); *see also* Joseph E. Tilson et al., *Hot Topics in Wage and Hour Law*, in 38TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 681, 685 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 802, 2009) ("Through 2008, the FLSA remains the most lucrative statute for the Department of Labor's Wage and Hour Division, which recovered \$140.2 million in minimum wage and overtime payments on behalf of more than 197,000 employees."); *Wages*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/wages/index.htm> (stating minimum wage is \$7.25 per hour as of June 24, 2009).

13. *See* 29 U.S.C. § 213 (detailing five exemptions to FLSA); *see* MARC LINDER, "TIME AND A HALF'S THE AMERICAN WAY": A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004, at 513-21, 678 (2004) (discussing necessity of worker protections but clarifying that they were not intended for all); Malamud, *supra* note 10, at 2223-24 (explaining that white-collar workers were previously unprotected because "pre-New Deal hours legislation was health-oriented, and the working conditions of white-collar workers were not as injurious to health as those of industrial workers").

Courts have echoed the sentiment that “[t]he goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection.”<sup>14</sup> Congress, however, never defined these exemptions from overtime pay, forcing courts to rely on conflicting interpretive guidance promulgated by the Department of Labor (DOL).<sup>15</sup> Unsurprisingly, courts have proved inconsistent in applying these exemptions, known as the “white-collar exemptions,” within the complexities of the modern American workplace.<sup>16</sup>

Further complicating matters for both courts and employers, the DOL revised its interpretative regulations regarding the white-collar exemptions in 2004.<sup>17</sup> As a result, pharmaceutical companies have witnessed a surge in collective actions filed by PSRs, alleging they were misclassified as exempt from overtime pay.<sup>18</sup> This issue is particularly important within the Third Circuit because the majority of pharmaceutical manufacturers

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14. *Nicholson v. World Bus. Network*, 105 F.3d 1361, 1363 (11th Cir. 1997); *see id.* (discussing purpose of FLSA but noting that “Congress removed ‘any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman’ from the FLSA’s strictures” (quoting 29 U.S.C. § 213(a)(1))); *see also* *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. at 22,123-24 (discussing rationale for white-collar exemptions).

15. *See* 29 U.S.C. §§ 203, 213 (defining employee broadly, but failing to define “executive, administrative, and professional” employee exemptions from overtime pay); *id.* § 204(b) (granting DOL authority to interpret statute’s provisions from “time to time”); Malamud, *supra* note 10, at 2289 (“Instead, the statute expressly authorized the Department of Labor to issue regulations interpreting these terms—making the choice to locate the decision in the agency rather than in the courts.”).

16. *See* Malamud, *supra* note 10, at 2220 (discussing how enumerated exemptions regarding executive, administrative, and professional employees are known as “FLSA’s so-called ‘white-collar exemptions’” and “are still the subject of controversy”); *see also* *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. at 22,127 (implying that pre-2004 revisions were complicated and confusing, resulting in divergent outcomes when applied in different factual scenarios).

17. *See* *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. at 22,122 (stating that revisions to white-collar exemptions were necessary because “workplace changes over the decades and federal case law developments are not reflected in the [pre-2004] regulations”); THOMPSON PUBL’G GRP., *FLSA SPECIAL REPORT: DOL’S NEW WHITE-COLLAR EXEMPTION RULES—WHAT EMPLOYERS NEED TO KNOW*, at iii (2004), available at <http://www.thompson.com/images/thompson/reports/FLSAreport.pdf> (discussing DOL’s “sweeping changes to its longstanding regulations implementing the ‘white-collar’ exemptions”).

18. *See* Tilson, *supra* note 12, at 685 (discussing how “[t]he 21st century has brought increased attention to the [FLSA] . . . [w]ith the advent of the ‘virtual workplace,’ telecommuting by employees, and flexible scheduling arrangements”); *id.* (asserting rise in suits brought by “groups of aggrieved workers seeking seven-figure damage awards . . . based on alleged misclassification”); Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 331 (1996) (“Few, if any, areas of employment law have proven themselves less adaptable to an evolving work force than the so-called white-collar exemption to the FLSA.”).

are located in the northeast corridor.<sup>19</sup> This concern, however, is not unique to PSRs; rather, it is representative of countless other employees in the modern American workforce who do not work conventional “nine-to-five” jobs.<sup>20</sup>

This Casebrief recognizes the current division developing among courts concerning whether PSRs have been wrongly misclassified as exempt from overtime pay.<sup>21</sup> Despite the Second Circuit’s more recent ruling in *In re Novartis Wage and Hour Litigation*,<sup>22</sup> this Casebrief identifies the

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19. See 2011-2012 Pharm Country: The Northeast Corridor’s Life Science Community, BIOSPACE.COM, [http://www.biospace.com/hotbed\\_map.aspx?ContentEntityID=934](http://www.biospace.com/hotbed_map.aspx?ContentEntityID=934) (last updated 2011) (depicting map of pharmaceutical manufacturers, which heavily populate Pennsylvania and New Jersey); *States Fact Sheets*, in DEP’T OF HEALTH & HUMAN SERVS., U.S. FOOD AND DRUG ADMINISTRATION, FISCAL YEAR 2010: JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 325 (2009), available at <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM153517.pdf> (recognizing that pharmaceutical industry has strong presence in Pennsylvania and New Jersey).

20. See Ashley M. Rothe, Comment, *Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS U. L.J. 709, 711 (2010) (drawing parallel between modern workplace demands on white-collar workers and industrial sweatshops (citing JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARDS IN CORPORATE AMERICA (2001))).

21. See *Smith v. Johnson & Johnson*, No. 06-4787 (JLL), 2008 WL 5427802 (D.N.J. Dec. 30, 2008) (finding PSRs met administrative employee exemption (AEE) but failing to address whether PSRs also qualified for outside sales employee exemption (OSEE)), *aff’d*, 593 F.3d 380 (3d Cir. 2010); *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 887 (E.D. Pa. 1982) (holding that “detail person” for pharmaceutical manufacturer qualified was exempt under AEE). Although both district courts within the Third Circuit that addressed the exemption status of PSRs determined that PSRs were exempt from the FLSA’s overtime pay requirements, the three district courts within the Second Circuit were not as consistent. Compare *In re Novartis Wage and Hour Litig.*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009) (holding PSRs were exempt under both AEE and OSEE), *vacated*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), with *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008) (determining that PSRs were not exempt under OSEE), and *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008) (finding PSRs were not exempt under OSEE but would likely be exempt under AEE). Although the Third Circuit in *Smith* affirmed the district court’s decision, the Second Circuit’s decision in *Novartis* both reversed the district court’s holding and contradicted the Third Circuit’s decision in *Smith*. Compare *Smith*, 593 F.3d 280 (affirming district court’s decision that PSRs were exempt under AEE), with *Novartis*, 611 F.3d 141 (holding PSRs were not exempt under either OSEE or AEE). As a result, more recent decisions within the Second and Third Circuits have followed their respective circuit holdings, deepening the split. Compare *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669 (W.D. Pa. 2009) (asserting PSRs qualified for AEE), *aff’d*, 372 F. App’x 246 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010), and *Jackson v. Alpharma, Inc.*, No. 07-3250 (GEB-DEA), 2010 WL 2869530 (D.N.J. July 19, 2010) (following Third Circuit’s decision in *Smith* and declaring PSRs exempt under AEE), with *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385 (D. Conn. 2009) (stating PSRs were not exempt from FLSA overtime pay requirements), *aff’d*, 384 F. App’x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011).

22. 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).



Third Circuit's decision in *Smith v. Johnson & Johnson*<sup>23</sup> as controlling.<sup>24</sup> Part II examines the white-collar exemptions both before and after the DOL's 2004 revisions and includes an account of the DOL's interpretive guidance.<sup>25</sup> Additionally, Part II discusses the foundational district court decisions and the Third Circuit's approach pre-*Smith*.<sup>26</sup> Acknowledging the Third Circuit as the first circuit court to address the exemption status of PSRs, Part III characterizes the Third Circuit's decision in *Smith* as a corollary to the district court's decision.<sup>27</sup> Part III also distinguishes the Third Circuit's approach as demonstrating unprecedented willingness to consider the realities of the pharmaceutical industry and to challenge the "controlling weight" of past precedent.<sup>28</sup> Part IV analyzes the Third Circuit's decision in *Smith* in light of the Second Circuit's conflicting decision in *Novartis* and exposes the DOL's influence on subsequent decisions as undeserved.<sup>29</sup> Part IV also examines the impact of the circuit split on the pharmaceutical industry and forecasts the impact of the Obama Administration's pledge to target employee misclassification.<sup>30</sup> Finally, Part V translates the Third Circuit's analysis in *Smith* into practical strategies for employers and practitioners.<sup>31</sup>

## II. MEDICAL HISTORY ON FILE

On June 25, 1938, Congress enacted the FLSA, which established a national minimum wage and guaranteed "time-and-a-half" as overtime

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23. 593 F.3d 280 (3d Cir. 2010).

24. *Compare id.* (incorporating realities of industry and recognizing past precedent as irrelevant due to DOL's revisions), *with Novartis*, 611 F.3d at 149 (performing analysis of PSR's duties under both OSEE and AEE but according DOL's amicus brief with controlling weight, which was essentially outcome-determinative).

25. For a further discussion of the statutory framework of the FLSA's white-collar exemptions, the AEE and OSEE pre- and post-2004, and the DOL's interpretive guidance, see *infra* notes 32-66 and accompanying text.

26. For a further discussion of the judicial framework of district court decisions prior to *Smith* and the Third Circuit's approach pre-*Smith*, see *infra* notes 67-83 and accompanying text.

27. For a further discussion of the foundation for the Third Circuit's decision in *Smith*, see *infra* notes 84-89, 97-109, and accompanying text.

28. For a further discussion of the Third Circuit's analysis in *Smith*, see *infra* notes 110-17 and accompanying text.

29. For a further discussion of the Second Circuit's contradictory decision in *Novartis* and how the circuit split has impacted subsequent decisions, see *infra* notes 118-43 and accompanying text.

30. For a further discussion of the impact of both the circuit split and the Obama Administration's 2011 efforts to back the DOL's fight against employee misclassification, see *infra* notes 144-49 and accompanying text.

31. For a further discussion of strategies for employers and practitioners, see *infra* notes 150-58 and accompanying text.

pay.<sup>32</sup> Congress, however, was clear that the reach of the minimum wage and overtime pay protections was limited.<sup>33</sup> Congress, therefore, recognized the following types of “white-collar employees” as exempt from these protections: (1) executive; (2) administrative; (3) professional; and (4) outside sales.<sup>34</sup> Although abstaining from defining the white-collar exemptions, Congress delegated authority to the Secretary of Labor to provide interpretive guidance, which has taken the form of codified regulations, opinion letters, and amicus briefs.<sup>35</sup> Nevertheless, courts have failed to consistently apply the DOL’s interpretive guidance when determining whether PSRs are “plainly and unmistakably within [the] terms and spirit” of either the administrative employee exemption (AEE) or outside sales employee exemption (OSEE).<sup>36</sup>

#### A. Statutory Examination

Prior to 2004, the DOL’s regulations consisted of somewhat ambiguous multi-part tests to determine whether a PSR satisfied the requirements for either the AEE or OSEE.<sup>37</sup> Attempting to modernize and streamline

32. See FLSA, 29 U.S.C. §§ 201-19 (2006) (enumerating “Fair Labor Standards”); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945) (stating basic goal of FLSA).

33. See 29 U.S.C. § 213 (listing exemptions to minimum wage and maximum hour protections); Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 LAB. LAW. 357, 361 (2000) (asserting that white-collar exemptions demonstrate that FLSA “was never intended to cover all employees”).

34. See 29 U.S.C. § 213 (identifying “any employee employed in a bona fide executive, administrative, professional, . . . or in the capacity of an outside salesman” as exempt from overtime pay under FLSA); Faillace, *supra* note 33, at 361 (explaining that white-collar exemptions functioned as “line-drawing tools between the hourly blue-collar clerical and line-workers, and the salaried white-collar supervisors and managers”).

35. See 29 U.S.C. § 213(a)(1) (delegating power to Administrator (now Secretary of Labor) to “define [ ] and delimit [ ]” white-collar exemptions). Congress ensured that the boundaries of these exemptions would not remain static and charged the Secretary of Labor with periodically revising and adjusting the codified regulations to comport with the evolving workplace. See *id.* § 204(b) (asserting Administrator had discretion to interpret and update exemptions); see also *Auer v. Robbins*, 519 U.S. 452, 463 (1997) (discussing Secretary of DOL’s authority to resolve statutory ambiguities); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (affirming agency’s authority to interpret statute).

36. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (discussing difficulty of applying exemptions). Courts, however, cannot interpret the white-collar exemptions based solely on their face value. See *Nicholson v. World Bus. Network*, 105 F.3d 1361, 1364 (11th Cir. 1997) (“To read the FLSA blindly, without appreciation for the social goals Congress sought, would also do violence to the FLSA’s spirit.”).

37. See 29 C.F.R. §§ 541.2, 541.5 (2003) (enumerating pre-2004 AEE and OSEE tests); see also *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (reminding courts to narrowly construe exemptions under FLSA); *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1307 (11th Cir. 2009) (warning that courts must

the white-collar exemptions, the DOL revised the regulations in 2004 by consolidating and clarifying the criteria for distinguishing between exempt and nonexempt salaried employees.<sup>38</sup> In addition to the pre- and post-2004 revisions, the DOL has also supplied both solicited opinion letters and unsolicited amicus briefs, which courts have typically accorded with controlling weight when determining the exemption status of PSRs.<sup>39</sup>

### 1. *Pre-2004 Revisions*

Prior to the DOL's 2004 revisions, the AEE consisted of a "long test" and a "short test," each of which consisted of two subtests: (1) the "salary basis test"; and (2) the "duties test."<sup>40</sup> To satisfy the relevant provisions under the AEE long test, a PSR was required to earn a minimum salary of \$155 per week and perform four pertinent duties: (1) primarily perform "office or nonmanual work" "of substantial importance" "directly related to management policies or general business" ("primary duty prong"); (2) "customarily and regularly exercise[ ] discretion and independent judgment" ("discretion and independent judgment prong"); (3) "perform[ ] under only general supervision"; and (4) devote eighty percent of one's workweek to the performance of exempt duties.<sup>41</sup> Alternatively, to satisfy the relevant provisions under the AEE short test, a PSR needed to: (1) earn \$250 per week and (2) satisfy both the primary duty prong and the discretion and independent judgment prong.<sup>42</sup>

Unlike the AEE, the pre-2004 OSEE consisted of a lone short test and did not mandate a minimum salary.<sup>43</sup> To satisfy the relevant provisions, the OSEE required a PSR to be "customarily and regularly engaged away from his employer's place . . . of business" for the purpose of either: (1)

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"navigate a course between a rock and a hard place" and "narrowly construe the exemption[s] without diminishing the spirit of its parent legislation").

38. See *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 870 (7th Cir. 2008) (discussing how 2004 revisions simplified white-collar exemptions); *Defining and Delineating the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,126 (Apr. 23, 2004) (explaining that 2004 revisions were made to streamline, organize, and update regulations).

39. See *Chevron*, 467 U.S. at 844 ("[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." (citing *United States v. Morton*, 467 U.S. 822, 834 (1984))).

40. See 29 C.F.R. § 541.2 (2003) (detailing pre-2004 requirements necessary to satisfy AEE under either "long test" or "short test"); *Side-By-Side: Overtime Security for 21st Century Workers*, U.S. DEP'T OF LABOR [hereinafter *Regulation Comparison Chart*], [http://www.dol.gov/whd/regs/compliance/fairpay/side-by-side\\_PF.htm](http://www.dol.gov/whd/regs/compliance/fairpay/side-by-side_PF.htm) (last visited Aug. 29, 2011) (comparing old and new white-collar exemption tests).

41. See 29 C.F.R. § 541.2 (2003) (specifying salary and duty requirements under AEE long test).

42. See *id.* (detailing salary and duty requirements of AEE short test); *Regulation Comparison Chart*, *supra* note 40 (summarizing pre-2004 AEE "short test").

43. Compare 29 C.F.R. § 541.5 (2003) (requiring that employee must only meet requirements of pre-2004 OSEE short test), with 29 C.F.R. § 541.2 (2003) (providing that employee can meet pre-2004 AEE by satisfying requirements of either long test or short test).

“[m]aking sales within the meaning of section 3(k) of the [FLSA]” or (2) [o]btaining orders or contracts.”<sup>44</sup> Further, a PSR needed to devote eighty percent of the workweek to exempt duties.<sup>45</sup> Additionally, the pre-2004 OSEE included an “indicia of sales” test, which was often used because PSRs perform a combination of sales and promotional work.<sup>46</sup>

## 2. DOL’s 2004 Revisions

Acknowledging that the framework of the pre-2004 white-collar exemptions “reflect[ed] the best evidence of the American workplace a half-century ago,” the DOL adapted the regulations to mirror the modern workplace.<sup>47</sup> Following the revisions, the AEE consisted of a single standard test, which fundamentally maintained the pre-2004 “salary basis test” and “duties test.”<sup>48</sup> To satisfy the revised salary requirement, a PSR must now earn a minimum of \$455 per week, or \$22,660 per year.<sup>49</sup> Additionally, the revisions borrowed the pre-2004 dual-prong duties test, but added a qualifying phrase to the primary duty prong, which further requires a PSR to exercise one’s primary duty “with respect to matters of significance.”<sup>50</sup>

In addition to providing examples of administrative exemptions, the 2004 revisions used simplified language to flesh out the respective require-

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44. See 29 C.F.R. § 541.5 (2003) (detailing pre-2004 requirements necessary to satisfy OSEE short test); *Regulation Comparison Chart, supra* note 40 (summarizing pre-2004 OSEE short test).

45. See 29 C.F.R. § 541.5(b) (2003) (requiring that no more than twenty percent of employee’s work could be nonexempt); *Regulation Comparison Chart, supra* note 40 (requiring that majority of employee’s duties constitute exempt work).

46. See 29 C.F.R. § 541.505(e) (2003) (listing “indicia of sales” factors, which were considered when employee performed combination of selling and promotional work). *But see* *Nielson v. Devry, Inc.*, 302 F. Supp. 2d 747, 756-58 (W.D. Mich. 2003) (arguing that indicia of sales factors cannot be considered in isolation).

47. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (concluding that pre-2004 regulations were outdated because “the structure of the workplace, the type of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy . . . has long been altered”).

48. *Compare* 29 C.F.R. § 541.200 (2005) (enumerating single AEE test), *with* 29 C.F.R. § 541.2 (2003) (delineating two alternative tests to satisfy pre-2004 AEE: (1) “long test” or (2) “short test”).

49. See 29 C.F.R. § 541.200 (2005) (specifying salary requirements for post-2004 AEE test); *Regulation Comparison Chart, supra* note 40 (comparing salary requirements for pre-2004 and post-2004 AEE test).

50. *Compare* 29 C.F.R. § 541.200 (2005) (adding qualifying phrase of “with respect to matters of significance” to primary duty prong of duties test (emphasis added)), *with* 29 C.F.R. § 541.205(a) (2003) (limiting “directly related” portion of primary duty prong to employees who perform work “of substantial importance to the management or operation of the business” (emphasis added)).

ments of the AEE's modified dual prongs.<sup>51</sup> The DOL, however, may have traded one problem for another as courts are now struggling to gauge whether PSRs exercise their primary duties "with respect to matters of significance."<sup>52</sup> Further complicating this determination is the DOL's suggestion that PSRs must now additionally meet two or three factors, which are delineated in the discretion and independent judgment prong.<sup>53</sup>

Similar to the revised AEE, the revised OSEE preserves the framework of the pre-2004 paradigm.<sup>54</sup> Retaining the former short test, the OSEE still requires a PSR's primary duty to consist of either "making sales" or "obtaining orders."<sup>55</sup> Additionally, the revised OSEE maintains the supplementary requirement that a PSR must "customarily and regularly engage [ ] [in work] away from the employer's place . . . of business" to satisfy the exemption.<sup>56</sup>

Although the revised OSEE departs from reliance on the "indicia of sales" test, new litigation surrounds the OSEE's modified focus on whether "the employee, in some sense, has made sales."<sup>57</sup> As a result, courts have

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51. See 29 C.F.R. § 541.203 (2005) (providing AEE examples); *id.* §§ 541.201, 541.202 (elaborating on requirements of dual prongs).

52. See *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740, 751 (N.D. Ill. 2010) (finding that PSRs do not exercise independent judgment with respect to matters of significance); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254, 275 (D. Conn. 2008) (discussing court's uncertainty that PSR's "independent judgments . . . were exercised and made with respect to 'matters of significance'"); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 476 (S.D.N.Y. 2008) (reasoning that PSRs would likely satisfy AEE even though industry "circumscribe[s]" manner in which PSRs exercise independent judgment with respect to matters of significance).

53. See 29 C.F.R. § 541.202(b) (2005) (providing non-comprehensive list of ten examples that would satisfy "directly related" portion of primary duty prong); *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,143 (Apr. 23, 2004) (discussing non-exhaustive list of ten factors "to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance").

54. See 29 C.F.R. § 541.500 (2005) (specifying salary and duty requirements needed to satisfy post-2004 OSEE); *Regulation Comparison Chart*, *supra* note 40 (comparing pre-2004 and post-2004 OSEE test).

55. See 29 C.F.R. § 541.500 (2005) (stating that employees will satisfy post-2004 OSEE by either "making sales within the meaning of Section 3(k) of [FLSA]" or "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer"); *id.* § 541.501 (providing expansive interpretation of "making sales or obtaining orders"); *see also* FLSA, 29 U.S.C. § 203(k) (2006) (defining "sale").

56. 29 C.F.R. § 541.500 (2005) (delineating two requirements to satisfy post-2004 OSEE test); *id.* § 541.502 (requiring that employee must also regularly work "away from employer's place of business" to satisfy post-2004 OSEE test).

57. *Compare* *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. at 22,162 ("An employer cannot [apply the outside sales exemption] unless it demonstrates that the employee, *in some sense, has made sales.*" (emphasis added)), *and* 29 C.F.R. § 541.500 (2005) (removing indicia of sales test), *with* 29 C.F.R. § 541.505(e) (2003) (listing indicia of sales factors). Courts, however, have strug-

faced the challenge of deciding whether the doctrine of *ejusdem generis* precludes expansion of the definition of “sale.”<sup>58</sup> Courts, therefore, have tended to err on the side of caution, finding PSRs as exempt under the AEE rather than the OSEE.<sup>59</sup>

### 3. DOL’s Interpretive Guidance

Although FLSA requirements are set by statute and “define[d] and delimit[ed]” in the regulations, the DOL provides additional interpretive guidance through opinion letters and amicus briefs.<sup>60</sup> Courts, employers, and employees, in turn, rely on this guidance to determine how the requirements apply to specific factual situations.<sup>61</sup> Until recently, the DOL selectively responded to written requests submitted by employers, inquir-

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gled to deal with the implications of the revised OSEE test. *See, e.g.*, *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1265 (10th Cir. 1999) (holding that OSEE cannot apply “if the employee in question does not actually consummate the sale”); *In re Novartis Wage and Hour Litig.*, 593 F. Supp. 2d 637, 650 (S.D.N.Y. 2009) (finding that PSRs “make sales in the sense that sales are made in the pharmaceutical industry”), *vacated*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *Ruggeri*, 585 F. Supp. 2d at 270-72 (finding that indicia of sales could not be used as alternative test).

58. *See* 29 U.S.C. § 203(k) (defining “sale”); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 138 (2001) (defining doctrine of *ejusdem generis* as “interpretive maxim” which states that “when specific terms are followed by a general one, the latter is meant to cover only examples of the same sort as the preceding specifics”); *Novartis*, 611 F.3d at 153 (discussing “*ejusdem generis*-type interpretation” of sale).

59. *See generally* *Jackson v. Alpharma, Inc.*, No. 07-3250 (GEB-DEA), 2010 WL 2869530 (D.N.J. July 19, 2010) (finding PSRs exempt under AEE); *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 687 (W.D. Pa. 2009) (same), *aff’d*, 372 F. App’x 246 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010); *Smith v. Johnson & Johnson*, No. 06-4787 (JLL), 2008 WL 5427802 (D.N.J. Dec. 30, 2008) (finding PSRs exempt under AEE but not OSEE), *aff’d*, 593 F.3d 280 (3d Cir. 2010).

60. *See* 29 U.S.C. §§ 201-19 (enacting statute); *id.* § 213(a)(1) (delegating power to Secretary of Labor to “define[ ] and delimit[ ]” white-collar exemptions); 29 C.F.R. § 541 (2003) (interpreting FLSA through regulations). The DOL, however, has also issued supplementary guidance in opinion letters and amicus briefs. *See, e.g.*, WAGE & HOUR DIV., DEP’T OF LABOR, OPINION LETTER FLSA2006-16 (May 22, 2006), *available at* 2006 WL 1698305 (responding to inquiry concerning whether employees who solicit charitable donations are exempt under OSEE); WAGE & HOUR DIV., DEP’T OF LABOR, OPINION LETTER FLSA 2000-23 (July 17, 2000), *available at* 2000 DOLWH LEXIS 23 (addressing concern as to whether executive secretary was exempt under AEE); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *Novartis*, 611 F.3d 141 (No. 09-0437-cv), 2009 WL 3405861 (arguing that PSRs should not be exempt from overtime pay); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011) (No. 10-15257), 2010 WL 5854250 [hereinafter *Christopher* Brief] (same).

61. *See Novartis*, 611 F.3d at 144 (agreeing with views expressed in Secretary of DOL’s amicus brief); *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 886 n.2 (E.D. Pa. 1982) (stating that DOL’s 1945 Opinion Letter was not dispositive but reasoning that it provided “some further evidence” to determine that “detail person” was exempt from overtime pay).

ing about the exemption status of particular employees based on stipulated facts.<sup>62</sup>

Because the DOL determined that it will no longer provide fact-specific opinion letters to employers, the Third Circuit's decision in *Smith* provides direction for other courts seeking to challenge the controlling deference typically afforded to both opinion letters and amicus briefs.<sup>63</sup> Although district and circuit courts have previously relied on both of these for guidance, neither have the force and effect of law and, therefore, cannot warrant the same degree of deference accorded to the regulations.<sup>64</sup> Additionally, the *Smith* decision provides a paradigm for courts wishing to break away from precedential cases; the Third Circuit recognized that "controlling" cases often relied on supplementary interpretive guidance based on the pre-2004 regulations (now outdated).<sup>65</sup> Courts, therefore, must now be wary of cases decided prior to the DOL's 2004 revisions as well as any interpretive guidance that provided the basis of those holdings.<sup>66</sup>

## B. Judicial Examination

### 1. District Court Decisions Pre-Smith

Prior to the Third Circuit's decision, only two district courts within the circuit specifically addressed the exemption status of PSRs.<sup>67</sup> Both district courts, however, were hesitant to find PSRs exempt under the OSEE

62. See *Wage and Hour Division (WHD): Rulings and Interpretations*, U.S. DEPT OF LABOR, <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Feb. 15, 2011) (stating that DOL will no longer issue fact-specific opinion letters, implying that they were inefficient and unproductive).

63. See *DOL Replaces Fact-Specific Opinion Letters with More Broadly Applicable "Administrator Interpretations"*, THOMPSON, Mar. 24, 2010, <http://www.thompson.com/public/printpage.jsp?id=2730&pageid=newsbrief> (discussing how DOL will now "provide general interpretation of the laws and regulations applicable to all"); *Wage and Hour Division (WHD): Rulings and Interpretations*, *supra* note 62 (asserting that DOL will now issue "Administrator Interpretations" instead of fact-specific opinion letters).

64. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (discussing controlling weight accorded to interpretations by Secretary of DOL); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (explaining why Secretary's regulations are accorded deferential authority). *But see* *Schaefer-LaRose v. Eli Lilly & Co.*, No. 1:07-cv-1133-SEB-TAB, 2010 WL 3892464, at \*2 (S.D. Ind. Sept. 29, 2010) (refusing to revisit exemption analysis of PSR at issue on basis of amicus brief that DOL submitted in *Novartis*); *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2010 WL 396300, at \*1 (D. Ariz. Feb. 1, 2010) (explaining why DOL's amicus brief was not entitled to controlling deference), *aff'd*, 635 F.3d 383, *cert. granted*, No. 11-204, 2011 WL 3608968 (U.S. 2011).

65. See *Smith v. Johnson & Johnson*, 593 F.3d 280, 286 (3d Cir. 2010) (departing from prior precedent), *aff'g*, No. 06-4787 (JLL), 2008 WL 5427802, at \*8 (D.N.J. Dec. 30, 2008) (explaining why court departed from prior precedent in Third Circuit).

66. See *id.* (establishing new precedent).

67. See *Smith*, 2008 WL 5427802, at \*4-13 (addressing whether PSR at issue was exempt from overtime pay under either OSEE or AEE); *Cote v. Burroughs*

and, instead, held that PSRs qualified for exemption status under the AEE.<sup>68</sup> Interestingly, one of the district courts relied heavily on a 1945 DOL Opinion Letter, which stated that medical “detailers” were exempt from the FLSA, in order to determine that the PSR at issue was an administrative employee and, therefore, exempt from overtime pay requirements.<sup>69</sup> In district courts outside of the Third Circuit, pharmaceutical companies have enjoyed similar success pre-*Smith*, winning six out of eight cases and finding PSRs exempt under the AEE, OSEE, or both.<sup>70</sup>

## 2. *Third Circuit’s Approach Pre-Smith*

Prior to the Third Circuit’s decision in *Smith, Martin v. Cooper Electric Supply Co.*<sup>71</sup> controlled as precedent within the circuit regarding the AEE.<sup>72</sup> Applying *Icicle Seafoods, Inc. v. Worthington*,<sup>73</sup> the Third Circuit in *Martin* determined that an employee’s exemption status under the FLSA is a question of law when the employee’s job responsibilities are not disputed.<sup>74</sup> Borrowing the rationales in *Arnold v. Ben Kanowsky, Inc.*<sup>75</sup> and

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Wellcome Co., 558 F. Supp. 883, 885-88 (E.D. Pa. 1982) (addressing whether pharmaceutical detail person at issue was exempt under AEE).

68. See *Smith*, 2008 WL 5427802, at \*13 (finding PSR exempt under AEE but not OSEE); *Cote*, 558 F. Supp. at 887 (finding detail person was exempt under AEE).

69. See *Cote*, 558 F. Supp. at 886 n.2 (stating that DOL’s 1945 Opinion Letter provided additional evidence to support court’s conclusion); Wage & Hour Div., Dep’t of Labor, Opinion Letter 1943-48, 1 Lab. L. Rep. (CCH) ¶ 33093 (stating that medical “detailists” are exempt from overtime pay under FLSA).

70. See *In re Novartis Wage and Hour Litig.*, 593 F. Supp. 2d 637, 637 (S.D.N.Y. 2009) (finding PSR to be exempt under both OSEE and AEE), *vacated*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *Rivera v. Schering Corp.*, No. CV 08-1743-GW(JCx), 2008 WL 6953955, at \*3-4 (C.D. Cal. Aug. 14, 2008) (determining that PSR satisfied OSEE); *Brody v. AstraZeneca Pharm., LP*, No. CV 06-6862 ABC (MANx), 2008 WL 6953957, at \*9 (C.D. Cal. June 11, 2008) (same); *Menes v. Roche Labs., Inc.*, No. 2:07-cv-01444-ER-FFMx, 2008 WL 6600518, at \*2 (C.D. Cal. Jan. 7, 2008) (same); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1264 (C.D. Cal. 2007) (same); *D’Este v. Bayer Corp.*, No. CV 07-3206-JFW (PLAx), 2007 WL 6913682, at \*5 (C.D. Cal. Oct. 9, 2007) (finding that PSR qualified for OSEE and, therefore, it was unnecessary to address whether PSR additionally qualified for AEE). *But see* *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008) (concluding that PSR was not exempt under OSEE); *Amendola v. Bristol-Myers Squibb, Co.*, 558 F. Supp. 2d 459, 462 (S.D.N.Y. 2008) (establishing that although PSR was not exempt under OSEE, PSRs were likely subject to AEE).

71. 940 F.2d 896 (3d Cir. 1991).

72. See *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010) (discussing previous Third Circuit decision on point); *Smith*, 2008 WL 5427802, at \*8-13 (discussing reliance on pre-2004 regulations by precedential case in Third Circuit (citing *Martin*, 940 F.2d 896)).

73. 475 U.S. 709 (1986).

74. See *id.* at 714 (“The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law.”); *Martin*, 940 F.2d at 900 (discussing how court can review district court’s application of facts).

75. 361 U.S. 388 (1960).



*Idaho Sheet Metal Works, Inc. v. Wirtz*,<sup>76</sup> the Third Circuit in *Martin* reasoned that white-collar exemptions must “be ‘narrowly construed against the employer[ ]’” and that the employer bears the burden of proof regarding the exemption status of employees, respectively.<sup>77</sup> Additionally, the court relied on the “administrative-production work dichotomy” in the pre-2004 regulations, finding that inside salespersons employed by a wholesale distributor were not exempt under the AEE because they did not satisfy the primary duty prong by either “promoting sales” or performing “work of substantial importance.”<sup>78</sup>

Because *Martin* did not address the OSEE, the Third Circuit pre-*Smith* relied on the Tenth Circuit’s decision in *Jewel Tea Co. v. Williams*,<sup>79</sup> which set forth the rationale of the OSEE.<sup>80</sup> Relying on the indicia of sales test from the pre-2004 regulations, the Tenth Circuit in *Jewel Tea* held that the route salesperson was exempt from the FLSA overtime pay requirements.<sup>81</sup> Unlike *Martin*, however, the rationale applied in *Jewel Tea* remains instructive because the indicia of sales test is still viewed as an important tool to guide courts despite being removed from the revised regulations.<sup>82</sup> The Third Circuit in *Smith*, therefore, recognized the need to distinguish *Martin* and look beyond the confines of the Third Circuit for AEE guidance regarding PSRs.<sup>83</sup>

### III. INITIAL DIAGNOSIS

The district court in *Smith* was the first district court in the Third Circuit to address the exemption status of PSRs in almost two decades.<sup>84</sup>

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76. 383 U.S. 190 (1966).

77. *Martin*, 940 F.2d at 900 (quoting *Wirtz*, 383 U.S. at 206) (citing *Arnold*, 361 U.S. at 392).

78. See *Martin*, 940 F.2d at 901 (italics omitted) (affirming district’s court use of administrative-production work dichotomy); 29 C.F.R. § 541.205(a) (2003) (establishing importance of analyzing work as administrative or productive); *id.* § 541.205(b) (explaining what would constitute administrative, as opposed to productive, work).

79. 118 F.2d 202 (10th Cir. 1941).

80. See *Martin*, 940 F.2d at 900 (analyzing whether employee was exempt under AEE only); *Jewel Tea*, 118 F.2d at 207-08 (providing paradigm of OSEE).

81. See *Jewel Tea*, 118 F.2d at 208 (paralleling indicia of sales test from pre-2004 regulations).

82. See *In re Novartis Wage and Hour Litig.*, 593 F. Supp. 2d 637, 648 (S.D.N.Y. 2009) (discussing rationale expressed in *Jewel Tea*), *vacated*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). Although the post-2004 regulations do not explicitly contain the indicia of sales test, it has an implied presence. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (echoing *Jewel Tea*’s rationale, giving it continued relevance).

83. See *Smith v. Johnson & Johnson*, 593 F.3d 280, 286 (3d Cir. 2010) (affirming that *Martin* was inapplicable because it was “distinguishable on the facts”).

84. See *Smith v. Johnson & Johnson*, No. 06-4787 (JLL), 2008 WL 5427802, at \*12 (D.N.J. Dec. 30, 2008) (determining that PSRs were exempt from overtime pay under AEE), *aff’d*, 593 F.3d 280. Prior to *Smith*, the exemption status of PSRs had

Prior to *Smith*, PSRs challenged their exemption status in district courts outside the Third Circuit on eight separate occasions.<sup>85</sup> Although employers enjoyed the bulk of the success, the resulting judgments reflected a reluctance to analyze whether PSRs were exempt from overtime pay under the AEE in addition to the OSEE.<sup>86</sup> The district court in *Smith*, however, characterized these recent decisions as unpersuasive and, instead, held that a PSR met the AEE but not the OSEE.<sup>87</sup> Affirming the district court's decision, the Third Circuit in *Smith* held that the PSR satisfied the AEE and, therefore, was properly classified as exempt from overtime pay under the FLSA.<sup>88</sup> Unlike the district court, however, the Third Circuit did not address whether the PSR at issue also qualified for the OSEE.<sup>89</sup>

#### A. *Patty Lee Smith's Self-Diagnosis*

From April 2006 to October 2006, Patty Lee Smith worked as a Senior Professional Sales Consultant for Johnson & Johnson (J & J), then the second-largest company in the pharmaceutical industry.<sup>90</sup> J & J employed Smith, as well as thousands of other PSRs, to promote its products to physicians according to specific company directives and industry regulations.<sup>91</sup>

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not been addressed by any district court within the Third Circuit in twenty-six years. *Compare id.* (holding PSRs exempt under AEE), *with* *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 883 (E.D. Pa. 1982) (holding that "detail person" was exempt under AEE).

85. For citation to the eight cases that were decided prior to Third Circuit's decision in *Smith*, see *supra* note 70 and accompanying text.

86. *See, e.g., Smith*, 2008 WL 5427802 (arguing it was unnecessary to explore whether PSRs satisfied additional exemptions); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 477 (S.D.N.Y. 2008) (failing to explore other exemptions despite insinuating that PSRs would likely meet AEE); *D'Este v. Bayer Corp.*, No. CV 07-3206-JFW (PLAx), 2007 WL 6913682 (C.D. Cal. Oct. 9, 2007) (examining whether PSR satisfied OSEE, but not AEE).

87. *See Smith*, 2008 WL 5427802, at \*6 (discussing why district court decisions outside of Third Circuit were irrelevant). *Compare id.* at \*4-12 (analyzing PSR under both OSEE and AEE and determining that PSR satisfied AEE but not OSEE), *with* *Rivera v. Schering Corp.*, No. 08-1743-gw(JCx), 2008 WL 6953955 (C.D. Cal. Aug. 14, 2008) (analyzing PSR under OSEE only); *Brody v. AstraZeneca Pharm., LP*, No. CV 06-6862 ABC (MANx), 2008 WL 6953957 (C.D. Cal. June 11, 2008) (same); *Menes v. Roche Labs., Inc.*, No. 2:07-cv-01444-ER-FFMx, 2008 WL 6600518 (C.D. Cal. Jan. 7, 2008) (same); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007) (same); *D'Este*, 2007 WL 6913682 (same).

88. *See Smith*, 593 F.3d at 282 (granting summary judgment for employer and determining that PSR satisfied AEE).

89. *Compare id.* at 286 n.4 (acknowledging that Third Circuit affirmed district court's decision without addressing OSEE), *with Smith*, 2008 WL 5427802, at \*4-12 (analyzing both OSEE and AEE).

90. *See Smith*, 2008 WL 5427802, at \*1 (discussing Patty Lee Smith's job title, employer, and length of employment); *see also Fortune 500 2006: Industry—Pharmaceuticals*, CNNMONEY, <http://money.cnn.com/magazines/fortune/fortune500/2006/industries/Pharmaceuticals/1.html> (last updated Apr. 17, 2006) (listing J & J as second largest pharmaceutical company in 2006).

91. *See* 21 C.F.R. § 203.20 (1988) (prohibiting direct sales of prescription drugs from PSRs to prescribers); *Smith*, 2008 WL 5427802, at \*1-2 (explaining na-

Specifically, Smith promoted Concerta, a Schedule II controlled substance used to treat attention-deficit hyperactivity disorder (ADHD), to company-identified target physicians using company-approved sales aids and “prepared ‘messages.’”<sup>92</sup> Smith, however, emphasized that she worked mostly unsupervised and exercised discretion to develop and implement a “strategic plan,” which served as a guide for how Smith planned her “calls,” developed her relationships, tailored her sales pitches, and allocated her budget.<sup>93</sup> Although Smith planned and executed her business strategy for a base salary of \$66,000, J & J reserved discretion to award Smith with a supplementary “bonus” if she achieved the requisite sales quotas.<sup>94</sup> After totaling the hours spent on her sales efforts, however, Smith believed that she was entitled to more than incentive compensation and brought action against her employer, seeking overtime pay under the FLSA.<sup>95</sup>

### B. *The District Court’s Differential Diagnosis*

Confronted with the issue of the exemption status of PSRs, the district court in *Smith* first analyzed the facts under the OSEE.<sup>96</sup> Notwithstanding the recent district court cases addressing this issue, the court held that these decisions did not provide persuasive guidance to determine whether Smith was exempt as an outside salesperson under the FLSA.<sup>97</sup> Instead, the court relied on the rationale of *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*<sup>98</sup> and the Third Circuit’s binding precedent of construing exemptions narrowly, concluding that Smith’s obligations as a PSR could not be reconciled with the “standard business-to-business sales posi-

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ture of Smith’s employment and identifying Smith’s role as “obtaining a commitments [sic] from the physician (including a commitment to prescribe Concerta) in order to increase sales via increasing prescriptions”); *see also* STUART O. SCHWEITZER, PHARMACEUTICAL ECONOMICS AND POLICY 87 (2d ed. 2007) (estimating that there is “a ratio of 1 sales representative for every 9 doctors”); Saul, *supra* note 3 (asserting that there are approximately 90,000 PSRs nationwide).

92. *See Smith*, 593 F.3d at 282 (discussing company materials and resources that J & J provided Smith); *Smith*, 2008 WL 5427802, at \*1 (discussing Smith’s extensive training to promote Concerta).

93. *See Smith*, 593 F.3d at 282-83 (explaining that Smith “had some discretion” despite industry regulations and J & J’s constraints); *Smith*, 2008 WL 5427802, at \*2 (discussing how Smith was rarely supervised and essentially ran her own business).

94. *See Smith*, 593 F.3d at 283 (explaining J & J’s discretion to award Smith with bonus); *Smith*, 2008 WL 5427802, at \*2 (asserting that bonus constituted “approximately 20% of Smith’s total compensation”).

95. *See Smith*, 593 F.3d at 283 (“After adding up the time she spent writing pre-visit reports, driving, conducting the visits, writing post-visit reports, and completing other tasks, Smith worked more than eight hours per day.”).

96. *See Smith*, 2008 WL 5427802, at \*4-7 (analyzing Smith’s duties as PSR under OSEE).

97. *See id.* at \*6 (explaining why district court cases decided outside of Third Circuit were not persuasive).

98. 585 F. Supp. 2d 254 (D. Conn. 2008).

tion” described in the OSEE.<sup>99</sup> Despite recognizing that the FLSA regulations did not account for sales transactions in the highly regulated nature of the pharmaceutical industry, the court was unwilling to interpret the ambiguity of Smith’s role as a PSR as exempt under the OSEE.<sup>100</sup>

The court, however, did not limit its analysis to the OSEE; the court further considered whether Smith qualified for the AEE.<sup>101</sup> Although Smith urged the court to again adhere to binding Third Circuit precedent and follow *Martin*, the court declined, reasoning that *Martin* relied on the pre-2004 regulations and, therefore, was “inapposite to the text of the current regulation at issue.”<sup>102</sup> Ironically, the court relied on *Reich v. John Alden Life Insurance Co.*,<sup>103</sup> which was decided prior to the 2004 revisions, and *Amendola v. Bristol-Myers Squibb Co.*,<sup>104</sup> which determined that the PSR at issue was non-exempt.<sup>105</sup> The court likened Smith to the marketing representatives in *Reich*, reasoning that Smith’s “role [was] as an educator and promoter.”<sup>106</sup> Although the court in *Amendola* determined that PSRs did not satisfy the OSEE, *Amendola* held that PSRs were “likely subject to”

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99. See *Smith*, 2008 WL 5427802, at \*5-6 (stating that *Ruggeri* analysis was “more persuasive on the issue of how the FLSA outside sales exemption is applied” than California district court cases); *id.* at \*7 (“[T]he Third Circuit has emphasized that exemptions to the FLSA are to be narrowly construed against employers, and . . . expanding the list of activities in the definition of sales to comprise the kind of presentation of information engaged in by Smith . . . represent[s] a bridge too far.” (citing *Davis v. Mountaire Farms, Inc.*, 453 F.3d 554, 556 (3d Cir. 2006))); see also *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 184 (3d Cir. 2000) (asserting that “FLSA exemptions should be narrowly construed against the employer”); *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 412 (3d Cir. 1992) (discussing employers’ burden of proof).

100. See *Smith*, 2008 WL 5427802, at \*5 (stating that Smith’s role as PSR “occupie[d] a somewhat ambiguous zone under the FLSA”); *id.* (discussing how FLSA regulations “describe a standard business-to-business sales position, but fail to address the thornier issues arising in highly regulated industries such as prescription pharmaceuticals”); *id.* at \*7 (acknowledging that physicians represent “a choke-point in the sale of pharmaceuticals” but finding that nature of pharmaceutical industry “insulates [physicians] from being amenable to ‘sales’”).

101. See *id.* at \*7-12 (analyzing Smith’s duties under AEE).

102. See *id.* at \*8-9 (stating that *Martin* relied on pre-2004 regulations, which required employees to “perform[ ] ‘work of substantial importance’” (quoting 29 C.F.R. § 541.201(a) (2003))). Because the DOL revised this language in 2004, the court asserted that *Martin*’s holding was irrelevant. See *id.* (discussing difference between pre-2004 and post-2004 regulations).

103. 126 F.3d 1 (1st Cir. 1997).

104. 558 F. Supp. 2d 459 (S.D.N.Y. 2008).

105. See *Reich*, 126 F.3d at 3 (determining that marketing representative was exempt under pre-2004 AEE); *Smith*, 2008 WL 5427802, at \*10-11 (describing *Reich* and *Amendola* as “instructive” and “[t]he two cases most on-point”); *Amendola*, 558 F. Supp. 2d at 475-77 (finding analysis of *Reich* persuasive, distinguishing *Martin*, and determining that PSR did not satisfy OSEE but would likely satisfy AEE).

106. See *Reich*, 126 F.3d at 11 (discussing district court’s opinion, which recognized that company’s success depended on marketing representatives promoting sales); *Smith*, 2008 WL 5427802, at \*10 (drawing similarities between Smith’s role as PSR and marketing representatives’ role in *Reich*).

the AEE.<sup>107</sup> Developing this rationale, the district court in *Smith* concluded that Smith's efforts to market and promote Concerta drove market demand and, therefore, satisfied the AEE by substantially "affect[ing] operation of 'a particular segment of the business.'"<sup>108</sup> Additionally, the court determined that Smith satisfied the requisite factors from the non-exhaustive "ten factor test," which are required to satisfy the discretion and independent judgment prong of the AEE test.<sup>109</sup>

### C. *The Third Circuit Concurs with Its Colleague*

Allowing the district court to do most of the heavy lifting, the Third Circuit in *Smith* essentially echoed the district court's holding.<sup>110</sup> Taking a parallel approach, the Third Circuit began its discussion with a brief summary of the white-collar exemptions and how Third Circuit precedent interpreted them.<sup>111</sup> The Third Circuit, however, condensed the district court's efforts by skipping the OSEE inquiry and concentrating solely on the AEE.<sup>112</sup> Adopting the district court's reliance on *Reich*, the Third Circuit concluded that Smith satisfied the AEE because she developed a "strategic plan . . . to maximize sales" and exercised a "high level of planning and foresight."<sup>113</sup>

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107. See *Amendola*, 558 F. Supp. 2d at 462, 470, 477 (determining that PSRs were not exempt under OSEE but that employer could likely demonstrate that PSRs satisfy requirements for AEE).

108. See *Smith*, 2008 WL 5427802, at \*10-11 (citation omitted) (discussing how Smith, like marketing representatives in *Amendola*, impacted business operations); see also *id.* at \*11 (distinguishing Smith's role from sales representatives in *Martin* (citing *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 901, 903-04 (3d Cir. 1991))).

109. See *Smith*, 2008 WL 5427802, at \*12 (explaining that Smith satisfied two factors because her "work in driving the market for Concerta within her territory 'affect[ed] business operations to a substantial degree,' and she . . . '[wa]s involved in planning long- or short-term business objectives' related to the marketing of Concerta within her territory"); 29 C.F.R. § 541.202(b) (2005) (listing non-exclusive factors, which can be used to determine whether employee meets requirements of discretion and independent judgment prong).

110. Compare *Smith v. Johnson & Johnson*, 593 F.3d 280, 286 n.4 (3d Cir. 2010) (affirming district court's decision that PSR was exempt under AEE without addressing OSEE), with *Smith*, 2008 WL 5427802, at \*4-13 (analyzing Smith's duties under both OSEE and AEE).

111. Compare *Smith*, 593 F.3d at 284 (asserting that employees who work more than forty hours per week are entitled to overtime pay under FLSA (citing 29 U.S.C. §§ 207, 213 (2006))), and *id.* at 284 (stating that white-collar exemptions under FLSA should be narrowly construed against employer (citing *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008))), and *id.* (explaining controlling weight of regulations (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984))), with *Smith*, 2008 WL 5427802, at \*4-5 (discussing exemptions from FLSA overtime provisions).

112. Compare *Smith*, 593 F.3d at 284 (limiting focus to AEE), with *Smith*, 2008 WL 5427802, at \*4-13 (analyzing Smith's role as PSR under both OSEE and AEE).

113. See *Smith*, 593 F.3d at 285 (relying heavily on Smith's deposition testimony, which emphasized "the independent and managerial qualities that her position required," to reach conclusion that she satisfied AEE); *id.* (drawing

Interestingly, the Third Circuit asserted its holding first; then, the Third Circuit backtracked to explain how the court arrived at its decision in spite of *Martin*.<sup>114</sup> The Third Circuit agreed with the district court that its decision in *Martin* predated the 2004 revisions to the regulations and, therefore, warranted a departure from prior circuit precedent and a need to look elsewhere for guidance.<sup>115</sup> Although the Third Circuit made a fleeting reference to the *Cote v. Burroughs Wellcome Co.*<sup>116</sup> decision, the court's decision ultimately rested heavily on Smith's deposition testimony and the specific facts of the case.<sup>117</sup>

#### IV. A "SECOND" OPINION

The Third Circuit's holding in *Smith* marked a paramount decision by an appellate court regarding the exemption status of PSRs.<sup>118</sup> The court, however, added a qualifying footnote, which recognized the possibility of achieving a different result given different facts.<sup>119</sup> Although the Third Circuit forfeited the opportunity to firmly establish the proper FLSA classification of PSRs, the court's decision in *Smith* remains instructive, especially regarding the AEE analysis.<sup>120</sup>

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comparison between Smith's role as PSR and marketing representatives in *Reich*, who satisfied AEE because they "dealt with licensed independent insurance agents who, in turn, dealt with purchasers of insurance products" (citing *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 3-5, 12 (1st Cir. 1997))). Compare *id.* (distinguishing between Smith's role and PSR's role in *Reich*), with *Smith*, 2008 WL 5427802, at \*10 (relating Smith's role as "an educator and promoter" as similar to that of marketing representatives in *Reich*).

114. See *Smith* 593 F.3d at 285-86 (affirming district court's judgment and acknowledging that Third Circuit did "not overlook[ ]" its decision in *Martin*); *id.* at 286 (explaining that Third Circuit determined that *Martin* was "distinguishable on the facts" and, therefore, irrelevant).

115. See *id.* at 286 (affirming district court's decision that "changes in the Secretary's regulations since [*Martin*] make that case inapplicable here" (citing *Smith*, 2008 WL 5427802, at \*8-9)).

116. 558 F. Supp. 883 (E.D. Pa. 1982)

117. See *Smith* 593 F.3d at 285 (asserting that "medical 'detailer'" in *Cote* qualified for AEE "even though description of employee's duties was more parsimonious than Smith's description of her duties" (citing *Cote*, 558 F. Supp. at 886-87)); *id.* at 282-85 (believing Smith's deposition testimony to be accurate and refusing to disregard it as "mere puffery").

118. See *id.* at 285-86 (distinguishing past precedent as irrelevant and finding PSRs exempt from overtime pay); Robert Wolff, *Third Circuit Finds Pharmaceutical Sales Reps Exempt*, HEALTHCARE EMP'T COUNSEL (Mar. 2, 2002), <http://healthcareemploymentcounsel.com/class-actions/wage-and-hour-class-collective-actions/misclassification/third-circuit-finds-pharmaceutical-sales-representatives-exempt-1/> (discussing Third Circuit's decision in *Smith* as "first federal appellate court decision to address the exemption status of [PSRs]").

119. See *Smith*, 593 F.3d at 283 n.1 (recognizing that "based on different facts, courts, including this Court, considering similar issues involving sales representatives for other pharmaceutical companies, or perhaps even for J & J, might reach a different result").

120. See *id.* (allowing for possibility of reaching alternate result).

A. *The Second Circuit's Misdiagnosis*

Because any subsequent case involving the exemption status of PSRs would arguably possess similar facts, the Third Circuit's wavering stance effectively opened the door for a future circuit split.<sup>121</sup> Unsurprisingly, the Second Circuit took advantage of this opportunity and assumed a rival position in *Novartis*, ruling that the PSRs did not satisfy either the OSEE or the AEE.<sup>122</sup> The DOL, however, likely forced the Second Circuit's hand by submitting an unexpected amicus brief in support of the PSRs.<sup>123</sup>

Despite the response brief submitted by the Chamber of Commerce that contested the DOL's views and claimed authority, the Second Circuit was unwilling to challenge the status quo as the Third Circuit did in *Smith*.<sup>124</sup> Setting a new standard, the Third Circuit in *Smith* recognized that the realities of the pharmaceutical industry and the impact of the 2004 revisions to the regulations could not be reconciled with past precedent.<sup>125</sup> The Second Circuit in *Novartis*, however, mistakenly assumed that the DOL's amicus brief merited the same controlling weight historically afforded to other forms of the DOL's interpretive guidance.<sup>126</sup>

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121. *See id.* (acknowledging that decision was highly fact-sensitive and that facts will vary from case to case).

122. *See In re Novartis Wage and Hour Litig.*, 611 F.3d 141, 149 (2d. Cir. 2010) (finding DOL's amicus brief was entitled to "controlling deference" and, therefore, concluding that PSRs were not exempt from overtime pay under either OSEE or AEE), *cert. denied*, 131 S. Ct. 1568 (2011). Unlike the Third Circuit in *Smith*, the Second Circuit in *Novartis* vacated the district court's judgment, which held that PSRs were exempt under both the OSEE and AEE. *Compare id.* (vacating district court's decision, which held that PSRs qualified for both OSEE and AEE), *with Smith*, 593 F.3d at 286 (affirming district court's holding, which held that PSRs were exempt from overtime pay under AEE).

123. *See Novartis*, 611 F.3d at 143-44 (discussing how Secretary of Labor submitted amicus brief in support of PSRs arguing that they were not exempt from overtime pay under FLSA); *id.* at 149 (asserting that DOL's amicus brief was "entitled to 'controlling' deference" and, therefore, determining that PSRs were not exempt under either OSEE or AEE (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

124. *See id.* at 149 (recognizing that Chamber of Commerce submitted amicus brief in support of *Novartis*, which argued that DOL's amicus brief "merely parrot[ed]" regulations and, therefore, did not provide interpretive guidance); *see also* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *Novartis Pharm. Corp. v. Lopes*, 131 S. Ct. 1568 (2011) (No. 10-460), 2010 WL 4494106 (arguing that DOL's amicus brief should not be accorded controlling deference and that PSRs should be exempt from overtime pay).

125. For a further discussion of why the Third Circuit's decision in *Smith* warranted a departure from the prior decision that was on point, *see supra* notes 114-15 and accompanying text.

126. *See Novartis*, 611 F.3d at 149 (discussing DOL's ability to "define and delimit the terms used in the statute," which includes regulations and interpretations of those regulations); *id.* at 153 (explaining that DOL's amicus brief was "entitled to 'controlling' deference" because its "interpretations [were not] 'plainly erroneous or inconsistent with the regulation[s]'" (quoting *Auer*, 519 U.S. at 461) (internal quotation marks omitted))).

While worthy of some deference, an amicus brief does not have the force or effect of law, particularly when it is “inconsistent with the statutory language and [the DOL’s] prior pronouncements.”<sup>127</sup>

Although the Third Circuit arrived at its decision in *Smith* without confronting a corresponding DOL amicus brief, the court’s analysis more accurately captures the reality that most courts addressing this issue will face: highly fact-sensitive cases that do not square with case law on point.<sup>128</sup> Further, the DOL’s interpretive guidance is currently conflicting; the DOL’s recently terminated practice of issuing opinion letters precludes the possibility of formally alleviating any existing confusion.<sup>129</sup> Moreover, recent decisions involving the impact of DOL amicus briefs on the exemption status of PSRs reveal the following: (1) the DOL will not submit an amicus brief for every case and (2) even if the DOL submits an amicus brief, courts will not interpret it as a substitute for an opinion letter.<sup>130</sup> Courts, therefore, should follow the Third Circuit’s decision in *Smith*, which places the onus on courts to consider all relevant factors and transcend normative conventions.<sup>131</sup>

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127. See *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2010 WL 396300, at \*2 (D. Ariz. Feb. 1, 2010) (refusing to reconsider exemption status of PSR at issue in light of DOL’s amicus brief that was submitted in *Novartis*, and reasoning that DOL’s amicus brief lacked authority and contradicted prior interpretive guidance), *aff’d*, 635 F.3d 383 (9th Cir. 2011), *cert. granted*, No. 11-204, 2011 WL 3608968 (U.S. 2011). Because amicus briefs function similarly to opinion letters, they should be accorded the same weight. See *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1302 (11th Cir. 2009) (“Agency opinion letters ‘do not warrant *Chevron*-style deference.’ They are, however, ‘entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but only to the extent that those interpretations have the power to persuade.” (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000))).

128. See generally *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010) (relying heavily on facts to find PSR at issue exempt from overtime pay). *But see S.D. Tex.: Upon Reconsideration, Pharmaceutical Reps Nonexempt; Court Elects to Adopt Second Circuit’s Reasoning*, OVERTIME L. BLOG (Oct. 6, 2010, 10:46 AM), <http://flsa.overtimelaw.com/2010/10/06/s-d-tex-upon-reconsideration-pharmaceutical-reps-nonexempt-court-elects-to-adopt-second-circuits-reasoning/> (arguing that Third Circuit’s decision in *Smith* did not “consider[ ] impact of the DOL’s amicus brief on [its] decision[ ]” and, therefore, does “not provide a reasoned counterweight”).

129. For a further discussion of the DOL’s former practice of issuing fact-specific opinion letters, see *supra* notes 62-63 and accompanying text.

130. See *Schaefer-LaRose v. Eli Lilly & Co.*, No. 1:07-cv-1133-SEB-TAB, 2010 WL 3892464, at \*1-2 (S.D. Ind. Sept. 29, 2010) (declining to revisit plaintiff’s claim in light of recent holding in *Novartis*, reasoning that their “decision cannot be a swinging pendulum, vacillating back and forth as each new ruling addressing this question is handed down by some court or another across the nation”); *Christopher*, 2010 WL 396300, at \*1 (refusing to reconsider PSR’s claim and reasoning that DOL’s amicus brief in *Novartis* was not entitled to degree of authority that Second Circuit afforded it).

131. See *Smith*, 593 F.3d at 285-86 (recognizing that PSRs were exempt from overtime pay by distinguishing current case from case law on point); *id.* at 283 n.1 (recognizing highly fact-sensitive nature of cases addressing exemption status of PSRs).



B. *Will Courts Correct Novartis's Diagnostic Error?*

Recent district court decisions indicate a trend toward the common sense rationale that the Third Circuit encouraged in *Smith*.<sup>132</sup> This, however, is not surprising considering the majority of lower courts followed the district court's lead in *Smith* to find PSRs exempt from overtime pay.<sup>133</sup> Although PSRs have challenged these judgments in light of the DOL's amicus brief submitted in *Novartis*, most courts have resisted the opportunity to use the Second Circuit's contradictory decision to smudge the Third Circuit's stamp of approval.<sup>134</sup>

Nonetheless, the DOL refuses to concede the issue; the DOL submitted another amicus brief in support of PSRs for a case before the Ninth Circuit.<sup>135</sup> Although two recent decisions in the Second and Third Circuits reaffirmed the respective holdings in *Novartis* and *Smith*, the DOL did

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132. See *Christopher*, 2010 WL 396300, at \*2 (rejecting "absurdity" of DOL's refusal to consider reality of pharmaceutical industry and goals of FLSA); *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 687 (W.D. Pa. 2009) (emphasizing importance of common sense approach because "society is better off when a duck, walking and talking so, can simply be treated as one"), *aff'd*, 372 F. App'x 246 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010).

133. See *Jackson v. Alpharma, Inc.*, No. 07-3259, 2010 WL 2869530, at \*3-5 (D.N.J. July 19, 2010) (finding PSRs exempt under AEE); *Christopher v. SmithKline Beecham Corp.*, No. CV-081498-PHX-FJM, 2009 WL 4051075, at \*3-5 (D. Ariz. Nov. 20, 2009) (finding PSRs qualify for OSEE), *aff'd*, 635 F.3d 383 (9th Cir. 2011), *cert. granted*, No. 11-204, 2011 WL 3608968 (U.S. 2011); *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 700 (S.D. Ind. 2009) (finding PSR exempt under both AEE and OSEE); *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 733-42 (S.D. Tex. 2009) (same), *vacated in part*, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010); *Baum*, 605 F. Supp. 2d at 675-87 (same); *Delgado v. Ortho-McNeil, Inc.*, No. SACV 07-00263-CJC(MLGx), 2009 WL 2781525, at \*5 (C.D. Cal. Feb. 6, 2009) (finding PSR exempt under OSEE); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. SACV 07-00127-CJC(MLGx), 2009 WL 3326632, at \*5 (C.D. Cal. Feb. 6, 2009) (same). *But see Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740, 749-50 (N.D. Ill. 2010) (finding PSRs do not qualify for OSEE or AEE); *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 402-03 (D. Conn. 2009) (finding that PSRs do not qualify for OSEE), *aff'd*, 384 F. App'x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011).

134. For a further discussion of the district court decisions in *Schaefer-LaRose* and *Christopher* that declined to revisit claims of PSRs in light of amicus brief that DOL submitted in *Novartis*, see *supra* note 130 and accompanying text, and *Jackson*, 2010 WL 2869530, at \*5 (finding it unnecessary to address Second Circuit's decision in *Novartis*). *But see Harris*, 2010 WL 3817150, at \*2-3 (reconsidering summary judgment against PSRs in light of DOL's *Novartis* amicus brief).

135. See *Christopher*, 635 F.3d at 391-95 (reconsidering whether DOL's views regarding PSRs' exemption from overtime pay should be entitled to deference under *Chevron* or *Auer*); *Christopher* Brief, *supra* note 60 (arguing that PSRs should not be exempt from overtime pay); *Sales Reps Not Exempt Salespeople, DOL Argues, FLSA EMP. EXEMPTION HANDBOOK NEWSL.*, Oct. 2010, at 8 (discussing how DOL filed "recent friend-of-the-court brief" and "urge[d] the 9th U.S. Circuit Court of Appeals to reverse . . . district court's ruling" in *Christopher*, which held that PSRs were exempt under OSEE).

not submit an amicus brief in either of these cases.<sup>136</sup> The DOL, however, recognized that the Ninth Circuit's case would likely exacerbate the existing circuit split, rather than simply serving as a tie-breaking decision.<sup>137</sup> Specifically, the DOL feared that the Ninth Circuit would affirm the district court's decision, which held that the PSRs at issue were exempt under the OSEE.<sup>138</sup> Additionally, the DOL feared that the Ninth Circuit would adopt the district court's rationale, which reasoned that the DOL's amicus brief in *Novartis* was not entitled to controlling deference.<sup>139</sup> As a result, the DOL strategically involved itself in the Ninth Circuit's case, attempting to browbeat the court into finding favorably for the PSRs.<sup>140</sup>

Although the DOL's attempt was unsuccessful, its fears were not unfounded; the Ninth Circuit aligned itself with the Third Circuit's decision in *Smith* and maintained that PSRs were exempt from overtime pay under the FLSA.<sup>141</sup> Like the Third Circuit, the Ninth Circuit recognized that finding otherwise would have contradicted "the statutory language and its prior pronouncements" and "defied common sense."<sup>142</sup> Nevertheless, the

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136. Compare *Kuzinski*, 384 F. App'x at 18-19 (affirming Second Circuit's decision in *Novartis* and holding that PSRs were not exempt from overtime pay), with *Baum*, 372 F. App'x at 249-50 (affirming Third Circuit's decision in *Smith* and determining that PSRs were exempt under AEE).

137. See generally *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d. Cir. 2010) (finding PSRs were not exempt from overtime under either OSEE or AEE), cert. denied, 131 S. Ct. 1568 (2011); *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010) (holding that PSRs were exempt under AEE but not addressing OSEE). If the Ninth Circuit in *Christopher* were to affirm the district court's holding, its judgment would not directly align with either the Second or Third Circuits' decisions. See generally *Christopher*, 2009 WL 4051075 (determining that PSRs were exempt under OSEE but not considering whether they were also exempt under AEE).

138. See *Christopher*, 2009 WL 4051075, at \*5 (declining to "adopt a hyper-technical construction of the regulations that runs counter to the purpose of the [FLSA]" and holding that PSRs "fit within the terms and spirit" of OSEE).

139. See *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2010 WL 396300, at \*1 (D. Ariz. Feb. 1, 2010) (disagreeing that DOL's amicus brief in *Novartis* was entitled to controlling deference because it was not subject to notice-and-comment procedures required by Administrative Procedure Act), *aff'd*, 635 F.3d 383, cert. granted, No. 11-204, 2011 WL 3608968 (U.S. 2011).

140. For a further discussion of how the DOL submitted an amicus brief in *Christopher* to persuade the Ninth Circuit to vacate the district court's decision, see *supra* note 135 and accompanying text. The DOL likely believed that its amicus brief would be treated with controlling weight as it was in *Novartis*. For a further discussion of how the Second Circuit in *Novartis* accorded the DOL's amicus brief with deferential authority, see *supra* note 124 and accompanying text.

141. See *Christopher*, 635 F.3d 383 (refusing to accord DOL's amicus brief with controlling deference and finding that PSRs were exempt from overtime pay). For a further discussion of the Third Circuit's approach in *Smith*, see *supra* notes 110-17, 126, 129, 132, and accompanying text.

142. *Christopher*, 635 F.3d at 389 (internal quotation marks omitted); see *id.* at 395-401 (explaining court's "common sense understanding of why PSRs make sales"); *id.* at 401 (affirming district court's decision); *Christopher*, 2010 WL 396300, at \*2 (discussing illogicality of DOL's interpretation regarding PSRs, emphasizing that role of PSRs must be considered with respect to pharmaceutical industry be-

Ninth Circuit should be wary that a previously nonexistent player—the Obama Administration—may second-guess its fact-based analysis.<sup>143</sup>

C. *Will an Intervening Third Party Affect Prognosis?*

Although the majority of courts addressing the exemption status of PSRs have returned verdicts for employers, the Obama Administration recently announced that it set aside \$25 million to combat employee misclassification.<sup>144</sup> As a result, courts and employers should be prepared to face increased scrutiny regarding the exemption status of PSRs.<sup>145</sup> If courts do not follow the Third Circuit's decision in *Smith*, pharmaceutical companies could be subject to the short-term "imposition of hundreds of millions of dollars in back pay liability for employers in the industry."<sup>146</sup> In the long-term, however, failure to adhere to the Third Circuit's decision in *Smith* "could . . . require a fundamental restructuring of the manner and means by which pharmaceutical companies conduct their sales activities in the U.S."<sup>147</sup> The exemption status of PSRs, therefore, may eventually warrant a decision by the Supreme Court, particularly as the circuit split deepens and the Obama Administration becomes involved.<sup>148</sup> In the interim,

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cause "[a]ny other construction ignores reality and defeats the spirit and purpose" of OSEE).

143. See Steven Greenhouse, *U.S. Cracks Down on 'Contractors' as a Tax Dodge*, N.Y. TIMES, Feb. 18, 2010, at A1, available at [http://www.nytimes.com/2010/02/18/business/18workers.html?pagewanted=1&\\_r=1&adxnnl=1&adxnnlx=1297886451-0XZfV%20M%20YxQrHwNn6GZk%20Q](http://www.nytimes.com/2010/02/18/business/18workers.html?pagewanted=1&_r=1&adxnnl=1&adxnnlx=1297886451-0XZfV%20M%20YxQrHwNn6GZk%20Q) (discussing Obama Administration as undertaking unprecedented "crackdown" on employee misclassification by expanding "enforcement personnel" and auditing employers).

144. See *Budget Summary*, in U.S. DEP'T OF LABOR, FY 2011 DEPARTMENT OF LABOR BUDGET IN BRIEF 1, 1 (2010), available at <http://www.dol.gov/dol/budget/2011/PDF/bib.pdf> (discussing DOL's increased 2011 budget, which is attributed to "a joint Labor-Treasury initiative to strengthen and coordinate Federal and State efforts to enforce statutory prohibitions, identify, and deter misclassification"); Evan Spelfogel, *President Obama Backs Department of Labor Misclassification Fight*, WAGE & HOUR DEFENSE BLOG (Feb. 11, 2010), <http://www.wagehourblog.com/2010/02/articles/dol-enforcement/president-obama-backs-department-of-labor-misclassification-fight/> (stating that purpose of President Obama increasing DOL's budget was to help DOL battle employee misclassification, especially regarding employees who do not meet requirements of white-collar exemptions).

145. See Spelfogel, *supra* note 144 (stating that budget will be used to "identify[] and litigat[e] against employers" that have miscategorized workers as exempt under FLSA); *id.* (discussing proliferation of "[i]ndividual, class[,] and collective actions" as consequences of employee misclassification).

146. Blackburn, *supra* note 8, at 159 (predicting immediate ramifications on individual pharmaceutical companies if courts follow Second Circuit's decision in *Novartis* and return verdicts for PSRs).

147. *Id.* (predicting long-term effects on entire pharmaceutical industry if courts follow Second Circuit's decision in *Novartis* and return verdicts for PSRs).

148. See *id.* (determining possible need for "definitive answer" from United States Supreme Court because of number of cases addressing issue). For a further discussion of the circuit split that resulted from the Second Circuit's decision in *Novartis*, see *supra* notes 121-31 and accompanying text. For a further discussion of

however, practitioners and employers should use the Third Circuit's decision in *Smith* as a guide.<sup>149</sup>

#### V. REMEDIES TO USE WHILE AWAITING A CURE

Because of the increased pressures from the DOL and the Obama Administration, employers and practitioners can expect an influx of misclassification lawsuits filed by employees.<sup>150</sup> Although the Third Circuit's decision in *Smith* was favorable for employers, all parties should take note of the factors that influenced its decision.<sup>151</sup> Additionally, the Third Circuit's analysis in *Smith* is instructive outside the limited context of PSRs because the evolving nature of the modern workforce increases the likelihood that employees will perform non-traditional roles similar to PSRs.<sup>152</sup>

First, *Smith* demonstrates that employers must carefully delineate and assign an employee's duties, recognizing that an employee's title alone is not dispositive.<sup>153</sup> Second, *Smith* warns potential plaintiffs that cases are highly fact-sensitive and, therefore, their deposition testimony may be outcome-determinative.<sup>154</sup> As a result, litigators should use the plaintiff's

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the Obama Administration's initiative regarding employee misclassification, see *supra* notes 143-45 and accompanying text.

149. See generally *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010) (addressing exemption status of PSRs and analyzing issue in light of realities of industry, spirit of white-collar exemptions, and specific facts of case).

150. See U.S. DEP'T OF LABOR, STRATEGIC PLAN FISCAL YEARS 2011-2016, at 31-32 (2010), available at [http://www.dol.gov/\\_sec/stratplan/StrategicPlan.pdf](http://www.dol.gov/_sec/stratplan/StrategicPlan.pdf) (delineating DOL's aggressive proposals to combat employee misclassification). For a further discussion of how the Obama Administration's concentrated efforts will likely result in uptick in wage and hour claims filed against employers, see *supra* notes 144-46 and accompanying text.

151. See generally *Smith*, 593 F.3d 280 (affirming district court's grant of summary judgment for employer and determining that PSRs were exempt from overtime pay). For a further discussion of how the Third Circuit in *Smith* accounted for factors that other courts have ignored when addressing exemption status of PSRs, see *supra* notes 110-17, 125, and accompanying text.

152. See generally *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300 (11th Cir. 2009) (finding that "marketing director" for title insurance company qualified for OSEE because employee focused her efforts on sales that would later be credited to her); Rothe, *supra* note 20, at 711 ("[M]ore than twenty-five million Americans currently work more than forty-nine hours each week—most of them white-collar professionals.").

153. See 29 C.F.R. § 541.2 (2005) ("A job title alone is insufficient to establish the exempt status of an employee."); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,160, 22,163 (Apr. 23, 2004) (stressing that "an employee's job duties, not job title, determine whether the exemption applies" and discussing possibility that job titles "may not accurately reflect job duties and actual performance" (emphasis added)); see also *Smith*, 593 F.3d at 283 (discussing how PSR's job description "required [her] to plan and prioritize her responsibilities in a manner that maximized business results").

154. See *Smith*, 593 F.3d at 283 (explaining that PSR's deposition testimony was significant in determining facts of case); *id.* at 285 (asserting that court "ac-

deposition testimony to their respective advantage.<sup>155</sup> Practitioners representing the plaintiff should prevent the employee from emphasizing the importance of his or her position, warning the plaintiff that his or her deposition cannot be retracted later.<sup>156</sup> Conversely, practitioners representing the employer should exploit the employee's inflated self-importance and expose the plaintiff's attempts to re-characterize his or her deposition testimony.<sup>157</sup> Finally, *Smith* encourages courts to consider the realities of the industry at issue and the modern work environment when evaluating an employee's exemption status.<sup>158</sup>

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cept[ed] Smith's deposition testimony as an accurate description of her position"); *id.* (concluding that PSR was exempt under AEE based on her testimony).

155. *Compare* Brief of Appellee/Cross-Appellant Johnson & Johnson, *Smith*, 593 F.3d 380 (Nos. 09-1223, 09-1292), 2009 WL 5635400 (arguing that opponent's brief contradicted evidence, especially PSR's own deposition testimony that "conclusively establishe[d]" that she should be exempt from overtime pay), *with* Reply Brief of Plaintiff-Appellant and Response Brief to the Cross Appeal, *Smith*, 593 F.3d 280 (Nos. 09-1223, 09-1292), 2009 WL 5635399 (arguing that PSR's deposition was "a superficial characterization," which resulted from "selective and leading questions").

156. *See Smith*, 593 F.3d at 285 (accepting Smith's deposition testimony as an accurate description of her position); *id.* (discussing how employee "understood the significance of her testimony in the context of this case"); *id.* at 285 n.3 (discussing how principle behind "the 'sham affidavit' doctrine" was applicable because court refused to accept contention by Smith's counsel, which argued that court should disregard Smith's deposition as "puffery").

157. *See id.* at 285 (refusing to accept argument by PSR's counsel that employee's deposition testimony "overinflated her importance"); Reply Brief on Cross-Appeal of Appellee/Cross-Appellant Johnson & Johnson, *Smith*, 593 F.3d 280 (Nos. 09-1223, 09-1292), 2009 WL 5635401 (discussing self-incriminating nature of Smith's testimony, which emphasized characteristics required to meet exemption).

158. *See Smith*, 593 F.3d at 282 (recognizing that realities of pharmaceutical industry precluded PSR from directly selling prescription product to physician); *id.* at 285-86 (evaluating role of PSR in context of pharmaceutical industry to determine that she was exempt from overtime pay under AEE).