No. 15-

In The
Supreme Court of the United States

GEICO GENERAL INSURANCE CO. AND GOVERNMENT EMPLOYEES INSURANCE CO.,

Petitioners,

v.

SAMUEL CALDERON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether insurance fraud investigators are covered by the administrative exemption from the Fair Labor Standards Act's overtime-pay requirement, 29 U.S.C. § 213(a), as the Sixth Circuit has held in conflict with the Fourth Circuit's judgment below.

II. Whether an exemption to the Fair Labor Standard Act's overtime-pay requirement must be narrowly construed and established by clear-and-convincing evidence, as the Fourth Circuit held, in conflict with fundamental principles of statutory construction and the decisions of every other court of appeals.

PARTIES TO THE PROCEEDINGS

Petitioners GEICO General Insurance Company and Government Employees Insurance Company were defendants in the district court and appellants/cross-appellees in the court of appeals.

Respondents are Samuel Calderon, Michael Headley, Aaron Kulsi, Kenneth Miller, Michael Creamer, George Wood, Robert DeMartino, John Halliday, James L. Hanson, Thomas F. Brady, Dana Ferrin, Maureen Ayling, Candido Cubero, Thomas Fitzgerald, William Dolinsky, Marvin Hourigan, David McCamley, Augustus Stansbury, Jr., Joan Bischoff, Randall Gibson, Vincent Greco, Teresa Hartey-Adametz, Thomas Lowe, David McEnry, Jennifer Ricca, Anita Singh, Bryan Utterback, Patrick Weise, Leah Hamilton, Dennis Fulton, Eberhard Grosser, Joseph Miles, Jr., Ricky McCracken, Thomas Sturgis, Christopher Sullivan, Michael Russell, Randall Stewart, Laverne Holmes, Thomas Davidson, Jr., Shannon Boyd, Anthony Dean, Jr., Francisco Nogales, John Ghetti, Gerald Dexter, Claude Reiher, Steven McBride, Phillip Rondello, and Robert Merry. They were plaintiffs in the district court and appellees/cross-appellants in the court of appeals.

RULE 29.6 DISCLOSURE

GEICO General Insurance Company and Government Employees Insurance Company are wholly owned subsidiaries of GEICO Corporation, an indirect subsidiary of Berkshire Hathaway, Inc. No publicly held company owns 10% or more of the GEICO General Insurance Company's or Government Employees Insurance Company's stock.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 809 F.3d 111. The opinion of the district court (App., *infra*, 48a-81a) is reported at 917 F. Supp. 2d 428.

JURISDICTION

The court of appeals entered its judgment on December 23, 2015. Petitioners GEICO General Insurance Company and Government Employees Insurance Company (collectively, GEICO) timely filed a petition for rehearing en banc, which was denied on

February 2, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 98a-107a.

INTRODUCTION

Controlling fraudulent claims is critical to the entire insurance industry, where fraud is a $32 billion problem that accounts for an estimated 10% of claims paid. Like other insurance companies, GEICO depends on a specialized unit of fraud investigators to investigate and resolve whether claims are fraudulent. Given the discretion involved in such determinations, and their significance to the company, GEICO has long classified its fraud investigators as administrative employees exempt from the overtime-pay requirement of the Fair Labor Standards Act (FLSA).

In 2013, the first court of appeals to address the question validated GEICO's approach, holding that materially indistinguishable fraud investigators for one of GEICO's competitors were exempt administrative employees. *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640 (6th Cir. 2013). Two years later, however, the Fourth Circuit—acknowledging that GEICO's case presented "facts essentially identical" to Nationwide's, App., *infra*, 39a—reached the opposite conclusion.

That holding created a square circuit split regarding the exempt status of insurance fraud investigators that alone warrants this Court's review.

The split between the Fourth and Sixth Circuits directly involves two national competitors, and it affects thousands more investigators for other insurance companies. If left unresolved, the conflict will un-level the playing field among industry competitors and will encourage forum shopping by plaintiffs.

In reaching its decision, the Fourth Circuit incorrectly narrowed the FLSA's administrative exemption in important and unprecedented ways that extend the impact of its decision beyond insurance fraud investigators. Contrary to the definition of administrative work in the regulation, it required that exempt employees make management-level decisions (*i.e.*, engage in policy-making or supervision). And it imposed a categorical rule that investigators do not perform administrative work, excluding from the exemption a broad and growing group of private-sector employees who investigate a variety of issues from data breaches to defective products.

In addition, the Fourth Circuit reaffirmed its clear-and-convincing evidence standard for an employer's affirmative defense of exemption, on top of the flawed narrow-construction rule. The narrow-construction rule itself stands on shaky ground as an application of the remedial-statute canon that is the "last redoubt of losing causes." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995). And the combination with a clear-and-convincing standard has been rejected by every other court of appeals that has considered the issue. Allowing the Fourth Circuit's out-of-step rule

to persist will lead to more of the untenable situation presented here: disparate results on identical facts.

These circuit conflicts have serious practical ramifications. They compound longstanding uncertainty facing employers attempting to comply with the FLSA, as reflected by the over 500% increase in the number of FLSA lawsuits since 1991.[1] Of all the exemptions from overtime, the administrative exemption has been the least clear.

Circuit conflicts are especially troublesome under the FLSA because employers can be sued anywhere they can be served with process. This allows plaintiffs to choose a favorable forum for a nationwide collective action. The Fourth Circuit's decision means that employers in other circuits—even circuits, like the Sixth, that have reached opposite results—are at risk unless they treat the Fourth Circuit's new limits on the administrative exemption as a *de facto* national standard.

The circuit conflicts at issue require no additional development and will not be resolved with time. This case presents an excellent opportunity not only to resolve a split that affects thousands of workers and imposes inconsistent overtime-pay obligations on national employers, but also to bring clarity to the administrative exemption and to correct the Fourth Circuit's outlier "clear and convincing" rule.

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[1] UNITED STATES GOV'T ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMIC APPROACH TO DEVELOPING ITS GUIDANCE 6 (Dec. 2013).

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. The FLSA's overtime requirement does not apply to individuals "employed in a bona fide *** administrative *** capacity." 29 U.S.C. § 213(a)(1). "The exemption for such employees is known as the 'administrative' exemption." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).

Congress exempted such administrative employees because "the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week." 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (describing legislative history). As such, there was little risk of "precluding the potential job expansion intended" by enactment of the overtime premium. *Id.* *See generally Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (discussing similar purpose for outside-salesman exemption).

2. Under Department of Labor regulations, the administrative exemption requires (1) that the employee be paid a salary of at least $455 per week, (2) that the employee's primary duty be administrative work, defined as "office or non-manual work directly related to the management or general business operations of the employer," and (3) that the employee's primary duty "includes the exercise of

discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a).[2]

a. The regulations describe administrative work (*i.e.*, the second element) as work "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Administrative work "includes, but is not limited to, work in functional areas" such as auditing, insurance, quality control, research, government relations, and legal and regulatory compliance. *Id.* § 541.201(b).

In addition, the regulations specifically identify insurance adjusters as exempt administrative employees where "their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." 29 C.F.R. § 541.203(a).

b. The exercise of discretion and independent judgment with respect to matters of significance (*i.e.*,

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[2] In July 2015, the Department of Labor issued a proposed rule that would, if adopted, revise the salary level needed to qualify for the exemption to $921 per week, indexed for inflation. 80 Fed. Reg. 38,516, 38,517 (July 6, 2015). The proposed rule does not alter the second and third elements of the test for the administrative exemption, and would not affect the circuit split regarding those elements at issue in this case.

the third element) "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). Factors indicating the requisite exercise of judgment include "whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business," and "whether the employee investigates and resolves matters of significance on behalf of management." *Id.* § 541.202(b).

"The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action." 29 C.F.R. § 541.202(c). Thus, employees "can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." *Id.*

An employee need not "'customarily and regularly' exercise discretion and independent judgment." 69 Fed. Reg. at 22,142-22,143. Rather, "the primary duty must 'include' the exercise of discretion and independent judgment." *Id*.

B. Factual and Procedural History

1. "GEICO is in the business of providing insurance for its customers." App., *infra*, 6a. As part of running an insurance company, GEICO must confront the major, industry-wide problem of insurance fraud. The Insurance Information Institute estimates that fraudulent claims account for 10% of losses, at a cost of $32 billion per year for

the property and casualty insurance industry. *See* INSURANCE INFO. INST., *Insurance Fraud* (Jan. 2016).[3]

To combat insurance fraud, GEICO maintains a Special Investigations Unit (SIU), App., *infra*, 7a, as do the majority (80%) of other property/casualty insurance companies, *see* INSURANCE INFO. INST., *Insurance Fraud*. These specialized units are required by 15 states. COALITION AGAINST INSURANCE FRAUD, *Statutes*.[4]

GEICO's Special Investigations Unit is a part of its Claims Department. App., *infra*, 7a. Other Claims Department personnel, including claims adjusters, refer suspicious claims to the fraud investigators, whose "primary duty consists of conducting investigations to resolve *** whether particular claims submitted to GEICO were fraudulent." *Id.* at 25a; *see also id.* at 7a.

GEICO's investigators work out of their homes and conduct investigations in the field unaccompanied by a supervisor. App., *infra*, 51a. Conducting an investigation includes interviewing witnesses, taking photographs, and reviewing property damage. *Id.* at 8a. Investigators also may decide to interview a claimant through "face-to-face questioning wherein the witness is under oath," *id.*, which is similar to a deposition. At the close of the investigation, the investigator prepares a report setting forth "the investigators[] findings regarding

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[3] http://www.iii.org/issue-update/insurance-fraud.

[4] http://www.insurancefraud.org/statutes.htm#.VwU2SJgUWM9 (last visited May 2, 2016).

the suspected insurance fraud and the basis for their findings." *Id.* (alteration in original).

The investigators provide reports to the claims adjusters and discuss their fraud determinations with the adjusters. App., *infra*, 9a. The "Claim Adjuster's decision on a claim is 'based on essentially what the [I]nvestigator tells them.'" *Id.* at 57a (alteration in original). In addition, an investigator "has discretion to refer the claim to the National Insurance Crime Bureau or other state agencies" for potential prosecution, and can refer a case to the underwriting department when the investigation reveals a problem with the policyholder. *Id.* at 10a. GEICO "has long classified its Investigators as exempt under the FLSA." *Id.*

2. In 2010, a GEICO fraud investigator brought this collective action under the FLSA, alleging that GEICO improperly classified its fraud investigators as exempt from the overtime-pay requirement. App., *infra*, 11a-12a. [5] On cross-motions for summary judgment, the district court agreed with GEICO that the first two elements of the administrative exemption were satisfied: it found that each Plaintiff's salary qualifies for exempt status, *id.* at 61a-62a, and that the type of work performed by investigators is administrative in nature, *id.* at 61a-72a. With respect to the third element, the district court agreed with GEICO that the investigators

[5] Plaintiffs subsequently amended their complaint to add a class claim under New York law. App., *infra*, 12a. New York incorporates by reference the federal administrative exemption. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2013).

exercise discretion and independent judgment, *id.* at 75a, but—imposing the Fourth Court's "clear and convincing" standard on GEICO along with the doctrine that FLSA exemptions are to be "narrowly construed" against employers—determined that the discretion and judgment "does not bear on matters of significance." *Id.* at 76a-81a.

3. The Fourth Circuit affirmed the judgment on alternative grounds, holding that GEICO's fraud investigators did not perform work of an administrative nature (*i.e.*, work "directly related to assisting with the running or servicing of the business," 29 C.F.R. § 541.201(a), the exemption's second element). The court of appeals acknowledged that its conclusion conflicted with that of the Sixth Circuit, which held on "essentially identical" facts involving Nationwide's insurance fraud investigators "that the exemption applied." App., *infra*, 39a (citing *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640 (6th Cir. 2013)).

Observing that the regulation governing this element distinguishes between production work and administrative work, the Fourth Circuit stated that the fraud investigators "are not production workers per se" because they "support[] the claim-adjusting function," App., *infra*, 24a, which is classified by regulation as administrative, *see* 29 C.F.R. § 541.203(a). The court nonetheless held that the investigators' work was "too far removed from their employer's management or general business operations to satisfy" the administrative work element. App., *infra*, 24a.

Specifically, the Fourth Circuit stated, the fraud investigators have "'no supervisory responsibility and

do not develop, review, evaluate, or recommend *** business policies.'" App., *infra*, 25a (quoting *Desmond v. PNGI Charles Town Gaming, LLC*, 564 F.3d 688, 694 (4th Cir. 2009)). In addition, the Fourth Circuit relied on a regulation providing that "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, *** and other similar employees" are non-exempt. *Id.* at 25a-26a (quoting 29 C.F.R. § 541.3(b)(1)). It did so despite its recognition that the Sixth Circuit in *Foster* had rejected the analogy to public-sector law enforcement and first responders in light of the role that fraud investigators play in supporting the general business operations of insurance companies. *Id.* at 26a-27a.

In resolving what it deemed a "close and complex" question, the Fourth Circuit cited two interpretive rules. App., *infra*, 39a. First, FLSA exemptions are "'narrowly construed against the employers seeking to assert them.'" *Id.* at 15a-16a (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). Second, in the Fourth Circuit, employers must prove FLSA exemptions "by clear and convincing evidence." *Id.* at 16a. Armed with those rules, the Fourth Circuit reached a conclusion about the administrative overtime exemption opposite from the Sixth Circuit's. *Id.* at 39a.[6]

The Fourth Circuit denied rehearing en banc.

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[6] The district court's decision on several remedial issues was cross-appealed by Respondents. App., *infra*, 38a-47a. The remedial decision was affirmed in part and reversed in part; it is not at issue in GEICO's petition for certiorari.

REASONS FOR GRANTING THE WRIT

This case presents two recurring questions of nationwide importance.

First, in direct and acknowledged conflict with the Sixth Circuit, the Fourth Circuit held that insurance fraud investigators are not administrative employees exempt from overtime. That conflict has a nationwide effect on the insurance industry, which will likely have to comply with the Fourth Circuit's rule—even for employees within the Sixth Circuit—in light of the inevitable forum shopping in FLSA collective actions.

The Fourth Circuit's reasoning impermissibly narrowed the administrative exemption in meaningful ways that affect other kinds of employers as well. The Fourth Circuit adopted a requirement that employees exercise supervisory or policy-setting responsibility to qualify as administrative, which upsets settled law under the governing regulations. The Fourth Circuit also adopted an unprecedented blanket rule that employees performing investigative and similar functions can never be exempt, regardless of the business context and purpose for which the investigative work is undertaken.

Second, the Fourth Circuit compounded its errors by reciting its heightened evidentiary standard for employers, on top of a narrow-construction principle, for *all* FLSA exemptions. That combination rule departs from basic statutory interpretation principles and conflicts with the decisions of every court of appeals to have considered the "clear and convincing" standard. It also lacks any basis in the text of the FLSA or its implementing

regulations, and conflicts with this Court's precedent mandating that the ordinary preponderance standard should apply unless fundamental individual rights and liberties are at stake.

This case presents an ideal opportunity to resolve both a significant conflict regarding the meaning of the administrative exemption and the entrenched divide in the courts of appeals regarding the standards applicable to all FLSA exemptions.

I. THE DECISION BELOW CREATES A CONFLICT WITH THE SIXTH CIRCUIT AND UNSETTLES BROADER FLSA PRINCIPLES

A. The Fourth Circuit Acknowledged A Direct Conflict With The Sixth Circuit On "Essentially Identical Facts"

The Fourth Circuit expressly recognized a conflict with the Sixth Circuit on "essentially identical" facts. App., *infra*, 39a. In *Foster v. Nationwide Mutual Insurance Co.*, the Sixth Circuit concluded that fraud investigators for Nationwide who "conduct investigations with the goal of resolving the indicators of fraud" were exempt from overtime pay. 710 F.3d 640, 650 (6th Cir. 2013). In this case, the Fourth Circuit concluded that fraud investigators who "conduct[] investigations to resolve *** whether particular claims submitted to GEICO were fraudulent" were not exempt. App., *infra*, 25a.

Like GEICO's investigators, Nationwide's investigators were instructed to investigate potentially fraudulent claims with the purpose of "resolving the indicators of fraud"; to make "factual

and not opinionated" findings relating to fraud; and to communicate any conclusion regarding suspected "legitimacy or illegitimacy of suspicious claims." *Foster*, 710 F.3d at 648-650; *see* App., *infra*, 7a-9a (GEICO investigators' "primary responsibility is to investigate whether *** claims are fraudulent," including "[w]riting a concise and complete summary of the investigation, including the investigators[']findings regarding the suspected insurance fraud and the basis for their findings") (second alteration in original). Moreover, as here, the "facts developed *** during the [Nationwide] investigations have an undisputed influence on [the company's] decisions to pay or deny insurance claims." 710 F.3d at 648; *see* App., *infra*, 9a (GEICO claims adjusters "base their decisions regarding whether to pay claims on oral reports or summaries of the reports that the Investigators provide to them").

The Sixth Circuit held that Nationwide's investigators satisfied both pertinent elements of the administrative exemption. First, because "claims adjusting is ancillary to Nationwide's general business operations," the investigators' "work that drives the claims adjusting decisions with respect to suspicious claims is also directly related to assisting with the servicing of Nationwide's business," and was therefore administrative work. *Foster*, 710 F.3d at 646.

Second, the Sixth Circuit concluded that conducting "investigations with the goal of resolving the indicators of fraud includes the exercise of discretion and independent judgment with respect to matters of significance." *Foster*, 710 F.3d at 650. The Sixth Circuit reasoned that detecting fraudulent

claims was a matter of critical importance to an insurer, and the investigators' exercise of discretion in recommending how fraudulent claims should be resolved was a matter of significance for the company. *Id.* at 648 ("The facts developed by the [investigators] during their investigations have an undisputed influence on Nationwide's decisions to pay or deny insurance claims. Paying insurance claims is central to Nationwide's business[.]").

The same is true of GEICO, yet the Fourth Circuit concluded that fraud investigators were not exempt. And by holding that fraud investigators are non-exempt because their work is not administrative in nature, the Fourth Circuit split not just with the Sixth Circuit but with other courts that have considered that question. *See, e.g.,* App., *infra*, 48a-81a (district court opinion); *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 904 (D. Minn. 2010) ("second element of the definition of administrative employees is met as to those individuals whose primary duty was claims investigations"). [7]

[7] In *Ahle*, the district court held that the investigators were non-exempt under the third element of the exemption because their function was solely to gather evidence for someone else to analyze, without providing findings or recommendations regarding suspected fraud. *See* 738 F. Supp. 2d at 906 (investigators "d[id] not provide opinions and conclusions about their investigative observations"); *see also Fenton v. Farmers Ins. Exch.*, 663 F. Supp. 2d 718, 725-727 (D. Minn. 2009). But the district court nonetheless recognized that fraud investigators performed work directly related to assisting with the servicing of the insurance business.

The Sixth Circuit's holding is a straightforward application of the regulation that recognizes the critical role that fraud investigators play in servicing the insurance business, and makes sense in light of the non-standardized, variable nature of the type and timing of the investigators' work. The Fourth Circuit openly acknowledged that Respondents perform the same job functions for GEICO as the fraud investigators in *Foster* performed for Nationwide, and that its decision conflicts with the Sixth Circuit's. This is a clear example of "a decision in conflict with the decision of another United States court of appeals on the same important matter," S. CT. R. 10(a), affecting at least thousands of investigators in the insurance industry.

B. The Erroneous Decision Unsettles FLSA Law for a Wide Variety of Professions and Industries

Beyond the direct conflict it created with the Sixth Circuit, the Fourth Circuit's reasoning cannot be squared with the plain text and basic structure of the administrative exemption. The decision strays in two ways. First, the Fourth Circuit adopted a requirement that an employee must exercise supervisory or policy-setting responsibility to perform administrative work. That requirement misconstrues the administrative-work element of the exemption and introduces uncertainty for a broad array of other occupations. Second, the Fourth Circuit adopted a broad view of the first-responder regulation as effectively making any investigative work non-exempt. That view is not only wrong, but conflicts with *Foster* and numerous other cases

addressing investigative work in a variety of contexts.

1. The Fourth Circuit's policy-setting requirement departs from well-established law governing a wide range of professions.

The Fourth Circuit primarily rested its conclusion that GEICO's fraud investigators were not exempt on its determination that their work was "too far removed from their employer's management or general business operations" to count as "administrative." App., *infra*, 24a. That is because, the court stated, the investigators "have no supervisory responsibility" and do not "develop, review, evaluate, or recommend [GEICO's] business policies or strategies." *Id.* at 23a (alteration in original) (internal quotation marks omitted). That reasoning incorrectly narrows the administrative exemption in a way that will have far-reaching ramifications. Essentially, the Fourth Circuit has limited the administrative exemption to management-level employees.

a. Contrary to the Fourth Circuit's decision, App., *infra*, 24a-25a, employees need not set policy to perform administrative work. While managing a business or setting business policy counts as administrative, so does "*assisting with"* the "*servicing* of the business." 29 C.F.R. § 541.201(a) (emphasis added). Accordingly, "exempt administrative work includes not only those who participate in the formulation of management policies," but also "a wide variety of persons who either carry out major assignments in conducting the operations of the

business, or whose work affects business operations to a substantial degree." 69 Fed. Reg. at 22,138 (internal quotation marks omitted). The regulations thus contradict the Fourth Circuit's insistence upon supervisory or policy-setting responsibility as the *sine qua non* of administrative work.

In the context at issue, the regulations make plain that claims adjusters are "engaged in servicing the business itself." 69 Fed. Reg. at 22,145. GEICO's fraud investigators directly assist in that servicing of the business by investigating, resolving, and reporting to the adjusters whether suspicious claims are fraudulent. Indeed, they perform a subset of the work specifically listed as exempt when performed by adjusters. 29 C.F.R. § 541.203(a) (describing adjusters' duties, including "interviewing insureds, witnesses and physicians" and "inspecting property damage"). It follows that fraud investigators, too, service the general business operations of GEICO, and therefore perform administrative work. *Foster*, 710 F.3d at 646 ("[T]he SIs' investigative work that drives the claims adjusting decisions with respect to suspicious claims is also directly related to assisting with the servicing of Nationwide's business.").

Although adjusting and investigations are closely interrelated parts of the claims function, the panel discounted the claims-adjuster regulation because adjusters can perform a broader range of duties, such as negotiating settlements, that arguably involve greater responsibility. App., *infra*, 34a-36a. But that is beside the point for purposes of the administrative-work element. That element turns upon the employees' functional area within the business, not their level of decision-making authority.

See 29 C.F.R. § 541.201(b) (listing "functional areas" that are administrative in type, including "legal and regulatory compliance" and "auditing"); *see also* Opinion Letter FLSA 2006-30, 2006 WL 2792444, at *3 (Dep't of Labor Sept. 8, 2006) (classifying the "loss prevention" function as administrative).

It is the exemption's *third* element—discretion and independent judgment with respect to matters of significance—that addresses "the level of importance or consequence of the work." 29 C.F.R. § 541.202(a). Accordingly, for employees within "functional areas or departments that generally relate to management and general business operations of an employer," "it is still necessary to analyze the level or nature of the work (*i.e.*, does the employee exercise discretion and independent judgment as to matters of significance) in order to assess whether the administrative exemption applies." 69 Fed. Reg. at 22,142. The Fourth Circuit's policy-setting requirement wrongly imports a level-of-work component into the question of whether the "type of work" performed by the employee is administrative. *Id.* at 22,139. Even then, it does not import the *correct* level-of-work test—requiring policy-setting or supervisory authority rather than inquiring whether fraud investigators exercise discretion regarding matters of significance.[8]

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[8] As the Sixth Circuit found, the discretion and independent judgment involved in determining whether claims are fraudulent "is a matter of significance." *Foster*, 710 F.3d at 650. The Fourth Circuit did not reach that issue, but recognized that the resolution of fraudulent claims "is important to GEICO." App., *infra*, 25a.

b. The end result is an analysis that not only is wrong but will affect an array of other professions for which the law had been considered settled. Other courts of appeals have long rejected arguments that the administrative exemption requires policy-setting or supervisory responsibility.

In *Reich v. John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997), the First Circuit held that insurance marketing representatives qualified for the administrative exemption. The marketing representatives' primary duty was to maintain relationships with independent insurance agents and to inform those agents regarding the insurer's product line. *Id.* at 3-4. In reasoning that the marketing representatives performed administrative work "servicing" the business, the First Circuit rejected the argument that the administrative exemption was limited to "employees who formulate management policies or oversee general business operations." *Id.* at 10. The First Circuit thus concluded that the exemption is not "limited solely to so-called 'management' personnel." *Id.*[9]

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[9] The First Circuit's *John Alden* decision applied the so-called "short test" under a prior version of the regulations, 126 F.3d at 5, but the standard adopted in the 2004 amendments is "very similar, if not functionally identical, to the current short duties test," 69 Fed. Reg. at 22,193. Accordingly, the First Circuit has continued to apply the administrative exemption to employees with no supervisory or policy-setting responsibility under the current regulation. *See Hines v. State Room, Inc.*, 665 F.3d 235, 244 (1st Cir. 2011) (rejecting argument that event facilities sales managers' "lack of supervisory authority and *** lack of policy-making authority" disqualified them from the administrative exemption).

The Seventh Circuit similarly rejected an argument by pharmaceutical sales representatives that administrative work can be performed only by "higher level employees" who possess "greater authority with respect to strategic design, proposal writing, supervision or similar significant employees." *Schaefer-LaRose v. Eli Lilly & Co.*, 679 F.3d 560, 573-574 (7th Cir. 2012). The proper test, the Seventh Circuit concluded, was whether the "employment activity [was] ancillary to an employer's principal production activity." *Id.* at 574 (internal quotation marks omitted). The court held that the sales representatives performed administrative work simply because their work "*supports*" the "core function of the drug makers"—the development and production of pharmaceuticals—but "is distinct from it." *Id.*

The Fourth Circuit's reasoning departs from this consensus and calls into question well-settled applications of the administrative exemption.

2. The Fourth Circuit's blanket rule for investigators is inconsistent with the consensus interpretation of the regulation.

The Fourth Circuit's reasoning also creates problems regarding the application of the administrative exemption to a range of different investigative duties.

The Fourth Circuit interpreted the regulation governing public safety officers and first responders, 29 C.F.R. § 541.3(b)(1), to establish a *per se* rule that investigators in all contexts do not qualify for the administrative exemption. But as the Sixth Circuit

held in *Foster*, Section 541.3(b)(1) is naturally read to cover *only* public safety officers who are "production" employees, rather than administrative employees, because they carry out the function that their agency exists to perform. 710 F.3d at 644.

Other federal courts have recognized, in a variety of public- and private-sector contexts, that the first-responder regulation does not categorically apply to officers or investigators. *See Mullins v. City of New York*, 653 F.3d 104, 110 (2d Cir. 2011) (noting that the "regulation does not 'purport to make all police officers non-exempt'") (citation omitted); *Nigg v. United States Postal Serv.*, 829 F. Supp. 2d 889, 899-900 (C.D. Cal. 2011) (holding postal inspectors performed exempt administrative work because their "law enforcement duties are intended to provide support for their employer's business operations" and are not "the commodity or service that the employer exists to provide"); *Mullins v. Target Corp.*, No. 09 C 7573, 2011 U.S. Dist. LEXIS 39997, at *13-*17 (N.D. Ill. Apr. 13, 2011) (holding first-responder regulation did not apply to loss prevention officer for retail store because "she assisted in 'servicing' Target's retail operations by investigating and preventing theft and fraud"); *Ferrell v. Gwinnett Cnty. Bd. of Educ.*, 481 F. Supp. 2d 1338, 1347 (N.D. Ga. 2007) (holding school resource officers who "carry firearms, make arrests, serve warrants and investigate crimes" were not covered by the first-responder regulation because their agency was in the business of education services, not law enforcement).

The Fourth Circuit's creation of a blanket rule for all investigators thus departs from other courts' narrower reading of the first-responder regulation. It

will unsettle the exempt status of a range of compliance positions that private employers have created in recent years to address a growing variety of issues, including data breaches, sexual harassment, securities fraud, false claims, inventory losses, and defective products, to name just a few. And it is also wrong. The regulation preamble explains that the regulation codified court decisions concluding that public safety officers did not perform administrative work when they produced the very service—investigations and enforcement—that their government agency provided to the public. *See* 69 Fed. Reg. at 22,129 (citing *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993) (police investigators non-exempt because their agency "is in the law enforcement 'business'" and "the primary function of the Investigators *** is to conduct—or 'produce'—its criminal investigations")); *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990) (probation officers' services were part of "day-to-day production process"); *Mulverhill v. New York*, Nos. 87-cv-853, 90-cv-850, 1994 WL 263594, at *4 (N.D.N.Y. May 19, 1994) (environmental investigators "fall squarely on the production side").

Despite recognizing that GEICO's fraud investigators are not production workers—GEICO's product being insurance policies, not investigations—the Fourth Circuit treated those investigators as covered by the regulation governing production-side law enforcement workers. As the Second Circuit put it, in deciding whether jobs are administrative or not, the "context of a job function matters." *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009) (underwriting credit for a retail store is

administrative while underwriting credit for a bank is production). The Fourth Circuit's *per se* rule precludes any inquiry into the context of the employer's business, and cannot be squared with the text of the administrative-work regulation.

II. THE FOURTH CIRCUIT'S COMBINATION OF THE "CLEAR AND CONVINCING" STANDARD WITH THE NARROW-CONSTRUCTION RULE CONFLICTS WITH THE LAW OF EIGHT OTHER CIRCUITS

In the course of reaching the opposite conclusion from the Sixth Circuit regarding fraud investigators on "essentially identical" facts, App., *infra*, 39a, the Fourth Circuit required GEICO to meet a "clear and convincing" standard for exemption, *id.* at 16a. It layered that requirement on top of the narrow-construction rule already at issue this Term in *Encino Motorcars, LLC v. Navarro*, No. 15-415 (cert. granted Jan. 15, 2016); *see* Brief for Petitioner at 34-35, No. 15-415 (Feb. 29, 2016) (arguing that FLSA exemptions must be interpreted "fairly and correctly, not narrowly or broadly") (capitalization omitted). That combination presumably tipped the scales for the Fourth Circuit on the "very close legal question" at hand, App., *infra*, 37a, and cannot be squared with basic statutory interpretation principles or the law of other circuits.

This Court has declined to apply the narrow-construction rule in every recent case in which it has made an appearance. *See, e.g.*, *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher v.*

SmithKline Beecham, 132 S. Ct. 2156, 2172 n.21 (2012) (canon does not apply to FLSA's definitions). The rule is the application of a canon of interpreting remedial statutes broadly that this Court has suggested should have little force. *See Newport News Shipbuilding*, 514 U.S. at 135-136. In *combining* that rule with a heightened evidentiary standard for employers seeking to invoke an FLSA exemption, the Fourth Circuit stands alone. There is no warrant in this Court's precedent, or the FLSA's text or regulations, for imposing a "clear and convincing" burden on employers, and certiorari review is warranted to resolve the lopsided circuit split on that issue.

1. The Fourth Circuit has acknowledged that the heightened "clear and convincing" standard it imposes on employers diverges from other courts of appeals, but has declined to resolve that conflict by reconsidering its circuit law en banc. *See, e.g., Desmond*, 564 F.3d at 691 n.3 (acknowledging split with the Seventh Circuit). Its once-minority position now appears to be a singular one; other courts of appeals that had used phrases like "clear and affirmative evidence" to describe the employer's burden have clarified in recent cases that employers are subject only to the ordinary preponderance standard, and not some heightened burden, to establish an FLSA exemption.

The Sixth, Seventh, and Tenth Circuits have all considered and rejected heightened evidentiary standards for FLSA exemptions. The Sixth Circuit has "made it clear that the employer claiming an FLSA exemption does not bear any heightened evidentiary burden," rejecting a "clear and

affirmative evidence" standard in favor of the normal preponderance standard. *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501-502 (6th Cir. 2007). The Tenth Circuit similarly rejected a jury instruction requiring the employer to prove the exemption "plainly and unmistakably," holding that "the ordinary burden of proof—preponderance of the evidence—controls *** whether the facts establish an exemption to the FLSA." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012). And the Seventh Circuit has explained that all of the various formulations of heightened standards are "garbled" transformations of the narrow-construction rule, which are unjustified by the FLSA's text or implementing regulations. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506, 507 (7th Cir. 2007) ("[N]othing in the statute, the regulations under it, or the law of evidence justifies imposing a requirement of proving entitlement to the exemption by 'clear and affirmative evidence.'").

In addition, the First, Fifth, Eighth, Ninth, and Eleventh Circuits have all made plain that the ordinary preponderance standard applies to FLSA exemptions, in irreconcilable conflict with the Fourth Circuit's clear-and-convincing standard. *See, e.g.*, *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013) ("preponderance of the evidence"); *Dybach v. Florida Dep't of Corr.*, 942 F.2d 1562, 1566 n.5 (11th Cir. 1991) (same); *Norman v. Moseley*, 313 F.2d 544, 546 (8th Cir. 1963) (same); *Telephone Answering Serv., Inc. v. Goldberg*, 290 F.2d 529, 533 (1st Cir. 1961) (same); *Coast Van Lines, Inc. v. Armstrong*, 167 F.2d 705, 707 (9th Cir. 1948) (same). As far as GEICO is aware, only the Fourth Circuit

now raises the bar to "clear and convincing" for employers to establish FLSA exemptions. This entrenched circuit conflict affects every case involving one of the FLSA's many exemptions—not just the administrative exemption at issue in this case—and will not be resolved absent this Court's intervention.

2. The Fourth Circuit's heightened standard also conflicts with precedent of this Court. The law presumes that a preponderance standard properly allocates risk in civil cases "unless 'particularly important individual interests or rights are at stake.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (citation omitted). In other employee-rights contexts, the preponderance standard governs an employer's affirmative defenses. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (affirmative defense of exercising reasonable care to prevent sexual harassment). The overtime exemption is far more analogous to those employment inquiries than to the critical individual rights to which the clear-and-convincing standard has been applied. *See Addington v. Texas*, 441 U.S. 418, 424 (1979) ("quasi-criminal wrongdoing by the defendant" subject to clear-and-convincing standard); *id.* at 433 (civil commitment); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization).

Moreover, given that the clear-and-convincing standard originated in the narrow-construction rule, *Yi*, 480 F.3d at 507 (tracing the origin of the heightened standards), which itself stands on shaky ground, *see* Brief for Petitioner at 34-35, *Encino Motorcars*, No. 15-415, the Fourth Circuit's law

effectively doubles whatever heightened bar for employers (if any) was intended by the statement that FLSA exemptions are to be narrowly construed. Plenary review is warranted to resolve the correctness of the "clear and convincing" bar imposed by the Fourth Circuit in conflict with nearly every other court of appeals and to resolve whether the narrow-construction rule itself is warranted under the text of the FLSA.

III. THE SCOPE OF THE FLSA'S ADMINISTRATIVE EXEMPTION IS AN IMPORTANT AND RECURRING QUESTION

The scope of the administrative overtime exemption, and the standards imposed on employers to prove that exemption (or any FLSA exemption), are questions of exceptional national importance.

The irreconcilable conflict between the Fourth and Sixth Circuits regarding the exempt status of fraud investigators warrants this Court's intervention without awaiting further percolation. Collective actions under the FLSA can be filed in any district where the employer can be served with process, even when no member of the collective action works in the district. *See* 29 U.S.C. § 216(b). (In this case, the named plaintiff, Samuel Calderon, worked in Florida, and the opt-in plaintiffs worked throughout the United States.) The circuit split therefore invites forum shopping because the Fourth Circuit's decision likely will become the *de facto* nationwide rule for any insurer that has operations within the Fourth Circuit. That is a particular problem for this industry because most insurance

companies operate nationwide. Moreover, to the extent that an insurer is *not* subject to suit in the Fourth Circuit, that insurer would benefit from an unfair competitive advantage.

Perhaps because of the nationwide dynamic with FLSA collective actions, this Court has intervened on multiple occasions to resolve divisions in the courts of appeals regarding the applicability of an FLSA exemption to a particular type of work. *See, e.g.*, *Encino Motorcars,* No. 15-415 (auto salesmen and mechanics exemption as applied to service advisors); *Christopher*, 132 S. Ct. at 2165 (outside sales exemption as applied to pharmaceutical sales representatives); *Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158, 161 (2007) (domestic companionship workers exemption as applied to worker employed by agencies).

This Court's review is again necessary to provide needed national uniformity with respect to the overtime eligibility of fraud investigators under the FLSA, which affects tens of thousands of workers.[10] And more broadly, the Fourth Circuit's parsimonious construction of the exemption's "administrative work" element as requiring supervisory or policy-setting duties threatens to destabilize the previously settled nature of that frequently occurring issue across professions. Beyond that, the case presents an

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[10] When it issued the current regulations in 2004, the Department of Labor estimated that there were about 492,000 insurance adjusters, examiners, and investigators, but did not separately estimate the number of investigators. 69 Fed. Reg. at 22,247.

opportunity to revisit the unfounded narrow-construction rule and to resolve an entrenched circuit conflict that affects the analysis of all FLSA exemptions—the Fourth Circuit's imposition of a "clear and convincing" standard where every other court of appeals hews to the normal preponderance standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 2, 2016

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2111

SAMUEL CALDERON, individually and on behalf of other similarly situated individuals; MICHAEL HEADLEY; AARON KULSIC; KENNETH MILLER; MICHAEL CREAMER; GEORGE WOOD; ROBERT DEMARTINO; JOHN HALLIDAY; JAMES L. HANSON; THOMAS F. BRADY; DANA FERRIN; MAUREEN AYLING; CANDIDO CUBERO; THOMAS FITZGERALD; WILLIAM DOLINSKY; MARVIN HOURIGAN; DAVID MCCAMLEY; AUGUSTUS STANSBURY, JR.; JOAN BISCHOFF; RANDALL GIBSON; VINCENT GRECO; TERESA HARTEY-ADAMETZ; THOMAS LOWE; DAVID MCENRY; JENNIFER RICCA; ANITA SINGH; BRYAN UTTERBACK; PATRICK WEISE; LEAH HAMILTON; DENNIS FULTON; EBERHARD GROSSER; JOSEPH MILES, JR.; RICKY MCCRACKEN; THOMAS STURGIS; CHRISTOPHER SULLIVAN; MICHAEL RUSSELL; RANDALL STEWART; LAVERNE HOLMES; THOMAS DAVIDSON, JR.; SHANNON BOYD; ANTHONY DEAN, JR.; FRANCISCO NOGALES; JOHN GHETTI; GERALD DEXTER; CLAUDE

REIHER; STEVEN MCBRIDE; PHILLIP RONDELLO; ROBERT MERRY,

Plaintiffs – Appellees,

and

MICHAEL BROWN,

Plaintiff,

v.

GEICO GENERAL INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendants – Appellants,

and

GEICO CORPORATION; GEICO INDEMNITY COMPANY; GEICO CASUALTY COMPANY; DOES 1-10,

Defendants.

No. 14-2114

SAMUEL CALDERON, individually and on behalf of other similarly situated individuals; MICHAEL HEADLEY; AARON KULSIC; KENNETH MILLER; MICHAEL CREAMER; GEORGE WOOD; ROBERT DEMARTINO; JOHN HALLIDAY; JAMES L. HANSON; THOMAS F. BRADY; DANA FERRIN; MAUREEN AYLING; CANDIDO CUBERO; THOMAS FITZGERALD; WILLIAM DOLINSKY; MARVIN HOURIGAN; DAVID MCCAMLEY; AUGUSTUS STANSBURY, JR.; JOAN BISCHOFF; RANDALL GIBSON; VINCENT GRECO; TERESA HARTEY-ADAMETZ; THOMAS LOWE; DAVID MCENRY; JENNIFER RICCA; ANITA SINGH; BRYAN UTTERBACK; PATRICK WEISE; LEAH HAMILTON; DENNIS FULTON; EBERHARD GROSSER; JOSEPH MILES, JR.; RICKY MCCRACKEN; THOMAS STURGIS; CHRISTOPHER SULLIVAN; MICHAEL RUSSELL; RANDALL STEWART; LAVERNE HOLMES; THOMAS DAVIDSON, JR.; SHANNON BOYD; ANTHONY DEAN, JR.; FRANCISCO NOGALES; JOHN GHETTI; GERALD DEXTER; CLAUDE REIHER; STEVEN MCBRIDE; PHILLIP RONDELLO; ROBERT MERRY,

Plaintiffs – Appellees,

and

MICHAEL BROWN,

Plaintiff,

v.

GEICO GENERAL INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendants – Appellants,

and

GEICO CORPORATION; GEICO INDEMNITY COMPANY; GEICO CASUALTY COMPANY; DOES 1-10,

Defendants.

Appeals from the United States District Court for the District of Maryland, at Greenbelt.
Roger W. Titus, Senior District Judge.
(8:10-cv-01958-RWT)

Argued: October 28, 2015

Decided: December 23, 2015

Before: TRAXLER, Chief Judge, KING, Circuit Judge, and DAVIS, Senior Circuit Judge.

Affirmed in part, reversed in part, and remanded by published opinion. Chief Judge Traxler wrote the opinion, in which Judge King and Senior Judge Davis concurred.

ARGUED: Pratik A. Shah, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Appellants/Cross-Appellees. Matthew Hale Morgan, NICHOLS KASTER, PLLP, Minneapolis, Minnesota, for Appellees/Cross-Appellants. **ON BRIEF**: Eric Hemmendinger, SHAWE & ROSENTHAL, LLP, Baltimore, Maryland; Hyland Hunt, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Appellants/Cross-Appellees. Timothy C. Selander, NICHOLS KASTER, PLLP, Minneapolis, Minnesota, for Appellees/Cross- Appellants.

TRAXLER, Chief Judge:

Government Employees Insurance Company and GEICO General Insurance Company (together, "GEICO") appeal a district court order granting judgment against them in an action asserting denial of overtime pay under the Fair Labor Standards Act ("FLSA"), *see* 29 U.S.C. §§ 201 *et seq*., and the New York labor law ("NYLL"), *see* N.Y. Lab. Law §§ 650 *et seq*.; N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2. The plaintiffs cross-appeal several rulings relating to the remedy awarded. We reverse the denial of prejudgment interest and remand for a prejudgment interest award. Otherwise, we affirm.

I.

GEICO is in the business of providing insurance for its customers. The plaintiffs in this matter are security investigators (the "Investigators") who currently work, or previously worked, for GEICO. The Investigators work in GEICO's Claims Department primarily investigating claims that are suspected of being fraudulent. The FLSA requires that employers pay overtime for each hour their employees work in excess of 40 per week, but it exempts "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1). GEICO has long classified its Investigators as exempt from the FLSA's overtime pay protections.[1] This case primarily concerns whether that classification is correct.

Viewing the facts concerning the classification in the light most favorable to GEICO, as we must,[2] the record reveals the following.

GEICO has employees called Claims Adjusters who work in the Claims Department and whose

---

[1] The sole exception is in the state of California. GEICO in 2001 reclassified all non-managerial claims employees there as non-exempt as a result of a California state-court decision that narrowed the administrative exemption under state law.

[2] The district court granted partial summary judgment to the plaintiffs on the issue of whether they were improperly classified. *See Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (explaining that we review a grant of summary judgment de novo, "viewing the facts and the reasonable inferences drawn therefrom in the light most favorable to the nonmoving party").

primary job it is to adjust insurance claims by investigating, assessing, and resolving them. The Claims Adjusters decide how much, if anything, GEICO will pay on a claim, and they negotiate any settlements.

The Investigators work in GEICO's Special Investigations Unit ("SIU"), which is part of GEICO's Claims Department. The Investigators report to Supervisors, who in turn report to Managers, who in turn report to the Assistant Vice-President of Claims. The SIU attempts to identify claims that are fraudulent and that GEICO therefore does not have to pay.[3] An Investigator generally becomes involved in a claim when other Claims Department personnel refer the claim to him on suspicion that it is fraudulent, although there are limited circumstances under which the Investigators initiate investigations themselves. The Investigators' primary responsibility is to investigate whether such claims are fraudulent, which occupies about 90% of their time.

GEICO has procedures that govern an Investigator's handling of a claim that has been referred to him, which require:

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[3] According to the Insurance Information Institute, approximately 10% of claims payments - about $32 billion per year for the insurance industry - are for fraudulent claims. *See Insurance Information Institute, Insurance Fraud*, http://www.iii.org/issue-update/insurance-fraud (last visited Dec. 22, 2015) (saved as ECF opinion attachment). Each Investigator handles approximately 165 investigations per year.

> 1. A thorough investigation of the referral.
>
> 2. Identification and interviews of potential witnesses who may provide information on the accuracy of the claim and/or application.
>
> 3. Utilizing industry recognized databases as deemed necessary in conducting investigations.
>
> 4. Preservation of documents and other evidence.
>
> 5. Writing a concise and complete summary of the investigation, including the investigators[’] findings regarding the suspected insurance fraud and the basis for their findings.

Calderon v. GEICO Gen. Ins. Co., 917 F. Supp. 2d 428, 432 (D. Md. 2012) (internal quotation marks omitted).

GEICO requires Investigators when they receive a claim referral to begin their work by creating a plan of action regarding what steps must be taken in order to investigate the particular claim. The Investigator then enters this plan of action into the SIU Case Management System ("SICM").

An investigation might entail steps such as interviewing witnesses, taking photographs, and reviewing property damage. Some interviews may take the form of face-to-face questioning wherein the witness is under oath. Such interviews serve the

purpose of obtaining information, providing the insured an opportunity to provide explanation or further substantiation for his claim. They also allow the Investigator to evaluate the credibility of the witness and to preserve the witness's testimony. Although GEICO has procedures governing how Investigators conduct investigations, Investigators still must use their judgment to determine exactly how to conduct their investigations and what inferences to draw from the evidence they uncover, including determining the credibility of insureds or other witnesses.

Investigators must submit an initial report within 10 days of receiving a claim referral and then submit interim reports every 20 days during the investigation. With regard to both interim and final reports, most Investigators – all but about 40 or 50 out of 250 – are required to submit their reports to their Supervisor for review before the reports are submitted through the SICM. This allows the Supervisor to "provide any input he may feel appropriate because of his expertise" and to ensure that the reports comply with format requirements. J.A. 1372.

GEICO does not permit speculation in its reports and it requires that Investigators substantiate any conclusions in their reports with facts and evidence. However, Claims Adjusters generally do not review reports once they are finalized. Instead, they generally base their decisions regarding whether to pay claims on oral reports or summaries of the reports that the Investigators provide to them.

In addition to conducting investigations, finding facts, and reporting their findings, Investigators also spend a small percentage of their time performing other duties. They sometimes educate adjusters about fraud, often utilizing their experiences from the field. Also, when an Investigator is preparing to end his work on a case, he has discretion to refer the claim to the National Insurance Crime Bureau or other state agencies if he has found significant indications of fraud. And finally, when an investigation reveals a problem with the policyholder, Investigators also may choose to refer a case to GEICO's underwriting department so that the insured's rates may be adjusted when his policy comes up for review.

GEICO has long classified its Investigators as exempt under the FLSA. In 2004, two events prompted GEICO to revisit the issue. First, a federal district court ruled that GEICO had misclassified its auto damage adjusters as exempt. *See Robinson-Smith v. GEICO*, 323 F. Supp. 2d 12 (D.D.C. 2004). Second, the Labor Department issued new regulations concerning the administrative exemption. *See* Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004).

In light of these events, GEICO Vice President of Claims John Geer asked GEICO's head of SIU, Steven Rutzebeck, to consider under the reasoning of the *Robinson-Smith* opinion whether the Investigators would be properly classified as exempt. Rutzebeck concluded that, assuming that the

reasoning of the decision was correct, it would apply to GEICO's Investigators as well.

Geer, an attorney, questioned the correctness of the *Robinson-Smith* decision and concluded himself the Investigators were properly classified as exempt. Geer discussed the issue with his boss, Senior Vice President Donald Lyons, as well as with Senior Vice President of Human Resources David Schindler. The group, which collectively had extensive knowledge of Investigators' duties, concluded that despite what the reasoning of *Robinson-Smith* might dictate, the Investigators were properly classified as exempt. Accordingly, GEICO continued the Investigators' exempt status. GEICO also appealed the *Robinson-Smith* decision, which was eventually reversed. *See Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010).

In 2007, GEICO undertook another review of various employee classifications under the FLSA, including that of the Investigators. After that review, which lasted one or two months and which involved different executives than did the 2004 review, GEICO again concluded that the Investigators were properly classified as exempt under the administrative exemption.

In 2010, named plaintiff Samuel Calderon brought a collective action under the FLSA in federal district court on behalf of himself and a proposed class of all persons who were or had been employed by GEICO as Investigators at any time in the United States, except for in California, within three years prior to the filing date of the action through the date

of the disposition of the action. The complaint alleged that GEICO improperly classified the Investigator position as exempt from overtime under the FLSA. *See* 29 U.S.C. § 213(a). The complaint requested damages in the amount of their unpaid overtime, liquidated damages, interest, and an award of attorneys' fees and costs. *See* 29 U.S.C. § 216(b). After the district court conditionally certified the FLSA claim as a collective action, approximately 48 current and former Investigators joined the suit as opt-in plaintiffs.

The plaintiffs subsequently amended their complaint to add an individual and class action claim for unpaid overtime pay under NYLL by opt-in plaintiff Tom Fitzgerald on behalf of himself and others who had worked as Investigators for GEICO in New York. *See* N.Y. Lab. Law §§ 650 *et seq.*; N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2. In addition to seeking compensatory damages in the amount of the unpaid overtime, the amended complaint sought liquidated damages, and attorneys' fees and costs in regard to this cause of action. The district court certified the class.[4] *See* Fed. R. Civ. P. 23.

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[4] In its discretion, the district court exercised supplemental jurisdiction over the NYLL claims. *See* 28 U.S.C. § 1367; *see Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 248 (2d Cir. 2011) (noting that "the Seventh, Ninth, and District of Columbia Circuits all have determined that supplemental jurisdiction is appropriate over state labor law class claims in an action where the court has federal question jurisdiction over FLSA claims in a collective action").

Following discovery, the plaintiffs moved for partial summary judgment, and GEICO moved for summary judgment, on the issue of liability. The district court granted the plaintiffs' motion and denied GEICO's, rejecting as a matter of law GEICO's contention that the Investigators fell within the FLSA's "administrative function" exemption. *See Calderon*, 917 F. Supp. 2d at 441-44.

The parties later filed cross-motions for summary judgment on several disputed remedy issues. Considering these motions, the court ruled that because GEICO acted in good faith, GEICO did not act willfully and thus the statute of limitations for the plaintiffs' claims extended only for two years. For similar reasons, the court also ruled that the plaintiffs were not entitled to liquidated damages or prejudgment interest. And finally, the court determined that because the plaintiffs were paid fixed salaries regardless of the varying number of hours they worked, the method of overtime described in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), applied to the plaintiffs' claims.

The district court then entered a "Stipulated Order Relating to Remedy" that it described as a "final judgment." J.A. 109, 112. That order "contain[ed] a complete formula for the computation of backpay" based on the rulings that the court had made and the parties' stipulations. J.A. 109. The order noted that both sides reserved the right to appeal the rulings of the district court underlying the order and that the order would "have no effect unless a judgment of liability is entered and sustained after all judicial review has been exhausted." J.A. 109.

The backpay formula adopted by the district court would produce an amount of backpay to which each plaintiff was entitled depending upon the total pay received and the total time worked for each two-week pay period within the applicable limitations period. The order further stated that "[t]he backpay calculations will be performed by a mutually acceptable entity with right of review and confirmation by Defendants' and Plaintiffs' counsel." J.A. 112. It also provided that the district court "shall have jurisdiction to resolve or supervise the resolution of any issue concerning the remedy that the parties are unable to resolve." J.A. 111. There was no limitation on the right of either party to appeal the district court's decisions.

GEICO subsequently appealed the district court's order granting partial summary judgment to the plaintiffs on the issue of liability, and the plaintiffs cross-appealed several of the district court's rulings regarding remedy issues.

Concluding that the district court had not yet found all of the facts necessary to compute the amount of damages to be awarded, we determined there was no final judgment and that we therefore lacked appellate jurisdiction; accordingly, we dismissed the appeals. *See Calderon v. GEICO Gen. Ins. Co.*, 754 F.3d 201, 204-07 (4th Cir. 2014). On remand, the district court determined the amount of damages to which each plaintiff was entitled and entered judgment in favor of the plaintiffs.

Now the plaintiffs have once again appealed and GEICO has cross-appealed, with each party

raising the same issues it raised in the prior appeal. Now that a final judgment is before us, we possess jurisdiction to consider the appeals, *see Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470, 474 (10th Cir. 1976) ("The general rule is that an interlocutory order from which no appeal lies is merged into the final judgment and open to review on appeal from that judgment."), which we will address seriatim.

II. GEICO's appeal

GEICO argues that the district court erred in granting partial summary judgment against it on the issue of liability. We disagree.

We review de novo a district court's order granting summary judgment, applying the same standards as the district court. *See Providence Square Assocs., L.L.C. v. G.D.F., Inc.*, 211 F.3d 846, 850 (4th Cir. 2000). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In FLSA exemption cases, "[t]he question of how [employees] spen[d] their working time . . . is a question of fact," but the ultimate question of whether the exemption applies is a question of law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *see also Shockley v. City of Newport News*, 997 F.2d 18, 26 (4th Cir. 1993) (noting that the significance of an employee's duties can also present questions of fact). "FLSA exemptions are to be 'narrowly construed against the employers seeking to

assert them and their application limited to those establishments plainly and unmistakably within [the exemptions'] terms and spirit.'" *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 692 (4th Cir. 2009) ("*Desmond I*") (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).[5] *See also Pugh v. Lindsay*, 206 F.2d 43, 46 (4th Cir. 1953) ("Since the Act is remedial in nature, the exemptions contained therein must be strictly construed, and it is incumbent upon one asserting an exemption to bring himself clearly and unmistakably within the spirit and the letter of its terms."). In this circuit, employers must prove application of the exemptions by clear and convincing evidence. *See Desmond I*, 564 F.3d at 691 n.3.

The FLSA generally requires that employers pay overtime in the amount of one-and-a-half times an employee's "regular rate" for each hour their employees work in excess of 40 per week. 29 U.S.C. § 207(a)(1). That requirement was intended "to spread employment by placing financial pressure on the employer" and "to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." *Walling v. Helmerich & Payne, Inc.*, 323

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[5] GEICO points out that the Supreme Court has recently explained that the rule that exemptions are narrowly construed against the employer is "inapposite where [courts] are interpreting a general definition that applies throughout the FLSA." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012). However, this case does not concern a general definition that applies throughout the FLSA. Rather, it involves interpreting the specific rules the Labor Department has created regarding the administrative exemption.

U.S. 37, 40 (1944). The Act does contain exemptions, however. As is relevant here, it exempts "any employee employed in a bona fide executive, administrative, or professional capacity."[6] 29 U.S.C. § 213(a)(1). Congress did not define this phrase. Rather, it delegated authority to the Labor Department to issue regulations "to define[] and delimit[]" these terms. *Id.* The current regulations, which were reissued in 2004, provide that the administrative exemption covers employees:

> (1) [Who are c]ompensated . . . at a rate of not less than $455 per week . . .;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent

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[6] Congress exempted employees fitting this description because "the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). Additionally, "the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week," thus "precluding the potential job expansion intended" by the overtime premium. *Id.*

> judgment with respect to matters of significance.

29 C.F.R. § 541.200(a).[7] The applicable New York regulations incorporate the federal exemption by reference. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2; *Gorey v. Manheim Servs. Corp.*, 788 F. Supp. 2d 200, 205 (S.D.N.Y. 2011) ("New York law governing overtime pay is defined and applied in the same manner as the FLSA.").

The district court addressed all three elements in resolving the summary judgment motions on the issue of liability. It is undisputed that the first element, regarding compensation, is satisfied here.[8] The district court also concluded that the second element (the "directly related element") was likely met. *See Calderon*, 917 F. Supp. 2d at 436-41. The court ruled, however, that the plaintiffs were entitled to partial summary judgment on the issue of liability because, as a matter of law, GEICO failed to

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[7] The prior version of the regulations had provided for a long and short test for the exemption. *See Darveau v. Detecon*, Inc., 515 F.3d 334, 338 (4th Cir. 2008). The amendments were not intended to significantly change the exemption criteria. *See Desmond I*, 564 F.3d 688, 691 n.2 (4th Cir. 2009).

[8] The salary threshold of $455 per week equates to $23,660 per year. The starting annual salary of Samuel Calderon, named plaintiff in the FLSA claim, was $45,000 in 2009. The starting annual salary for Tom Fitzgerald, class representative in the NYLL claim, was $37,000 in 2000. We note that the Labor Department has recently proposed increasing the threshold to $921 per week (or $47,892 per year). *See* http:/www.dol.gov/whd/overtime/NPRM2015/factsheet.htm (last visited Dec. 22, 2015) (saved as ECF opinion attachment).

establish the third element (the "discretion-and-independent-judgment element"). *See id.* at 441-44. In our view, the plaintiffs were entitled to summary judgment on the basis of the directly related element. It is therefore that element on which we focus our discussion.

The applicable Labor Department regulations shed some light on the meaning of the directly related element. They explain that "'primary duty' means the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). "Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole."[9] *Id.*

Here, the summary judgment record clearly showed that the Investigators' primary duty was the investigation of suspected fraud, including reporting their findings. Unless the primary duty qualifies as "exempt work," the FLSA exemption relied upon by GEICO does not apply.[10] *See id.* ("To qualify for

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[9] 29 C.F.R. § 541.700(a) also provides:

> Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

[10] GEICO notes that the Investigators also must make decisions regarding whether to make referrals to law

exemption under this part, an employee's 'primary duty' must be the performance of exempt work.").

"The phrase 'directly related to the management or general business operations,'" within the context of the second element, "refers to the type of work performed by the employee." 29 C.F.R. § 541.201(a); *see Desmond I*, 564 F.3d at 693 ("Both the FLSA and its regulations make clear that an employee is exempt based on the *type* of work performed by that individual." (emphasis in original)). "To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, *for example, from working on a*

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enforcement or to the National Insurance Crime Bureau and whether to make referrals to GEICO's underwriting department so that an insured's rates may be adjusted when his policy comes up for review. GEICO also notes that Investigators sometimes process claim withdrawals when claimants decide to withdraw their claims. And they speak with law enforcement officials to discuss particular investigations and share information with other insurers. Even assuming that the administrative exemption would apply to an employee whose duties were primarily these, GEICO has pointed to nothing in the record that would support a conclusion that these responsibilities were any more than a minor part of the Investigators' jobs, either in their importance or in the amount of the Investigators' time that they occupy. *See Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986) (holding that employer "bears the full burden of persuasion for the facts requisite to an exemption"); *see also Schaefer v. Indiana Mich. Power Co.*, 358 F.3d 394, 403 (6th Cir. 2004) (holding that even though some of employee's duties appeared to satisfy the directly related element, the element was not satisfied where those duties were not part of his primary duty).

manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a) (emphasis added).

The regulations provide examples of the type of work that is directly related to management or general business operations, explaining that qualifying work

> includes, but is not limited to, *work in functional areas* such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b) (emphasis added).[11] And Labor Department comments to the applicable regulations explain that "the administrative operations of the business include the work of employees 'servicing' the business, such as, for example, 'advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.'" 69 Fed. Reg. at 22,138.

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[11] The regulation notes that "[s]ome of these activities may be performed by employees who also would qualify for another exemption." 29 C.F.R. § 541.201(b).

Because § 541.201(a) specifically identifies working on a manufacturing production line as an example of work that is not directly related to assisting with the running or servicing of a business, courts analyzing whether the directly related element has been satisfied have often focused their inquiry on whether the work is "production-type" work or analogous thereto. *See, e.g.*, *Desmond I*, 564 F.3d at 694. Our court has explained that "[a]lthough the administrative-production dichotomy is an imperfect analytical tool in a service-oriented employment context, it is still a useful construct." *Id.* One reason that the dichotomy is imperfect is that while production-type work is *not* administrative, not all non-production-type work *is* administrative. *See Martin v. Indiana Mich. Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004) ("The regulations do not set up an absolute dichotomy under which all work must either be classified as production or administrative."); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) ("Only when work falls 'squarely on the "production" side of the line,' has the administration/production dichotomy been determinative."). The regulation, after all, provides production work only as an *example* of work not directly related to assisting with the running or servicing of the business. Thus, in the end, the critical focus regarding this element remains whether an employee's duties involve "'the running of a business,'" *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990), as opposed to the mere "'day-to-day carrying out of [the business's] affairs,'" *Desmond I*, 564 F.3d at 694 (citing *Bratt*, 912 F.2d at 1070).

We applied this test most recently in *Desmond I*. In that case, the plaintiff-employees worked as racing officials for a company that staged live horse races. Along with some clerical responsibilities, the employees ensured that the horses wore proper equipment and that a trainer or groom was positioned to saddle the horse and prepare it for the race; verified that the horses had the proper papers, tattoos, and test results; confirmed each jockey's presence and licensing; and determined the races' final outcomes. *See id.* at 690.

Despite the employer's contention that the officials were indispensable to its business, we concluded as a matter of law that their work was not "directly related to the management or general business operations of the employer." *See id.* at 692. We noted that the employees' indispensability was not dispositive because it was "'the *nature* of the work, not its ultimate consequence'" that was critical. *Id.* (quoting *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287 (4th Cir. 1986)). As for the nature of the work, we reasoned:

> Racing officials have no supervisory responsibility and do not develop, review, evaluate, or recommend Charles Town Gaming's business policies or strategies with regard to the horse races. Simply put, the [racing officials'] work did not entail the administration of-the "running or servicing of"-Charles Town Gaming's business of staging live horse races. The Former Employees were not part of "the management" of Charles Town Gaming

> and did not run or service the "general business operations." While serving as a Placing Judge, Paddock Judge, or performing similar duties is important to the operation of the racing business of Charles Town Gaming, those positions are unrelated to management or the general business functions of the company.

Id. at 694. We concluded that the employees' duties were "similar to those performed 'on a manufacturing production line or selling a product in a retail or service establishment,'" *id.* (quoting 29 C.F.R. § 541.201(a)), in that their employer produces live horse races and the employees' duties "consist[] of 'the day-to-day carrying out of [their employer's] affairs' to the public, a production-side role," *id.* (quoting *Bratt*, 912 F.2d at 1070).

To the extent that the Investigators' work supports the claim-adjusting function, the Investigators, unlike the employees in *Desmond I*, are not production workers per se. *See* 69 Fed. Reg. at 22,145 ("[C]laims adjusters are not production employees because the insurance company is in the business of writing and selling automobile insurance, rather than in the business of producing claims." (internal quotation marks omitted)). But, like the employees in *Desmond I*, the Investigators' primary duty is too far removed from their employer's management or general business operations to satisfy the directly related element.

Their primary duty consists of conducting investigations to resolve narrow factual questions, namely whether particular claims submitted to GEICO were fraudulent. Like the racing officials in *Desmond I*, the Investigators have "no supervisory responsibility and do not develop, review, evaluate, or recommend [GEICO's] business polices or strategies with regard to the" claims they investigated. *Desmond I*, 564 F.3d at 694. Although their work is important to GEICO, the Investigators are in no way "part of 'the management' of [GEICO] and d[o] not run or service the 'general business operations.'" *Id.* Rather, by assisting the Claims Adjusters in processing the claims of GEICO's insureds, the Investigators' duties simply "consist[] of 'the day-to-day carrying out of [GEICO's] affairs' to the public." *Id.*

The applicable regulations and Labor Department opinion letters support this interpretation. Specifically, they indicate that employees whose primary duty is to conduct factual investigations do not satisfy the directly related element, even when the work is of significant importance to the employer. For example, 29 C.F.R. § 541.3(b)(1) provides:

> The section 13(a)(1) exemptions and the regulations in this part . . . do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, *investigators*, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical

> technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, . . . *who perform work such as* preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; *conducting investigations or inspections for violations of law*; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; *interviewing witnesses*; interrogating and fingerprinting suspects; *preparing investigative reports; or other similar work*.

29 C.F.R. § 541.3(b)(1) (emphasis added). Subsection 541.3(b)(3) explains that "[s]uch employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200."

GEICO argues that this regulation, when read in context, should be interpreted as pertaining only to "public-sector law enforcement officers." Response and Reply Brief for Appellants/Cross-Appellees at 23. In support of its argument, which the district court agreed with, *see Calderon*, 917 F. Supp. 2d at 440, GEICO specifically notes that the Labor Department's stated purpose for adopting this provision was to clarify that "police officers, fire

fighters, paramedics, EMTs and other first responders are entitled to overtime pay." 69 Fed. Reg. at 22,129 (emphasis added)); *see Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640, 644 (6th Cir. 2013). GEICO no doubt has correctly identified the Labor Department's *motivation* for including this clarifying regulation. *See* 69 Fed. Reg. at 22,129 ("This new subsection 541.3(b) responds to commenters, most notably the Fraternal Order of Police, expressing concerns about the impact of the proposed regulations on . . . first responders."). However, neither the Labor Department's comments nor the regulation itself suggest that the Labor Department intended to carve out some sort of special exception for first responders or otherwise treat workers performing similar work differently depending on whether they worked in the public or private sector. *See* 29 C.F.R. § 541.201(a) ("The phrase 'directly related to the management or general business operations' refers to *the type of work performed by the employee*." (emphasis added)); *see Desmond I*, 564 F.3d at 693 ("Both the FLSA and its regulations make clear that an employee is exempt based on the *type* of work performed by that individual." (emphasis in original)).

In fact, the Labor Department's comments to 29 C.F.R. 541.3(b)(1) explain that the regulation was merely intended to reflect results that courts had already reached. *See* 69 Fed. Reg. at 22,129. Indeed, one of the three cases cited in the comments as supporting § 541.3(b)(1)'s application of the administrative exemption, *Bratt*, employed analysis very similar to that which we applied in *Desmond I*, analysis that seems to apply to the Investigators as

well. In *Bratt*, the court considered whether the administrative exemption applied to employees of a county probation department who "conduct[ed] factual investigations of adult offenders or juvenile detainees and advise[d] the court on their proper sentence or disposition within the system." *Bratt*, 912 F.2d at 1069. Analogizing the sentencing courts' work to a business, the court rejected the notion that the employees could be characterized as "servicing" the business of the courts or "advising the management" regarding policy determinations such as how the business could be run more efficiently. *Id.* at 1070 (internal quotation marks omitted). Rather, the court concluded, the service that the probation officers provided the courts, namely, "providing information in the course of the customer's daily business operation[,] . . . d[id] not relate to court policy or overall operational management but to the courts' day-to-day production process." *Id.* Thus, the court determined that the probation officers' work did not directly relate to the management or general business operations of the employer.

A strong argument can be made that the Investigators' work in this case did not satisfy the directly related element for similar reasons. It is of course true that while the primary duty of both the probation officers in *Bratt* and the Investigators before us was to conduct factual investigations and report their results, the information provided by the probation officers was put to a different use than is that of the Investigators before us. Namely, the information in *Bratt* was used by courts to determine defendants' sentences, while the information in the present case is used by GEICO to assist the Claims

Adjusters in the processing of insurance claims. Nothing in the regulations demonstrates that this distinction would be dispositive, however. As we have stated, the regulations' focus is on "the *nature* of the work, not its ultimate consequence," *Desmond I*, 564 F.3d at 692, and the nature of the Investigators' primary duty was not different in any significant way from that of the probation officers. In neither case did the employees' actual work duties relate to business policy or overall operational management. *Compare Shockley*, 997 F.2d at 28 (holding that because "Ethics and Standards Lieutenant spent all her time accumulating and analyzing data and making recommendations that shaped the police department's policy with regard to internal discipline[, her work was] 'directly related to management policies.'"), *and West v. Anne Arundel Cnty.*, 137 F.3d 752, 764 (4th Cir. 1998) (holding that EMS Training Lieutenants' position met criteria because the Lieutenants "develop[ed], coordinate[d], implement[ed,] and conduct[ed] EMS training programs[;] . . . prepare[d] lesson plans and training aids[;] supervise[d] delivery of training and tests[;] and evaluate[d] new equipment"), *with Shockley*, 997 F.2d at 28-29 (holding that Media Relations Sergeants did not meet exemption criteria when they "spent half their time on the 'crime line,' answering the phone, taking tips, and passing them on to the right department," and also "screen[ed] calls to the Chief of Police, respond[ed] to impromptu questions by the press, determin[ed] what information should be released to the press regarding ongoing investigations, and develop[ed] an ongoing news broadcast called 'Crime of the Week'"). Rather, the information the Investigators provided was used in

GEICO's day-to-day processing of their employers' claims. Regardless of whether this was "production work," it does not appear to be directly related to GEICO's management or general business operations.

Further supporting the conclusion that conducting factual investigations does not constitute exempt work is 29 C.F.R. 541.203(j), which provides that the work of "[p]ublic sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees . . . typically does not involve work directly related to the management or general business operations of the employer."[12] As with § 541.3(b)(1), the addition of this subsection was motivated by concerns relating to public employees. *See* 69 Fed. Reg. at 22,147. But also as with 541.3(b)(1), there is no clear indication that the Labor Department, in promulgating the regulation, was doing anything other than applying generally applicable principles to the specifically enumerated jobs.

Several Labor Department letter opinions further support the view that conducting factual

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[12] The regulation also provides that "[s]uch employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met." 29 C.F.R. § 541.203(j).

investigations, regardless of how important they are to the employer, is not directly related to management or general business operations.[13] Most prominently, a 2005 opinion letter considered whether the administrative exemption applied to investigators working for a company that had contracted with the U.S. government to perform "background investigations of potential government employees being considered for U.S. Government Secret and Top Secret security clearances." U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA 2005-21, 2005 WL 3308592 (Aug. 19, 2005), at *1. Notwithstanding that the employees' work was critical to national security, that the investigators possessed significant discretion in determining how to conduct their investigations, and that they were called upon to make credibility determinations, the Labor Department concluded that their primary duty was "diligent and accurate fact-finding, according to [agency] guidelines, the results of which are turned over to [the agency,] who then makes a decision as to whether to grant or deny security clearances." *Id.* at *6. The Labor Department determined that those activities "are more related to providing the ongoing, day-to-day investigative services, rather than performing administrative functions directly related to managing [the employer's] business." *Id.* And, the letter specifically noted the fact that "29 C.F.R.

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[13] When a regulation is ambiguous, we defer to the agency's interpretation of the regulation in an opinion letter so long as it is not "'plainly erroneous or inconsistent with the regulation.'" *D.L. ex rel. K.L. v. Baltimore Bd. of Sch. Comm'rs*, 706 F.3d 256, 259-60 (4th Cir. 2013) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

§ 541.203(j) regard[s] public sector inspectors, investigators and similar employees, as employees whose duties have been found not to meet the requirements for the administrative exemption 'because their work typically does not involve work directly related to the management or general business operations of the employer.'" *Id.* at *7. Thus, the Labor Department determined that the investigators' "activities, while important, do not directly relate to the management or general business operations of the employer within the meaning of the regulations." *Id.* at *6.

The reasoning in this letter is similar to several other Labor Department opinion letters applying the pre-2004-amendment regulations to other investigators. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1998 WL 852783 (Apr. 17, 1998), at *2 (concluding that work of journeymen investigators in liquor industry "involve[d] the day-to-day 'production' functions of the employer rather than the management policies or general business operations of the employer"); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1998 WL 852752 (Jan. 23, 1998), at *2 (concluding that medical legal investigators were "carrying out the employer's day-to-day affairs rather than running the business itself or determining its overall course and policies"); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1997 WL 971811 (Sept. 12, 1997), at *3 (concluding that work of investigators who worked for a company that conducted background investigations of various types of employees that were used to determine the subjects' fitness for employment did not satisfy the directly related element because "the specific

investigation activities . . . would appear to be more related to the ongoing day-to-day production operations of the firm than to [its] management policies or general business operations"; noting that the directly related element would not be satisfied "[e]ven if the investigators were viewed as performing staff operations of the firm's customers," such that the investigators would not be engaged in production activities, "because their work does not help shape or define the policies or operations of [the customer businesses] or affect their operations to a substantial degree"). We see nothing plainly erroneous concerning these interpretations, and we therefore defer to them, as we must. *See D.L. ex rel. K.L. v. Baltimore Bd. of Sch. Comm'rs*, 706 F.3d 256, 259-60 (4th Cir. 2013).

Notwithstanding the similarity between the nature of the Investigators' primary duty and that of the many jobs the regulations identify as not satisfying the directly related element, GEICO maintains that the Investigators are nonetheless exempt because they perform some of the same duties that claims adjusters typically perform.[14] In this regard, GEICO points to § 541.203(a), which states,

> *Insurance claims adjusters* generally meet the duties requirements for the

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[14] The district court's conclusion that the directly related element was likely satisfied was based in part on the fact that Investigators' work is used to assist GEICO claims adjusters in adjusting claims. *See Calderon v. GEICO Gen. Ins. Co.*, 917 F. Supp. 2d 428, 441 (D. Md. 2012).

> administrative exemption, whether they work for an insurance company or other type of company, *if their duties include activities such as* interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; *negotiating settlements; and making recommendations regarding litigation*.

29 C.F.R. § 541.203(a) (emphasis added).

This regulation is of little help to us in our evaluation of whether the nature of the Investigators' work is directly related to management or general business operations. As the regulation's language indicates, even for claims adjusters,[15] the question of whether they satisfy the directly related element is determined on a case-by-case basis and depends on their specific duties. *See* 69 Fed. Reg. at 22,144, 22,145 (emphasizing that the regulation "identifies the typical duties of an exempt claims adjuster" and noting that "there must be a case-by-case assessment to determine whether the employee's duties meet the requirement for exemption," including the directly related element); *see also* U.S. Dep't of Labor, Wage

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[15] "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2.

& Hour Div., Opinion Letter, FLSA 2005-2 (Jan. 7, 2005), at *2 ("[S]ection 541.203(a) simply provides an illustration of the application of the administrative duties test; it does not provide a blanket exemption for claims adjusters." Rather, "there must be a case-by-case assessment." (internal quotation marks omitted)).[16] The duties of the typical claims adjuster that the regulation describes are certainly much broader than those of the Investigators, and they include some duties that are unmistakably administrative, such as "negotiating settlements" and "making recommendations regarding litigation."[17] *See* 69 Fed. Reg. at 22,138 (noting that "the

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[16] The Labor Department over the years has consistently expressed the view that claims adjusters typically satisfy the requirements of the administrative exemption. *See In re Farmers Ins. Exch.*, 481 F.3d 1119, 1128-29 (9th Cir. 2007) (reviewing prior regulations and opinion letters).

[17] That the Investigators do not have these duties distinguishes this case from many of those decisions that GEICO relies on in its argument that the directly related element is satisfied here. *See Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 868-73 (7th Cir. 2008) (holding that administrative exemption covered material-damage appraisers responsible for "investigating auto accident damage, making repair or replacement determinations, drafting estimates, and settling claims of up to $12,000 where liability has been established and coverage approved"); *In re Farmers Ins. Exch.*, 481 F.3d at 1124 (holding that administrative exemption covered claims adjusters who "determine whether the loss is covered, set reserves, decide who is to blame for the loss and negotiate with the insured or his lawyer"); *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 585 (5th Cir. 2006) (per curiam) (holding that exemption covered adjusters who "advised the management, represented Allstate, and negotiated on Allstate's behalf").

administrative operations of the business include the work of employees 'servicing' the business, such as, for example, 'advising the management, planning, *negotiating, representing the company*, purchasing, promoting sales, and business research and control'" (emphasis added)). For this reason, it is hardly surprising that the work of a claims adjuster with those duties would be considered to be directly related to management or general business operations.

Although GEICO does not dispute that the Investigators' duties are significantly more narrow than those of the typical claims adjuster that the regulation describes, GEICO nevertheless argues that the fact that the Investigators' work is used *to support the claims-adjusting function* demonstrates that their work satisfies the directly related element. *See Foster*, 710 F.3d at 646 (holding that although the plaintiffs had only a subset of the duties listed in § 541.203(a), the directly related element was satisfied because the employees' "work remains integral to the claims adjusting function, is performed in partnership with the [claims adjusters], and involves making findings that bear directly on the [claims adjuster's] decisions to pay or deny a claim"). But this argument fails to take into account that it is "the nature of the work, not its ultimate consequence," that controls whether the exemption applies. *Desmond I*, 564 F.3d at 692; *see* 29 C.F.R. 541.201(a) ("The phrase 'directly related to the management or general business operations' refers to the *type* of work performed by the employee." (emphasis added)). Were GEICO's reasoning correct, even "run-of-the-mine" jobs such as secretarial work

that supported the claims-adjusting function could be found to be directly related to management policies or general business operations. But in fact such jobs do not generally satisfy this element.[18] *See Clark*, 789 F.2d at 287.

Regardless of how Investigators' work product is used or who the Investigators are assisting, whether their work is directly related to management policies or general business operations depends on what their primary duty consists of. And, as we have explained, the primary duty of the Investigators – conducting factual investigations and reporting the results – is not analogous to the work in the "functional areas" that the regulations identify as exempt. 29 C.F.R. § 541.201(b). It is, however, directly analogous to the work the regulations identify as not satisfying the directly related element. *See* 29 C.F.R. §§ 541.3(b)(1), 541.203(j). Accordingly, although the issue presents a very close legal question, we conclude that GEICO has not shown that the Investigators' primary duty is, plainly and unmistakably, directly related to GEICO's management or general business operations. We therefore hold that the district court correctly granted partial summary judgment to the plaintiffs

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[18] Indeed, if the fact that an employee's work supported the claims-adjusting process demonstrated that the directly related element were satisfied, there would be no need to consider claims adjusters' duties on a case-by-case basis in deciding whether they satisfied that element.

on the issue of whether GEICO improperly classified the plaintiffs as exempt.[19]

III. The plaintiffs' cross-appeal

A. Willfulness

The plaintiffs first argue in their cross-appeal that the district court erred in granting partial summary judgment to GEICO on the issue of willfulness under the FLSA. We disagree.

Under the Portal-to-Portal Act of 1947 (the "Portal Act"), 29 U.S.C. §§ 251-62, the length of the FLSA's statute of limitations depends upon whether the violation at issue was willful. *See* 29 U.S.C. § 255(a); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 375 (4th Cir. 2011). If it is not willful, the limitations period is two years, but the period is three years for willful violations. *See* 29 U.S.C. § 255(a); *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011) ("*Desmond II*"). "[O]nly those employers who either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA] have willfully violated the statute." *Desmond II*, 630 F.3d at 358 (internal quotation marks omitted). And, negligence is insufficient to establish willfulness. *See id.* The question of whether an employer acted willfully is generally a question of fact. *See Martin v. Deiriggi*, 985 F.2d 129, 136 (4th Cir. 1993). The burden to

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[19] In light of our affirmance on the basis of the directly related element, we do not address the application of the discretion-and-independent-judgment element.

establish willfulness rests with the employee. *See Perez*, 650 F.3d at 375.

Here, the question of whether the Investigators are exempt was a close and complex one regarding two of the three elements of the applicable test. Indeed, the Sixth Circuit in *Foster v. Nationwide Mutual Insurance Company*, faced with facts essentially identical to ours, concluded that the exemption applied. *See Foster*, 710 F.3d at 644-50. As evidence of willfulness, the plaintiffs point only to the memo that Rutzebeck prepared in conjunction with GEICO's 2004 review of the Investigators' exempt status. However, Rutzebeck's conclusion that the Investigators were not exempt was based on a court decision that GEICO's senior executives disagreed with, and there is no reasonable basis for any finding that GEICO's disagreement with that decision was reckless. In fact, the court decision was eventually reversed.

In any event, regardless of how GEICO made its exemption decision in 2004, GEICO reconsidered the issue anew in 2007 over a one- or two-month period and again concluded that the Investigators were correctly classified as exempt. As was true of the 2004 process, there is no evidence that any of the executives involved in the 2007 process made anything other than their best attempts to resolve this difficult exemption question, and we conclude that their decision to continue classifying the Investigators as exempt was a reasonable one. We therefore agree with the district court that there was no basis upon which a reasonable factfinder could conclude that GEICO's decision to classify its

investigators as exempt was knowingly incorrect or reckless. Accordingly, the district court properly granted summary judgment on the issue to GEICO.

B. Regular Rate

The plaintiffs next challenge the method the district court used to calculate the compensation they were due for unpaid overtime.

The FLSA provides that an employer will be liable to its employees for a violation of the overtime pay requirement "in the amount of . . . their unpaid overtime compensation."[20] 29 U.S.C. § 216(b). The method of calculating compensatory damages for lost overtime is established for mistaken-FLSA-exemption cases in which "the employer and employee had a mutual understanding that the fixed weekly salary was compensation for all hours worked each workweek and the salary provided compensation at a rate not less than the minimum wage for every hour worked." *Desmond II*, 630 F.3d at 354. In such a case, "a court should divide the employees['] fixed weekly salary by the total hours worked in the particular workweek," producing the "regular rate" for a given workweek. *Id.* (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579-80 (1942)). The employee should then receive overtime compensation for each week in an amount no less than half of the regular rate for that week

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[20] NYLL also provides such liability. *See* N.Y. Lab. Law §§ 198(1-a); 663(1).

multiplied by the number of hours worked in excess of 40. *See id*. at 354-57.

In challenging the method the district court employed for calculating damages, the plaintiffs simply maintain that there was a genuine factual dispute regarding whether they agreed to receive straight-time pay for all hours worked in a given workweek. We disagree.

Importantly, "an understanding [that the fixed weekly salary was compensation for all hours worked] may be 'based on the implied terms of one's employment agreement if it is clear from the employee's actions that he or she understood the payment plan.'" *Mayhew v. Wells*, 125 F.3d 216, 219 (4th Cir. 1997) (quoting *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1281 n.21 (4th Cir. 1996)). For many years without objection, although the plaintiffs did not always work the same number of hours in a day, they received fixed salaries that did not fluctuate depending on the number of hours they worked. On this basis, we conclude that the district court correctly determined that a reasonable jury could only find that the Investigators and GEICO came to understand that the Investigators were receiving straight-time pay for all hours worked in a given workweek. Although the plaintiffs claim that GEICO hired them with the understanding that they would be working only 38.75 hours per week, that does not negate the fact that the record establishes that, over time, they came to understand that any fluctuations that occurred in their hours from week

to week would not affect the amount that they would be paid.[21] Accordingly, the district court correctly resolved the issue against the plaintiffs as a matter of law.

C. Liquidated Damages

The plaintiffs also contend that the district court abused its discretion by denying their request for liquidated damages under the FLSA and NYLL. We disagree.

In addition to authorizing unpaid overtime award, the FLSA provides for an award of liquidated damages equal to the amount of compensation for unpaid overtime. *See* 29 U.S.C. § 216(b). "Under the Portal Act, however, a district court, in its sound discretion, may refuse to award liquidated damages if 'the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." *Perez*, 650 F.3d at 375 (quoting 29 U.S.C. § 260) (alteration in original). This provision

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[21] *Black v. SettlePou, P.C.*, 732 F.3d 492, 498 (5th Cir. 2013), on which the plaintiffs rely, is distinguishable. In that case, the court noted that the plaintiff testified that she objected when she was not paid additional compensation for working additional hours and that such testimony tended "to show that she did not agree that her fixed weekly salary was intended to compensate her for all of the hours she worked each week." *Id.* at 501 (distinguishing case in which "the employee accepted her fixed weekly pay no matter how many hours she worked and never asked for any additional overtime pay"). The plaintiffs point to no such testimony in this case.

protects employers who violate the statute but "who had reasonable grounds for thinking the law was other than it turned out to be." *Thomas v. Howard Univ. Hosp.*, 39 F.3d 370, 373 (D.C. Cir. 1994). "[G]ood faith" and "reasonable grounds" are both measured objectively, *see* 29 C.F.R. § 790.22(c), and establishing either element is sufficient to satisfy the statute. *See Mayhew*, 125 F.3d at 220.

NYLL regarding the liquidated damages that could be awarded in addition to compensatory overtime underwent a change during the limitations period applicable to the state-law violations, which the parties stipulated was six years beginning on July 19, 2009. Prior to November 24, 2009, the law allowed for liquidated damages in the amount of 25 percent of the overtime underpayments in the event the employee could prove a willful violation. *See* N.Y. Lab. Law §§ 198(1-a), 663(1). Effective November 24, 2009, through April 8, 2011, liquidated damages in the amount of 25 percent of the overtime underpayments were allowed "unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." N.Y. Lab. Law § 98(1-a); *see* N.Y. Lab. Law § 663(1) (similar). And effective April 9, 2011, the 25-percent amount was increased to 100 percent. *See* N.Y. Lab. Law §§ 198(1-a), 663(1).

The district court concluded that GEICO acted in good faith by reviewing the classification issue multiple times and that, given the closeness of the issue, its decision to treat the Investigators as exempt was a reasonable one. We agree that the issue was a very close one, and we conclude that the

district court was within its discretion in refusing to award liquidated damages under either the FLSA or NYLL.

D. Prejudgment Interest

The plaintiffs finally argue that, in the absence of an award of liquidated damages, the district court abused its discretion in declining to award prejudgment interest on the basis that GEICO acted in good faith in treating its Investigators as exempt. We agree.

Although the FLSA does not explicitly provide for prejudgment interest, we have noted in the FLSA context that "[n]ormally, '[p]rejudgment interest is necessary, in the absence of liquidated damages, to make the [plaintiff] whole.'" *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990) (second alteration in original) (quoting *Cline v. Roadway Express*, 689 F.2d 481, 489 (4th Cir. 1982)); *see Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 274 (3d Cir. 2010) ("Prejudgment interest [on a backpay award under the FLSA] attempts to compensate for the delay in receiving the wages as well as offset the reduction in the value of the delayed payments caused by inflation."). S*ee also City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 195 (1995) ("The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss."). And we have held that "the decision whether to award interest is within the trial court's discretion." *Dole*, 899 F.2d at 1401; *see Cline*, 689 F.2d at 489. ("[W]e have indicated that the district court has discretion,

based on the equities involved, in awarding or denying interest" in FLSA cases).

Nevertheless, "as is always the case when an issue is committed to judicial discretion, the judge's decision must be supported by a circumstance that has relevance to the issue at hand." *City of Milwaukee*, 515 U.S. at 196 n.8. Because prejudgment interest on an FLSA overtime claim is compensatory rather than punitive, the fact that the defendant's decision not to treat the plaintiffs as exempt was reasonable or in good faith is not a valid basis for the denial of an award. *See id.* at 196-97; *see First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 480 (7th Cir. 1999) ("[T]he 'closeness' of a case is not material to the issue of prejudgment interest."). Accordingly, we reverse the district court's denial of prejudgment interest under the FLSA.

On the NYLL claims, we conclude that the plaintiffs were entitled to prejudgment interest as a matter of right and the district court thus did not have discretion to deny an award. "Where state law claims come before a federal court on supplemental jurisdiction," as they do in this case, "the award of prejudgment interest rests on state law." *Mills v. River Terminal Ry. Co.*, 276 F.3d 222, 228 (6th Cir. 2002). *Accord Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1126 (10th Cir. 2003) ("Where state law claims are before a federal court on supplemental jurisdiction, state law governs the court's award of prejudgment interest."); *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 692 n.13 (2d Cir. 1983) ("Because the applicability of state law depends on the nature of the

issue before the federal court and not on the basis for its jurisdiction, state law applies to questions of prejudgment interest on the pendent claims in an action predicated upon violations of the federal securities laws."); *cf. Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 633 (4th Cir. 1999) ("[State] law governs the award of prejudgment interest in a diversity case."); *Martin v. Harris*, 560 F.3d 210, 220 (4th Cir. 2009) (explaining that "the allowance of prejudgment interest is a substantive provision").

On a NYLL wage claim, such as this one, an award of prejudgment interest is mandatory. Prior to 2011, the source of that statutory right was Section 5001 of New York's Civil Practice Law and Rules, which provides that prejudgment "[i]nterest shall be recovered upon a sum awarded . . . because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." N.Y.C.P.L.R. § 5001(a)[22]; *see Santillan v. Henao*, 822 F. Supp. 2d 284, 298 (E.D.N.Y. 2011) ("Section 5001 of New York's Civil Practice Law and Rules governs the calculation of prejudgment interest for violations of the state's Labor Law."); *see also Mallis*, 717 F.2d at 693-94 (holding that "[i]n light § 5001(a)'s mandatory nature," even a failure to request such interest in the complaint or during trial does not constitute a waiver of the right to prejudgment

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[22] The rule contains an exception for equitable actions, *see* N.Y.C.P.L.R. § 5001(a), but an action seeking damages for unpaid overtime is legal in nature, *see Shannon v. Franklin Simon & Co.*, 43 N.Y.S.2d 442, 444 (N.Y. Sup. Ct. 1943).

interest under the statute). Effective April 9, 2011, New York also amended its statutes governing civil actions asserting wage claims to explicitly provide for awards of prejudgment interest. *See* N.Y. Lab. Law §§ 198(1-a), 663(1). Accordingly, with regard to the NYLL claims, the district court did not have discretion to decline to award prejudgment interest.

IV.

In sum, for the foregoing reasons, we reverse the district court's decision denying prejudgment interest under the FLSA and NYLL and remand so that the district court may award prejudgment interest. We otherwise affirm.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAMUEL CALDERON, ***et al.*,**	:	
Plaintiffs,	:	
v.	:	Civil Case No.: RWT 10-1958
GEICO GENERAL INSURANCE COMPANY, ***et al.*,**	:	
Defendants.	:	

MEMORANDUM OPINION

On July 19, 2010, Plaintiffs filed a one-count complaint on behalf of a collective class to recover overtime pay allegedly withheld by Defendants (collectively, "GEICO") in violation of the Fair Labor Standards Act ("FLSA"). Doc. No. 1. Plaintiffs maintain that the position of Security Investigator was improperly classified by GEICO as exempt from overtime under the FLSA. Plaintiffs moved for Conditional Certification and Judicial Notice pursuant to 29 U.S.C. § 216(b) on October 22, 2010. Doc. No. 23. This Court granted the motion on January 12, 2011. Doc. Nos. 31, 32. Plaintiffs' counsel mailed a court-approved judicial notice to the putative opt-in plaintiffs on January 26, 2011, and the notice period ended ninety days later on April 26,

2011. There are now forty-nine current and former Security Investigators in this case.

Following the close of the notice period, the parties filed a stipulation permitting Plaintiffs to amend the Complaint, Doc. No. 56, which this Court granted on June 1, 2011. Doc. No. 57. The Amended Complaint added an individual and Rule 23 class action claim for overtime pay by opt-in Plaintiff Tom Fitzgerald under New York state law. Doc. No. 56. On August 15, 2011, Plaintiffs filed a Motion to Certify Class Under Rule 23. Doc. No. 61.

On January 30, 2012, a hearing was held on Plaintiffs' motion to certify a Rule 23 class under New York state law. On February 14, 2012, this Court issued a Memorandum Opinion and Order that granted the Plaintiffs' motion, and directed the parties to jointly submit a proposed notice to the class for approval by the Court. Doc. Nos. 67, 68. On March 9, 2012, this Court entered an order approving the Plaintiffs' proposed Rule 23 class notice. Doc. No. 78. On March 1, 2012, the parties filed a stipulation permitting the Plaintiffs to file a second amended class action and collective action complaint ("Second Amended Complaint"), Doc. No. 73, which this Court granted on March 9, 2012. Doc. No. 76. GEICO filed its Answer to the Second Amended Complaint on March 5, 2012. Doc. No. 74.

On May 11, 2012, Plaintiffs filed a Motion for Partial Summary judgment. Doc. No. 80. On July 16, 2012, GEICO filed an Opposition to Plaintiffs' Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment. Doc. No. 86. On

November 5, 2012, this Court held a hearing on the parties' cross-motions for summary judgment.

BACKGROUND FACTS

The Plaintiffs are current and former Security Investigators (hereinafter, "Investigators" or "Plaintiffs") who worked for GEICO. Doc. No. 80 at 1. GEICO classifies its Investigators as exempt from the overtime pay protections of the FLSA. *Id.* GEICO is in the business of providing insurance to its policyholders. Rutzebeck Dep. 39:22-40:4.[1] Its purpose is to sell insurance policies and handle customers' claims. Pierce Dep. 65:15-18.[2]

When a policyholder submits a claim for insurance coverage to GEICO, it is handled by an employee called a Claims Adjuster in the Claims Department. *See* Doc. No. 80, Ex. 1 at NKA0001272-1279. The Claims Department is divided into a Liability Division and an Auto Damage Division. *Id.* at NKA0001268. The Claims Adjuster determines whether to pay or deny a claim, see Rutzebeck Dep. 66:12-17, and his primary job is to "adjust[] insurance claims by investigating, assessing, and resolving them." Doc. No. 80, Ex. 2 Pham Dec. ¶ 3.[3]

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[1] Steven Rutzebeck is the Director of Claims Security/Special Investigations Unit.

[2] Nancy Pierce is the Vice-President of Claims.

[3] At the time he signed the declaration, John Pham was employed by GEICO as Assistant Vice-President of Claims for Region 2.

The Investigators work in the Special Investigations Unit ("SIU"), which is part of the Claims Department. *Id*., Ex. 1 at NKA0001269. They occupy the lowest level of the SIU. The Investigator reports to a Supervisor, the Supervisor reports to a Manager, and the Manager reports to the Assistant Vice-President of Claims. Rutzebeck Dep. 19:7-19. GEICO divides Security Investigators into eight regions across the country. *Id*. 20:20-21:8. Outside of California, GEICO employs approximately 250 Investigators who normally work out of their homes and connect into GEICO's network through the internet. *Id*. 46:25-47:4.

The primary job of Investigators is to conduct investigations. *Id*. 46:2-8. (Investigators "prevent fraud by investigating claims suspected of being fraudulent, educating GEICO adjusters about fraud and serving as liaisons to law enforcement and regulatory agencies."). They spend approximately "90 percent of their time" on investigations. *Id*. 47:22-24. Michael College, the former Operations and Training Manager for SIU from February 2003 until March 2011, described the main job of an Investigator as "assist[ing] a claims examiner in uncovering" the facts of a claim and how the claim was reported to GEICO. College Dep. 21:7-18.

The claims process begins when a computer program called Intelligence Claims Evaluation ("ICE") "flags" a policyholder claim that exhibits indicia of fraud. Rutzebeck Dep. 17:11-13. The flagged claims are then reviewed by an Intake Associate. *Id*. 28:17-29:24. If the Intake Associate determines that the claim needs further

investigation, he will refer it to either the appropriate regional SIU Supervisor or to an Investigator. *Id*. 27:8-22. If the referral is sent to the SIU Supervisor, he will assign the matter to an Investigator. *Id*. 28:23-29:1. An Investigator has no control in deciding whether a claim is going to be investigated. *Id*. 27:5-7.

After an Investigator receives the referral, he is required to adhere to "written procedures for the investigation of possible suspected insurance fraud." Doc. No. 80, Ex. 3 at NKA000837. GEICO requires that the investigation include:

1. A thorough investigation of the referral.

2. Identification and interviews of potential witnesses who may provide information on the accuracy of the claim and/or application.

3. Utilizing industry recognized databases as deemed necessary in conducting investigations.

4. Preservation of documents and other evidence.

5. Writing a concise and complete summary of the investigation, including the investigators findings regarding the suspected insurance fraud and the basis for their findings.

Id. The investigatory process involves an administratively-regulated four-step procedure: (1) receive an assignment, (2) create a plan of action, (3) gather evidence, and (4) create a written report memorializing the investigation. Rutzebeck Dep.

51:4-10. Investigators are not allowed to deviate from this process without pre-approval from a superior. Derenthal Dep. 32:4-10.

When an Investigator is assigned a claim, he will perform the "pre-work" of reviewing the claim, any attached documents, and public records, if necessary. Rutzebeck Dep. 52:14-21. The plan of action requires the Investigator to "determine what activities [he] need[s] to perform in order to investigate the particular circumstances of that particular case." *Id.* 55:21-23. The plan of action contains instructions like, "conduct a complete background investigation of the insured," "inspect vehicle," "contact alibi witness . . . and interview him about the circumstances of the case," and "contact [the police] to determine who is assigned to the case." Doc. No. 80, Ex. 17 at NKA0012436; Ex. 18 at NKA0011257. After completing the plan of action, the Investigator enters it into the SIU Case Management System, or SICM. Rutzebeck Dep. 56:7-17.

An Investigator then begins the third step in the process: gathering evidence. To complete this task, the Investigator interviews witnesses, takes photographs, and reviews property damage, among other evidentiary-gathering procedures. *Id.* 56:21-57:2. Investigators may also interview an insurance claimant in a more formalized face-to-face interview called an examination under oath ("EUO"). *Id.* 72:18-73:21. Claimants are required to engage in a EUO if asked to do so by GEICO. Doc. 80, Ex. 6 at NKA0000655. The difference between a normal interview and an EUO is that the latter requires the

interviewee to be under oath. The purpose of the EUO is to (1) "obtain or clarify information necessary to properly handle a claim," (2) "provide an opportunity for an insured to explain or further substantiate their claim," (3) "eliminate as many gray areas as possible," (4) "evaluate the insured as a witness," and (5) "preserve testimony." *Id.* at NKA0000656.

GEICO maintains that "[a]n interview of a policyholder or other claimant suspected of fraud requires tactical decisions by the investigator." Doc. No. 86 at 5. It contends that although "GEICO has issued lists of suggested interview questions for certain types of suspected fraud," each interview is different and requires questions and tactics unique to the situation. *Id.* at 5-6. For example, an "investigator must decide whether to ask open-ended or leading questions and whether or not to disclose what he has learned already," and he "formulates follow-up questions based on the answers to initial inquiries." *Id.* at 6. Investigators also "observe[] body language to see if the witness is being deceptive." *Id.* GEICO disputes Plaintiffs' contention that Investigators rely on questions created by the company. *Compare* Doc. No. 80 at 11 *with* Doc. No. 86 at 8.

After the investigation is complete, the Investigator completes an initial report, makes appropriate referrals, and submits the report to a supervisor for review. Derenthal Dep. 58:12-18. The Investigator must also call the Claims Adjustor to discuss his initial findings. *Id.* 58:19-59:12. Approximately 40 to 50 investigators out of 250 have

self-approval authority over both their interim and final reports, which means "that they can approve their reports without supervisory approval." Rutzebeck Dep. 59:6-60:22. For those Investigators who do not have self-approval authority, they must submit their initial and final reports to a supervisor for review. Assuming that the Claims Adjustor agrees with the Investigator's findings, the Investigator writes the final report, which is the fourth step of the process. "The report will be forwarded to a supervisor for final approval," and if the Investigator does not have self-approval capability, the supervisor will "score the overall report on a 1-to-5" scale and the report is approved. *Id*. 61:20-25.

Investigators are instructed that "it is imperative that if [they] include any conclusions or recommendations, that they be totally substantiated by the information [they] listed in the body of the report." *Id*. 107:25-108:3. Steven Rutzebeck testified that this means that an Investigator's "speculations and things like that are not appropriate, that [an Investigator's] conclusions and . . . recommendations need to be based on the facts and evidence that allows [the Investigator to] make those conclusions." *Id*. 108:7-11. The SIU Administration and Operations Manual states that Investigators' "[r]eports will be free of innuendoes, opinions or rumors. Reports will be based upon objective findings, observations, and physical evidence or other pertinent documentation." Doc. No. 80, Ex. 4 at NKA0000733. Additionally, the recommendations provided "shall be based upon the facts of the investigation" and "should not include statements

regarding payment of claim unless required by state law." *Id*.

When Investigators are preparing to close a file, they may, if they deem it appropriate, refer the claim to the National Insurance Crime Bureau ("NICB") or other state agencies based on a finding of fraud. An Investigator does not need input from management or a claims examiner to make a referral. Derenthal Dep. 51:5-53:25. In instances where an SIU Supervisor believes that a referral is necessary but was not made, he will direct an Investigator to make the referral. Hodge Dep. 94:13-21. Once a referral has been made, the Investigator does not have control over the information or how NICB may use it. Derenthal Dep. 54:6-11. Claims Adjusters do not have access to referrals to NICB. Doc. No. 80 at 14.

GEICO maintains strict control and oversight over the reports that the Investigators complete. Investigators are required "to write their initial, interim, and final reports according to specific template[s]." *Id*. at 15; *see* Doc. No. 80, Ex. 8 at NKA 0000872-874; Ex. 10 at NKA0000425-427. The parties disagree whether "[a]ll reports, whether initial, interim, or final, are reviewed by SIU Supervisors" for every Investigator or only those without self-approval authority. *Compare* Doc. No. 80 at 15 ("All reports, whether initial, interim, or final, are reviewed by SIU Supervisors, even for the small number of Investigators with 'self-approval' authority.") *with* Doc. No. 86 at 16 ("The supervisors review the closing reports for investigators not on self-approval."). GEICO's "regulations and

corresponding review of Investigators[’] reports scrutinize not only the content of the report (i.e., the investigative activities performed during an investigation), but also the minutiae, including Investigators’ proper use of grammar, punctuation, and formatting.” Doc. No. 80 at 15 (citing Exs. 5, 8-10, 19-25). If a Supervisor finds a deficiency in a report, he will contact the Investigator and tell him to make corrections. Derenthal Dep. 45:7-15. “The purpose of SIU Supervisor reviews of Investigators’ reports is to make sure that reports conform to [GEICO’s] expectations.” Doc. No. 80 at 17. The Supervisor ensures that “the investigator has included everything the examiner needs in the report.” Derenthal Dep. 78:19-23.

Once an Investigator self-approves a report or it is approved by a supervisor, the report “is electronically transmitted to the referring adjuster. The adjuster does not have access to SICM. He sees only the report.” Doc. No. 86 at 17. After the report is finalized, the Investigator speaks to the Claims Adjuster. GEICO maintains that “[t]ypically, the adjusters do not look at the whole report, and rely on the oral report and summary.” *Id.* The Claim Adjuster’s decision on a claim is “based on essentially what the [I]nvestigator tells them.” Derenthal Dep. 74:23-24.

Each year during GEICO’s audit, it “review[s] four files from each investigator for a number of standards, particularly focusing primarily on report format.” Rutzebeck Dep. 22:7-10. The audit is conducted in accordance with a “File Audit Guide” created by GEICO. Doc. No. 80, Exs. 11, 12. The File

Audit Guide measures "the SIU efficiency ratio, the file compliance, [and] the file quality." Marine Dep. 40:13-20. Investigators are given scores ranging from one (the lowest) to five (the highest) within these measures, "based on their communication during the investigation, their plan of action, the thoroughness of their investigation, and the readability of their report." Doc. No. 80 at 18 (citing Marine Dep. 40:21-41:12).

STANDARD OF REVIEW

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). A dispute of material fact is only "genuine" if sufficient evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party. *Anderson*, 477 U.S. at 248-49. However, the nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1986). "A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514,

522 (4th Cir. 2003) (alternation in original) (quoting Fed. R. Civ. P. 56(e)).

The Court may only rely on facts supported in the record, not simply assertions in the pleadings, in order to fulfill its "affirmative obligation . . . to prevent 'factually unsupported claims or defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Celotex*, 477 U.S. at 323-24). When ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

"When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). "When considering each motion the court must take care to resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion." *Id.*

ANALYSIS

I. FLSA Administrative Function Exception

Section 206 of the FLSA requires that employers pay employees "engaged in commerce or the production of goods for commerce" the minimum wage set by statute. 29 U.S.C. § 206(a)(1). Section 207 prohibits employers from employing workers "engaged in commerce or the production of goods for

commerce" for more than forty hours per week unless the employer pays the employee at the rate of one and one-half times his regular rate for the hours worked in excess of forty hours. *Id.* at § 207(a)(1). Relevant here, Congress exempted employees "employed in a bona fide executive, administrative, or professional capacity" from these wage requirements. *Id.* § 213(a)(1).

In the Fourth Circuit, an employer bears the burden of proving, "by clear and convincing evidence," that an employee falls within the administrative exception. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir. 2009) (citing *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993)). "FLSA exemptions are to be 'narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within the exemptions' terms and spirit.'" *Id.* at 692 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)) (internal bracketing omitted).

"The Secretary of Labor has adopted regulations that set forth a three-part test for determining whether an employee is subject to the administrative exemption: (1) the employee must be compensated at a salary rate of not less than $455 per week; (2) the employee's primary duty must consist of 'the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers'; and (3) the employee's primary duty must 'include[] the exercise of discretion and independent

judgment with respect to matters of significance.'" *Id*. at 291 (quoting 29 C.F.R. § 541.200).

The parties agree that the Investigators are compensated at a salary rate not less than $455 per week; thus, there are two elements at issue: (1) whether the Plaintiffs' primary job duty as Investigators consists of the performance of office or non-manual work directly related to GEICO's management or general business operations; and (2) whether the Plaintiffs' primary job duty includes the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 C.F.R. § 541.200(a)(2), (3).

a. The Investigators' Primary Job Duty is Administrative in Nature.

The applicable FLSA regulations provide guidance in determining whether an employee's primary job duty is administrative in nature, thus satisfying the administrative exemption requirement. "To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.201(a). "The term 'primary duty' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." *Id*. § 541.700(a). "The phrase 'directly related to the management or general business operations' refers to the type of work

performed by the employee." *Id*. § 541.201(a). An employee meets this requirement if he "perform[s] work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id*.

The regulations provide a non-exhaustive list of work that is "directly related to management or general business operations," including:

> work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

29 C.F.R. § 541.201(b). Plaintiffs maintain that "the undisputed evidence in this case confirms that [their] primary job duty as Investigators is to conduct investigations. The weight of authority holds that employees with such a primary duty are not administratively exempt and are entitled to overtime pay because investigating is not directly related to the employer's management or general business

operations." Doc. No. 91 at 2. Plaintiffs also contend that their "work as Investigators is production work and does not . . . fall into any of the categories of back-office work considered to be administrative by the [DOL]." *Id*.

GEICO argues that its Investigators "perform administrative-type work. They do not produce insurance policies. Rather, they support the claims function by investigating suspicious claims and preventing loss due to fraud." Doc. No. 86 at 32. GEICO maintains that the Investigators "perform a subset of the work specifically listed as exempt when performed by the adjusters." *Id*. According to GEICO, "[t]he nature of the work, and its relationship to GEICO's overall business purpose, does not change when it is assigned to investigators instead of adjusters." *Id*.

i. The Administrative-Production Dichotomy Analysis Does Not Work for the Primary Duty Analysis Here.

In determining whether a set of job duties qualifies as administrative, courts may rely on the "imperfect" "administrative-production dichotomy," *Desmond*, 564 F.3d at 694, which is intended to distinguish "between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to running the business itself." *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (citation omitted). The inquiry is intended to determine whether the "work 'is directly related to management policies or general business operations,' not as an end in itself."

Id.; *see Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287 (4th Cir. 1986) ("The regulations emphasize the nature of the work, not its ultimate consequence.").

Work is not classified as administrative simply because it does not fit completely within the definition of production. "'On the contrary, non-manufacturing employees can be considered 'production' employees in those instances where their job is to generate (i.e., 'produce') the very product or service that the employer's business offers to the public.'" *Desmond*, 564 F.3d at 694; *see also Foster v. Nationwide Mut. Ins. Co.*, 695 F. Supp. 2d 748, 756 (S.D. Ohio 2010) ("Under this dichotomy, employees who are engaged in work related to their employers' administrative operations may qualify for the administrative exemption, while those who perform 'production' work cannot."); *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004) ("The regulations do not set up an absolute dichotomy under which all work must either be classified as production or administrative.").

For example, in *Desmond*, the Fourth Circuit reversed the district court's order granting summary judgment in favor of the employer on the applicability of the administrative exemption. Horseracing officials brought suit against the racetrack operator for unpaid overtime compensation under the FLSA. The employer operated a casino and horse racing facility and employed racing officials who "assisted in various tasks associated with . . . live horse races." *Desmond*, 564 F.3d at 689. During the races, the racing officials "fulfilled one of several roles, which required them to observe and examine the horses, the

jockeys, the trainers or grooms, the relevant paperwork for the horses, the order of finish for the race, or the paperwork associated with any subsequent claims." *Id.* at 694.

The Fourth Circuit, relying on the administrative-production dichotomy, found that the employees' work "consisted of tasks somewhat similar to those performed 'on a manufacturing production line or selling a product in a retail or service establishment.'" *Id.* (quoting 29 C.F.R. § 541.201(a)). It reasoned that the employees "have no supervisory responsibility and do not develop, review, evaluate, or recommend Charles Town Gaming's business policies or strategies with regard to the horse races." *Id.* The court concluded that, "[s]imply put, the [employees'] work did not entail the administration of the running or servicing of [the employer's] business of staging live horse races." *Id.* The court also found that the employees "were not part of the management of [the business] and did not run or service the general business operations." *Id.* It held that "[b]ecause the [employees'] duties are not directly related to the general business operations of [the employer], the position does not satisfy the requirements for the administrative exemption under the FLSA." *Id.* at 695.

Similarly, in *Martin v. Indiana Michigan Power Co.,* 381 F.3d 574, 582 (6th Cir. 2004), the Sixth Circuit held that information technology support specialists were non-exempt employees under the FLSA because they performed troubling-shooting on other employees' computers. The court rejected the employer's argument that the plaintiff's

work was exempt under the administrative exemption because his work was not production work; "[t]hat is, he is not producing electricity because he is not an 'operator' running the nuclear power equipment—and therefore his work is administrative and thus 'directly related to management policies or general business operations of the employer.'" *Id.* The court maintained, "[w]e have rejected the argument that all work that is not production work is automatically directly related to management policies or general business operations of the employer." *Id.* (quotation omitted).

Here, Plaintiffs' argument that Investigators "are engaged in Defendant's day-to-day production work" is unpersuasive. Doc. No. 80 at 28. They maintain that GEICO "is in the business of selling insurance policies and handling policyholders' claims for coverage." *Id.* According to the Plaintiffs, "SIU, which is part of the Claims Department, is involved in the handling of policyholders' claims through their investigation of the facts surrounding the claim. The role of Investigators fits squarely within the production function." *Id.* at 28-29. GEICO contends that Investigators "do not produce insurance policies. Rather, they support the claims function by investigating suspicious claims and preventing losses due to fraud." Doc. No. 86 at 32. Plaintiffs' attempt to analogize *Desmond* and *Martin* to demonstrate that an Investigator's work is production (rather than administrative) is unconvincing in light of cases that discuss investigators and find that the administrative-production dichotomy does not work in this context.

Courts have recognized that the administrative-production dichotomy is not a useful means of determining if the administrative exemption applies in all instances. *See, e.g., Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 402-03 (6th Cir. 2004) (citations omitted) ("The analogy—like various other parts of the interpretive regulations—is only useful to the extent that it is a helpful analogy in the case at hand; that is, to the extent it elucidates the phrase 'work directly related to the management policies or general business operations.' This dispute must therefore be resolved using other analytical tools set out in the regulations for resolving this question."); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1126 (9th Cir. 2002) (citation omitted) ("As this case suggests, the administration/production dichotomy is useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.' Indeed, the regulation from which the dichotomy derives does not stand alone. Rather, the administrative exemption is explicated in a series of interpretive regulations, of which 29 C.F.R. § 541.205(a) is only one, attempting to clarify the elusive meaning of the term 'administration.'").

For example, in *Foster*, the District Court for the Southern District of Ohio rejected the plaintiffs' claim that as "special investigators" and "senior special investigators" of Nationwide Mutual Insurance Company, they were involved in production work. The court found that "[i]nsurance companies, like Nationwide, are in the business of creating and marketing insurance policies to the public." *Foster*, 695 F. Supp. 2d at 756 (citation

omitted). The court held that "[b]ecause Nationwide's Special Investigators are not involved in either the underwriting or selling of such policies—Nationwide's 'product'—they cannot be fairly characterized as 'production' employees." *Id.* (citation omitted). The court concluded that the administrative-production dichotomy was an inadequate investigative tool for resolving the issue and found that "the determinative issue is whether the primary duty of Special Investigators directly relates to the 'servicing' of Nationwide's business." *Id.*

The *Foster* court's approach is also logical here. The administrative-production dichotomy analysis fails to suggest an obvious conclusion as to whether the Investigators' work can be classified as administrative or involving production. The test does not establish a bright-line where a court can determine if the work should be classified as production or administrative. Because it appears that the GEICO Investigators do not underwrite or sell policies, they are likely not engaged in production work for GEICO.

ii. The Investigators' Primary Duty is Likely Directly Related to the Management or General Business Operations of GEICO.

The Plaintiffs' primary argument is that the DOL, through its regulations and Opinion Letters, has determined that Investigators do not qualify for the administrative exemption. Plaintiffs' reliance on authorities governing public sector employees to

argue that Investigators are non-exempt employees is not persuasive. FLSA regulations provide that the exemptions in the regulations do not apply to:

> police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, ***investigators***, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, ***who perform work such as*** preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; ***conducting investigations or inspections for violations of law***; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; ***interviewing witnesses***; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

29 C.F.R. § 541.3(b)(1) (emphasis added). Plaintiffs contend that the regulations addressing investigators apply to both public and private investigators. They argue that "[n]othing in the plain language of § 541.3(b)(1) limits its scope to public-sector

employees." Doc. No. 80 at 30. Furthermore, the Plaintiffs suggest that because "inspectors" are listed next to "investigators" in the regulations, there is a clear indication "that private, as well as public employees are contemplated by this regulation." *Id.*

The Plaintiffs also contend that "the DOL has consistently concluded that the job of an investigator, private or public, is not administrative." Doc. No. 80 at 23 (citing Dept. of Labor, Wage & Hour Div., Opinion Letter, FLSA 2005-21, 2005 WL 3308592 (Aug. 19, 2005) (discussing employer who provided contract background investigations for government security clearances); Dept. of Labor, Wage & Hour Div., Opinion Letter, 1998 WL 852783 (April 17, 1998) (employer who "enforce[d] State liquor law statutes and regulations"); Dept. of Labor, Wage & Hour Div., Opinion Letter, 1997 WL 971811 (Sept. 12, 1997) (employer who conducted investigations "as its business function")). Plaintiffs' argument fails for at least three reasons.

First, Plaintiffs' interpretation of 29 C.F.R. § 541.3(b)(1) as including private and public investigators appears incorrect. As discussed by the District Court for the Southern District of Ohio in *Foster*, when one reads the reference to investigators "in the context of the entire regulation, it is clear that the regulation pertains to law enforcement and safety personnel—not those who perform investigative duties in the private sector." 695 F. Supp. 2d at 757 (citation omitted). The *Foster* court concluded that "[b]ecause of the missions of their respective governmental agencies and departments, the individuals delineated in this regulation are most

accurately characterized as 'production' employees." *Id*. at 758. The plain language of the regulation suggests that the regulation contemplated a public-sector employee in a public safety capacity and not a private insurance investigator.[4]

Second, this Court cannot simply rely on the job title of "Investigator" as outcome-determinative as to whether an employee is administratively exempt. See *Foster*, 695 F. Supp. 2d at 756 ("The DOL, however, does not treat an employee's job title as a sufficient basis for determining whether he or she is exempt under the FLSA."); 29 C.F.R. § 541.2 ("A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.").

Finally, the DOL "[r]elied on the administrative-production dichotomy in rendering each of these opinions," and it "found that the investigators who work for these employers were not subject to the administrative exemption." *Foster*, 695

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[4] Additionally, a different section of the regulation suggests that public sector inspectors and investigators are categorized differently from private inspectors. *See* 29 C.F.R. § 541.203(j) ("Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer.").

F. Supp. 2d at 757. As discussed above, the administrative-production dichotomy does not offer a clear means of determining if the Investigators here are exempt. Furthermore, as discussed in *Foster*, the Opinion Letters on which the Plaintiffs rely "are not particularly helpful to [the] inquiry into whether [Investigators] satisfy the second element of the administrative exemption . . . . [because,] [m]ost notably, in each of the Opinion Letters referenced by Plaintiffs, investigative services—in one form or another—comprised the core business function of the employer." *Id*.

Still, the investigative duties of an Investigator seem to be "directly related to" GEICO's "general business operations," because they, at the very least, "assist" GEICO claims adjusters in "adjusting . . . claims." *Id*. at 758. GEICO concedes that Investigators "do not produce insurance policies"; however, it points out that Investigators "support the claims function by investigating suspicious claims and preventing losses due to fraud." Doc. No. 86 at 32. As the court concluded in *Foster*, "[b]ecause the DOL regulations and case law deem claims adjusting to be administrative work, it follows that investigative services performed in direct furtherance of claims adjusting efforts is administrative work, as well." 695 F. Supp. 2d at 758.

b. The Investigators Do Not Exercise Discretion and Independent Judgment as to Matters of Significance.

Even if the Investigators' work is administrative in nature, this does not end the

inquiry. Rather, the third and final element of the administrative exemption must be satisfied. That is, whether an Investigator, in performing his or her primary duty, exercises "discretion and independent judgment" regarding "matters of significance." 29 C.F.R. § 541.200(a)(3). Plaintiffs argue that the primary job duty of conducting investigations "does not involve the exercise of discretion and independent judgment with respect to matters of significance." Doc. No. 91 at 2.

i. The Investigators Exercise Discretion and Independent Judgment.

"Discretion and independent judgment," for the purposes of the administrative exemption, generally "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). The "phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises." *Id.* § 541.202(b). "Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to:"

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments

> in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long-or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Id. An employee, however, does not exercise discretion and independent judgment if his or her work amounts to nothing more than "the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." *Id*. § 541.202(e). Although "[t]he exercise of discretion and independent judgment implies that the employee has authority to make an independent

choice, free from immediate direction or supervision . . . , employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." *Id.* § 541.202(c). Indeed, "decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action." *Id.*

GEICO asserts that the Investigators "exercise discretion and independent judgment throughout their investigations." Doc. No. 86 at 38. GEICO asserts that Investigators expand the scope of investigations and decide when investigations are complete; decide what investigative methods to use; inspect property damage and clinics and review claims files and medical records; question policyholders, claimants and other witnesses, in recorded interviews or deposition-like Examinations Under Oath ("EUOs"); use their judgment to probe inconsistencies and ask follow-up questions; observe demeanor and listen to tone of voice to gauge credibility; make findings about credibility, the cause of accidents, the cause and extent of damage, excessive treatment and other issues and report their findings to adjusters, law enforcement and underwriting; and resolve whether a claim is fraudulent. *Id.*

Plaintiffs concede that Investigators exercise "limited discretion" in the course of investigations, *see* Doc. No. 91 at 21; Doc. No. 80 at 2 ("Plaintiffs acknowledge that they exercise some limited discretion and independent judgment . . . ."); however, Plaintiffs stress that such discretion does

not "relate to matters of significance," as required for the administrative exemption to apply to their position.

ii. The Investigators' Discretion Does Not Bear on "Matters of Significance."

The term "matters of significance" refers "to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a). In *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896 (D. Minn. 2010), the court observed that "[a]ll employees exercise some discretion in deciding how to perform their jobs, and the way in which they exercise that discretion likely will affect matters of significance." *Id.* at 908. Specifically, for "claims investigators, how they exercise their discretion in conducting an investigation will impact or affect how a claims adjuster . . . decides the significant matter of the value of the claim. But an exercise of discretion that impacts or affects a matter of significance is not exercising discretion with respect to a matter of significance. If the rule were otherwise, all employees would arguably meet the third element of the definition of administrative employees." *Id.* (finding that an employer hired by insurance companies, third-party administrators, and law firms to investigate suspect claims "failed to demonstrate a triable issue as to whether the duties of claims investigators include the exercise of discretion and independent judgment with respect to matters of significance" where "(1) [the employer's] written guidelines explain in great detail how claims investigators should conduct an investigation, (2) the

claims investigators are required to obtain all the facts regardless of their impact, and (3) the claims investigators do not include their own opinions, conclusions, or recommendations regarding the decision whether to pay or deny the claim.").

The court in *Ahle* relied in part on *Fenton v. Farmers Insurance Exchange*, 663 F. Supp. 2d 718 (D. Minn. 2009), which involved "special investigators who investigate potentially fraudulent insurance claims" for their employer, Farmers Insurance Exchange. *Id.* at 721. The investigators' "primary role" was "simply to gather facts and present them for someone else to analyze." *Id.* at 727. The court found "nothing in the residual discretion available to investigators that is sufficient to justify exemption." *Id.* at 726-27. The court in *Fenton* explained that, "although an employee need not perform all of the duties of claims adjusters listed [at 29 C.F.R. § 541.203(a)] to qualify as exempt [. . . ,] that list includes a variety of significant, discretion-laden activities that are undisputedly not present here, such as 'negotiating settlements' and 'making recommendations regarding litigation.'" *Id.* at 727. There, the investigators' job duty was to "gather facts" for claims adjusters and they were "formally barred from presenting their opinions about how to handle claims in their written reports." *Id.* Like the plaintiffs in *Fenton*, Plaintiffs in this case were "trained and directed" by GEICO "to specifically omit

all opinions from their written reports to the Claims Adjusters." Doc. 80 at 36.[5]

GEICO argues that *Fenton* and *Ahle* "are both distinguishable and unpersuasive on the discretion and independent judgment issue. They are distinguishable because GEICO does not impose the same restrictions on its investigators as the defendants in those cases. . . . The evidence in this case shows that GEICO's investigators report findings concerning fraud or lack thereof, credibility, caused accidents, excessive treatment and other similar issues." Doc. No. 86 at 44. GEICO emphasizes that "[f]raud is a major problem in the insurance industry," and if a claim is suspected of being fraudulent, it is assigned to the SIU "to resolve the indicia of fraud." *Id.* at 1. GEICO asserts that the Investigators engage in "loss prevention" because "investigation and reporting of fraudulent claims to

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[5] The court in *Fenton* discussed and relied in part on *Gusdonovich v. Business Information Co.*, 705 F. Supp. 262 (W.D. Pa. 1985), a case involving an investigator for a company that investigated and collected information for insurance companies. *Id.* at 263. The investigator's "primary duty was the investigation of insurance claims," and his duties included "the search of public records, the serving of subpoenas and orders, surveillance, [and] interrogation of witnesses." *Id.* The court noted that the investigator was subject to oversight by a supervisor, and found that the investigator was merely "applying . . . knowledge and skill in determining what procedure to follow"; not exercising "discretion and independent judgment." *Id.* at 265. Thus, the court found "as a matter of law that the plaintiff was not a bona fide administrative employee within the meaning of the statute and regulations." *Id.*

law enforcement is a legal and regulatory compliance function." *Id.* at 32-33. GEICO also highlights that the Investigator "is able to generate a withdrawal of the claim during the interview or EUO." *Id.* at 12.

But "an employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will suffer financial losses if the employee does not perform the job properly." 29 C.F.R. § 541.202(f). Indeed, in a matter involving the status of federal investigators under Office of Personnel Management ("OPM") guidelines, a court concluded that fraud investigators were non-exempt. *Adams v. United States*, 78 Fed. Cl. 536, 554 (Fed. Cl. 2007). There, the investigators were employed by the Office of Inspector General ("OIG") in the Department of Housing and Urban Development ("HUD"). *Id.* at 537. The investigators' "primary duty was investigating fraud or violent crimes affecting HUD programs." *Id.* at 550. The court noted that "these investigations provided substantially important funds for the furtherance of HUD's mission, [but] there is no evidence that line managers in HUD programs used those criminal investigations in the same way they used computer networks or purchasing systems to support their management functions." *Id.* at 554. Referencing both OPM and DOL regulations,[6] the court found

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[6] The "difficult" question before the *Adams* court was "whether plaintiffs' primary duty qualifies as a supporting service under FLSA's administrative exemption. The OPM regulation describing the primary duty test relied upon by defendant requires that administrative employees work as supporting service specialists." *Adams v. United States*, 78 Fed.

that the "defendant . . . failed to overcome the presumption that plaintiffs are entitled to benefit from FLSA's overtime requirements by proving that plaintiffs were subject to the administrative exemption." *Id.*

Plaintiffs assert that "Investigators attempt to confirm the facts surrounding a claim. This means that they find facts that tend to support or contradict the suspicion identified by ICE or the Claims Adjuster. It does not mean that Investigators determine whether fraud occurred. Instead, Investigators find facts that allow Claims Adjusters to determine whether enough suspicion remains to warrant denial of a claim." Doc. No. 80 at 40. Regulations and case law suggest that the fact that Investigators note that certain claims could be fraudulent does not in itself establish that their discretion bears on "matters of significance."

In the Fourth Circuit, the FLSA's administrative exemption is "narrowly construed," and the Court concludes that GEICO has failed to demonstrate by clear and convincing evidence that Investigators fit within the narrow administrative exemption. Although they appear to perform administrative tasks and exercise some discretion during investigations, the Investigators' discretion does not bear on matters of significance. *See Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564

Cl. 536, 551 (Fed. Cl. 2007) (citing 5 C.F.R. § 551.206 (OPM regulation) and later citing 29 C.F.R. § 541.201 (DOL regulation)).

F.3d 688, 692 (4th Cir. 2009) ("FLSA exemptions are to be 'narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within [the exemptions'] terms and spirit.") (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

II. Conclusion

For the foregoing reasons, the Court will grant Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 80), and deny Defendants' Cross-Motion for Summary Judgment (Doc. No. 86). A separate order follows.

Date: November 29, 2012 /s/

ROGER W. TITUS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAMUEL CALDERON, ***et al.*****,**	:	
Plaintiffs,	:	
v.	:	Civil Case No.: RWT 10-1958
GEICO GENERAL INSURANCE COMPANY, ***et al.*****,**	:	
Defendants.	:	

ORDER

Upon consideration of Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 80), Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment (Doc. No. 86), the arguments presented by counsel at a hearing held before the undersigned on November 5, 2012, and for the reasons stated in the accompanying Memorandum Opinion, it is this 29th day of November, 2012, by the United States District Court for the District of Maryland,

ORDERED, that Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 80) is **GRANTED**; and it is further

ORDERED, that Defendants' Cross-Motion for Summary Judgment (Doc. No. 86) is **DENIED**; and it is further

ORDERED, that the Court finds that Plaintiffs were not "employed [by Defendants] in a bona fide executive, administrative, or professional capacity," and thus are entitled to recover damages from Defendants in the amount of their respective unpaid compensation, including overtime compensation, and other damages as permitted by the Fair Labor Standards Act, 29 U.S.C. § 207, *et seq*., and other applicable law; and it is further

ORDERED, that the Court will hold a telephone status conference on **December 20, 2012, at 4:30 p.m.**, to be initiated by counsel for Plaintiffs.

/s/

ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

FILED: February 2, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2111 (L)
(8:10-cv-01958-RWT)

SAMUEL CALDERON, individually and on behalf of other similarly situated individuals; MICHAEL HEADLEY; AARON KULSIC; KENNETH MILLER; MICHAEL CREAMER; GEORGE WOOD; ROBERT DEMARTINO; JOHN HALLIDAY; JAMES L. HANSON; THOMAS F. BRADY; DANA FERRIN; MAUREEN AYLING; CANDIDO CUBERO; THOMAS FITZGERALD; WILLIAM DOLINSKY; MARVIN HOURIGAN; DAVID MCCAMLEY; AUGUSTUS STANSBURY, JR.; JOAN BISCHOFF; RANDALL GIBSON; VINCENT GRECO; TERESA HARTEY-ADAMETZ; THOMAS LOWE; DAVID MCENRY; JENNIFER RICCA; ANITA SINGH; BRYAN UTTERBACK; PATRICK WEISE; LEAH HAMILTON; DENNIS FULTON; EBERHARD GROSSER; JOSEPH MILES, JR.; RICKY MCCRACKEN; THOMAS STURGIS; CHRISTOPHER SULLIVAN; MICHAEL RUSSELL; RANDALL STEWART; LAVERNE HOLMES; THOMAS DAVIDSON, JR.; SHANNON BOYD; ANTHONY DEAN, JR.; FRANCISCO NOGALES; JOHN GHETTI; GERALD DEXTER; CLAUDE REIHER; STEVEN MCBRIDE; PHILLIP RONDELLO; ROBERT MERRY

Plaintiffs – Appellees

and

MICHAEL BROWN

Plaintiff

v.

GEICO GENERAL INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY

Defendants – Appellants

and

GEICO CORPORATION; GEICO INDEMNITY COMPANY; GEICO CASUALTY COMPANY; DOES 1-10

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

Amici Supporting Appellant

No. 14-2114
(8:10-cv-01958-RWT)

SAMUEL CALDERON, individually and on behalf of other similarly situated individuals; MICHAEL HEADLEY; AARON KULSIC; KENNETH MILLER; MICHAEL CREAMER; GEORGE WOOD; ROBERT DEMARTINO; JOHN HALLIDAY; JAMES L. HANSON; THOMAS F. BRADY; DANA FERRIN; MAUREEN AYLING; CANDIDO CUBERO; THOMAS FITZGERALD; WILLIAM DOLINSKY; MARVIN HOURIGAN; DAVID MCCAMLEY; AUGUSTUS STANSBURY, JR.; JOAN BISCHOFF; RANDALL GIBSON; VINCENT GRECO; TERESA HARTEY-ADAMETZ; THOMAS LOWE; DAVID MCENRY; JENNIFER RICCA; ANITA SINGH; BRYAN UTTERBACK; PATRICK WEISE; LEAH HAMILTON; DENNIS FULTON; EBERHARD GROSSER; JOSEPH MILES, JR.; RICKY MCCRACKEN; THOMAS STURGIS; CHRISTOPHER SULLIVAN; MICHAEL RUSSELL; RANDALL STEWART; LAVERNE HOLMES; THOMAS DAVIDSON, JR.; SHANNON BOYD; ANTHONY DEAN, JR.; FRANCISCO NOGALES; JOHN GHETTI; GERALD DEXTER; CLAUDE REIHER; STEVEN MCBRIDE; PHILLIP RONDELLO; ROBERT MERRY

Plaintiffs – Appellants

and

MICHAEL BROWN

Plaintiff

v.

GEICO GENERAL INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY

Defendants – Appellees

and

GEICO CORPORATION; GEICO INDEMNITY COMPANY; GEICO CASUALTY COMPANY; DOES 1-10

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

Amici Supporting Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge King and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAMUEL CALDERON, Individually and on behalf of other Similarly situated individuals,	:	
Plaintiffs	:	
v.	:	No. 2010-cv-01958 RWT
GEICO General Insurance Company; Government Employees Insurance Company	:	
Defendants	:	

FINAL JUDGMENT

In accordance with the Court's prior rulings on liability (ECF Nos. 98 & 99) and remedies (ECF No. 117) and the stipulated order on remedies (ECF No. 118), it is ordered that judgment is entered against Defendants GEICO General Insurance Company and Government Employees Insurance Company[1], and in

[1] The Court approved the parties' stipulation to the dismissal of GEICO Corporation, GEICO Indemnity Company

favor of Plaintiffs, in the amounts set forth below: New York Class:

Last name	First name	Middle	Amount ($)
Austin	Karen		32,058.29
Banks	Steven	P	48,561.18
Biglin	Richard	F	37,689.11
Bischoff	Joan	M	31,918.44
Boyle	Patrick	J	31,789.33
Brogna	Christopher	A	53,347.03
Brown	Hazel	G	18,580.84
Caniglia	Louis	M	51,349.99
Cannon	Kara	F	19,797.09
Chapman	Barbara-Ann		38,501.86
Cicio	Louis		12,123.82
David	Eric	G	38,883.41
DeFalco	John	M	51,853.73

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and GEICO Casualty Company, and to the addition of Government Employees Insurance Company. ECF No. 84, 85.

Last name	First name	Middle	Amount ($)
Demartino	Robert	J	2,086.09
Diniso	Vito		21,149.20
Feeks	Stephen	J	46,159.93
Felt	Erin	S	7,738.98
Fenrich	James	R	8,698.97
Fischer	Margaret	A	20,746.71
Fischer	Keith	F	57,351.80
Fitzgerald	Thomas	J	30,484.66
Fulton	Dennis	M	39,867.1
Garziano	Lorraine		7,438.56
Geraci	Anthony	J	53,818.67
Giambalvo	Mark	P	52,555.84
Gillen	John	J	49,924.02
Gotterbarn	Karen		38,560.2
Greco	Vincent	A	17,856.60
Hale	William		7,558.26
Hartey-Adametz	Teresa	A	51,460.76

Last name	First name	Middle	Amount ($)
Interlicchio	Alfred	T	53,434.43
Johnston	Carol	A	4,251.74
Jones	David	B	50,276.40
Kaufold	Edward	C	10,473.62
King	Daniel	J	42,016.6
Klaynman	Ida		35,935.05
Koscik	Theresa	J	37,759.8
Krattinger	Joseph	W	19,777.87
Lazos	Michael		51,957.95
Leath	Edward	F	2,700.38
Lenihan	Richard	J	44,602.81
Lupo	Timothy	J	16,553.86
Macaulay	Dennis		32,925.22
Marchiselli	Arthur	V	48,249.03
McDonagh	Francis	J	51,394.83
McEvoy	John		21,971.73
McGuigan	Thomas	E	47,612.62

Last name	First name	Middle	Amount ($)
McManus	George		57,525.30
Miles	Joseph	J	43,299.05
Miller	Katrina	P	0
Moeser	John		43,498.23
Murtha	Raymond	P	50,515.79
Nazzaro	Annette	E	41,469.01
Neenan	Joseph	J	50,957.66
Ohrnberger	Patricia		43,198.46
Oliver	Emily	F	9,979.60
Oneill	Edward	M	55,231.65
O'Sullivan	Michael	E	48,654.89
Pfalzgraf	John	F	54,347.86
Radice	Richard	D	58,222.08
Russell	Michael	W	51,690.83
Simmons	Glenn	E	15,307.83
Solan	James	D	42,391.81
Solazzo	Nicholas	A	26,328.65

Last name	First name	Middle	Amount ($)
Stone	Lynnette	M	39,808.73
Teatum	Evan	G	40,373.89
Trzewieczynski	Leon		34,943.42
Walkowiak	Jillian	M	8,438.96
Wasson	Timothy	W	12,489.49
Wisler	Jill	R	21,818.77
Wood	George	A	25,234.59

Opt-in Class:

Last name	First name	Middle	Amount ($)
Ayling	Maureen		6,024.39
Boyd	Shannon	A	23,241.86
Brady	Thomas	F	26,156.36
Calderon	Samuel		8,044.14
Creamer	Michael	D	27,821.25
Cubero	Candido		27,226.24
Davidson	Thomas	W	25,410.08

Last name	First name	Middle	Amount ($)
Dean	Anthony	J	4,105.22
Dexter	Gerald	A	16,983.09
Dolinsky	William		8,483.16
Ferrin	Dana	C	31,927.82
Ghetti	John	K	18,963.87
Gibson	Randall	B	28,137.67
Grosser	Eberhard	G	1,9051.78
Halliday	John	M	0
Hamilton	Leah	M	3,561.28
Hanson	James	L	25,304.48
Headley	Michael	A	7,166.86
Holmes	Laverne	A	21,498.79
Hourigan	Marvin	M	7,233.83
Kulsic	Aaron	R	16,221.75
Lowe	Thomas	Edward	26,078.53
McBride	Steven	J	22,330.20
McCamley	David	E	0

Last name	First name	Middle	Amount ($)
McCracken	Ricky	Dale	29,641.75
McEnry	David	Kelly	15,522.5
Merry	Robert	L	24,758.91
Miller	Kenneth	M	26,649.55
Nogales	Francisco	R	3,159.36
Reiher	Claude	L	14,497.03
Ricca	Jennifer	L	0
Rondello	Phillip	A	17,593.47
Singh	Anita	L	29,788.51
Stansbury	Augustus	D	10,906.69
Stewart	Randall	B	18,318.15
Sturgis	Thomas	K	0
Sullivan	Christopher	Eugene	2,140.58
Utterback	Bryan	L	3,511.67
Weise	Patrick	J	21,700.59

The Clerk is directed to enter judgment on this matter accordingly and close the file.

So ordered this 9th day of October, 2014,

/s/

Roger W. Titus
United States District Judge

United States Code

Title 20. Labor

Chapter 8. Fair Labor Standards

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)

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Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees

Subpart C. Administrative Employees

29 C.F.R. § 541.200

§ 541.200 General rule for administrative employees.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees

Subpart C. Administrative Employees

29 C.F.R. § 541.201

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to,

work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees

Subpart C. Administrative Employees

29 C.F.R. § 541.202

§ 541.202 Discretion and independent judgment.

a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to

matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete

absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine

work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees

Subpart C. Administrative Employees

29 C.F.R. § 541.203

§ 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

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