MAYER·BROWN

Mayer Brown LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, California 94306-2112

Main Tel (650) 331-2000
Main Fax (650) 331-2060
www.mayerbrown.com

Donald M. Falk
Direct Tel (650) 331-2030
Direct Fax (650) 331-4530
dfalk@mayerbrown.com

October 10, 2007

BY COURIER

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Harris v. Superior Court (Liberty Mutual Insurance)*, No. S156555

Dear Chief Justice George and Associate Justices:

The Chamber of Commerce of the United States of America and the California Chamber of Commerce (the "Chambers"), through their attorneys, submit this letter as *amici curiae* in support of the petition for review filed on September 21, 2007, by Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits. The reclassification of exempt administrative employees as nonexempt production workers is an issue of broad and continuing importance to a wide variety of businesses in California.

The California Chamber of Commerce ("CalChamber") is a voluntary, non-profit, California-wide business association with more than 16,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the CalChamber's members are small- or medium-sized businesses that it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business. CalChamber is involved with legislative, regulatory, and judicial issues effecting the business community, including issues surrounding labor and

employment law. Moreover, CalChamber has a continuing interest in the Labor Code administrative exemption issue presented here, having filed an amicus brief in one of the principal earlier cases addressing this issue, *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715 (addressing now-superseded Wage Order 4).

The Chambers and their members have a strong interest in further review of the decision below (154 Cal.App.4th 164, attached to the petition) because it would substantially disrupt California businesses and invite massive litigation. That decision of a divided panel disregards the express intent of the Wage Order it purports to interpret and does so in a way that, if uncorrected, will have deep repercussions throughout the California economy. The decision parts from the federal regulations incorporated in Wage Order 4–2001 and the federal judicial decisions construing those regulations. And it rests on an insupportable premise: that the exemption from wage and hour regulations for "administrative" employees applies only to employees at a "level" of the organizational chart that places them above and apart from the generation of revenue or the reduction of expenses, even if their tasks are administrative and discretionary. That premise could lead to the reclassification as hourly wage earners of hundreds of thousands, if not millions, of salaried administrative employees who currently are and historically were considered exempt from most California wage and hour requirements.

The importance of the issue is manifest, and its recurrence is obvious from the volume of wage-and-hour class actions proliferating through the California courts, many of them (as in this case) challenging the application of the regulatory exemptions. The decision below could prompt an entire new series of cases addressing purported wage claims of whole categories of employees long believed (and held) exempt from the overtime pay and meal- and rest-period obligations. Moreover, the issue is unlikely to produce additional appellate decisions promptly enough to forestall further decisions by dozens of trial courts that are constrained to apply its erroneous analysis because it is the only pertinent published authority.

The decision below purports to interpret Wage Order 4–2001, § 1(A)(2), which exempts from wage-and-hour regulation employees who are employed in an "administrative capacity." In promulgating this Wage Order, the Industrial Welfare Commission (IWC) attempted to make that exemption precisely coextensive with its analogue in regulations promulgated under the federal Fair Labor Standards Act. Accordingly, the IWC incorporated by reference several subparts of the Code of Federal Regulations in effect on January 1, 2001, when the Wage Order was issued (the "federal regulations").[1] Wage

[1] Accordingly, all citations to the Code of Federal Regulations refer to the version in effect at that time.

Order 4–2001, § 1(A)(2)(f). That incorporation by reference aims specifically at the "activities constituting exempt work and non-exempt work," and mandates that the scope of those activities "shall be construed in the same manner" as in those regulations.

There is a reason why Justice Vogel's dissent consumes only seven pages while the panel majority takes 22. The dissent simply applies the federal regulations incorporated by the Wage Order, and accords with the federal decisions on point. Those regulations specifically note that "claims adjusters"—or at the very least "many persons employed as ... claims adjusters"—meet the "test of 'directly related to management policies or general business operations.'" 29 C.F.R. § 541.205(c)(5). The regulations do the same for several other occupations, *id.*, one reason why the significance of this case extends beyond the insurance industry.

The panel majority recognized that 29 C.F.R. § 541.205 is "incorporated into Wage Order 4–2001." 154 Cal.App.4th at 174. But the majority treated that and the other federal regulations that are *part* of the Wage Order as if they were distantly analogous expressions of opinion that a court might take or leave. To the contrary, the incorporated federal regulations are not some mere discretionary "guide" (154 Cal.App.4th at 176). Rather, because the Wage Order does not elaborate on its own general standards, it prescribes that "[t]he activities constituting exempt work and non-exempt work"—the specific, concrete activities, not the general statutory language—"shall be construed in the same manner" as in the incorporated federal regulations. Wage Order 4–2001, § 1(A)(2)(f). The court below instead began from the same starting point as the federal regulations—the general terms "directly related to management policies or general business operations"—and disregarded the federal regulations' detailed guidance about "*activities* constituting exempt and non-exempt work."

The court below also disregarded the unified (and contrary) federal case law addressing the exempt status of claims adjusters. That case law should have confirmed that, in accord with the statement about claims adjusters in 29 C.F.R. § 541.205(c)(5), the administrative exemption encompasses claims adjusters as a general rule. The court acknowledged that "a number of federal circuit and district court cases" have held that claims adjusters fall within the administrative exemption. 154 Cal.App.4th at 186. And the court tellingly failed to identify a *single* federal decision that agrees with it. Thus, the decision below conflicts not only with the most specific reference in the federal regulations, but with all (or at least the vast majority) of federal decisions to address the same issue. That result defies the IWC's intent to make its administrative exemption coextensive with that recognized under federal law.

In elevating its own version of the "administrative/production worker dichotomy" over the specific guidance provided in the federal regulations incorporated into Wage Order 4–

2001, the Court of Appeal adopted an analysis that could drastically alter the classification of administrative employees throughout California. The court held that the administrative exemption in the Wage Order (*id.* § 1(A)(2)(a)) covers "only work performed at the *level* of *policy* or *general* operations." 154 Cal.App.4th at 177 (first emphasis added; remaining emphasis in original); *see also id.* at 178-181 (repeating versions of this "level" formulation). But that is not what the Wage Order says. Like the incorporated federal regulations, it requires only that an employee's work be nonmanual and "directly related to management policies or general business operations." Wage Order, § 1(A)(2)(a). The word "level" does not appear in the relevant part of the Wage Order or (in any remotely similar sense) in the incorporated federal regulations. It is purely an invention of the court below.

In practical effect, the Court of Appeal's restriction of the administrative exemption to work performed at the "*level* of policy or general operations" narrows the administrative exemption to a tiny core of employees who have nothing to do with any of the day-to-day, profit-related activities of the business. Indeed, the court appears to believe that no employee whose work has anything to do with revenue generation or cost reduction can be an administrative employee. The whole point of the administrative exemption is not to confine exemption to central management or the purely ancillary segments of a firm, but to encompass "so-called white-collar employees" who provide administrative skills and services at *all* levels of a business. (28 C.F.R. § 541.205(b)). Indeed, by narrowing the administrative exemption to persons who make rather than execute company policy, the court to a substantial extent merges that exemption (Wage Order 4–2001, § 1(A)(2)) with the *executive* exemption, which applies to those "[w]hose duties and responsibilities involve the management of the enterprise ... or of a customarily recognized department or subdivision thereof." *Id.* § 1(A)(1).

But the federal regulations preclude any such limitation. So long as the work is "of substantial importance to the management or operation of the business, the phrase 'directly related to management policies or general business operations' is *not* limited to persons who participate in the formulation of management policies or in the operation of the business as a whole." 29 C.F.R. § 541.205(c). And the court below acknowledged that the claims adjusters at issue here did work of such substantial importance. *See* 154 Cal.App.4th at 184.

Yet the court below nonetheless held that claims adjusters fell outside of the exemption because they were engaged in a "claims-adjusting component of their employer's business" rather than something removed from substantive significance. 154 Cal.App.4th at 178. Nothing in the federal regulations suggests that "components" in a business may not require the efforts of employees subject to the administrative exemption. To the

contrary, the regulations make clear that many "components" of many businesses require the efforts of administrative employees, indeed may turn primarily on the efforts of administrative employees supported by nonexempt employees. Not only claims adjusters, but "credit managers," "account executives in advertising agencies," and "customers' brokers in stock exchange firms" are listed as examples of pursuits that likely fall within the exemption. Yet the latter two occupations are largely engaged in sales of their employers' services, a type of "production" that would disqualify them from the exemption as narrowed by the court below.

Another instructive example—closely analogous to the activities of claims adjusters—appears in 29 C.F.R. § 541.208(c). That regulation notes that a "credit manager who makes and administers the credit policy of his employer" is likely to be exempt. In particular, "[e]stablishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, would be exempt work of the kind specifically described in [29 C.F.R.] § 541.2." But that is what claims adjusters do—assess whether to pay a claim, and how much, with reference to particular insureds, particular policies, and particular facts, with substantial leeway in deciding whether to pay or deny a claim, and how much, if anything, to pay.

Yet another specific example in the federal regulations excludes any limitation of the exemption to administrative activities directed to the business as a whole. The regulations note that an "administrative assistant in the production department of the business" is "engaged in activities relating to the administrative operations of the business"—and thus is exempt if she meets the other standards for the exemption, even though her function clearly would not meet the Court of Appeal's test.

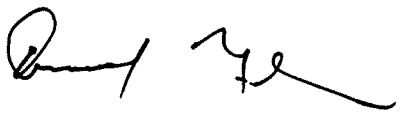
To justify its limitation of "administrative" type-of-work criterion to employees at a high or central "level" of an organization, the court advanced another fallacy: that even the most clearly clerical office workers would qualify for the administrative exemption if it were not limited to employees at the "level" of policy or "general" business operations (defined to exclude the actual operation of the business). *See* 154 Cal.App.4th at 181-182. That attack pummels a straw man. The type of work performed ("directly related to management policies or general business operations") is only one of *four* screens that limit the application of the administrative exemption. Wage Order 4–2001, § 1(A)(2); *id.* § 1(A)(2)(a), (f). To be exempt from wage and hour laws, an employee also must satisfy factors addressing "discretion and independent judgment" (*id.* § 1(A)(2)(b), the type and degree of supervision (*id.* § 1(A)(2)(c)-(e)), and salary (*id.* § 1(A)(2)(g)). The court's stringent narrowing of the general type of work subject to the administrative exemption—one of four screens—completely disregarded the other screens. The *amicus* letter of the

California Employment Law Council explains the error of this approach in greater detail (at pages 3-5). Most *clerical office* workers do not engage in the activities identified in the exception (Wage Order 4-2001, § 1(A)(2)(a)), and fewer still operate with independent discretion and only general supervision.

The decision of the Court of Appeal in this case thwarts the Industrial Welfare Commission's effort to bring California law on the exempt status of administrative employees into accord with federal law. In straining to do so, the court injected ambiguity into an otherwise-clear regulatory provision by reaching beyond the provision's terms to a separate body of law. To make sure which *interpretation* of federal law would control, the IWC incorporated a small, clearly identified set of federal regulations into its Order, going so far as to specify that only the regulations in effect when the Order issued were incorporated. Those regulations make the status of claims adjusters (and several other occupations) clear. That status cannot become less clear because another federal regulation, *not* incorporated into the statute, arguably muddies the waters (though the federal courts seem unconfused). Yet the Court of Appeal relied on that *un*incorporated regulation, 29 C.F.R. § 778.405, to create the very ambiguity that the IWC's selective incorporation had excluded, and thus to excuse judicial disregard of the regulations that were incorporated. *See* 154 Cal.App.4th at 183-184. That was improper. It is for the IWC to make policy, not the Court of Appeal, and not the federal government. And the IWC's choice is clear.

The decision below should be reviewed and reversed.

Respectfully submitted,



Donald M. Falk

Robin S. Conrad
Shane Brennan
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Erika Frank
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

CERTIFICATE OF SERVICE

I, Kristine Surzynski, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On October 10, 2007, I served the foregoing document(s) described as:

AMICUS LETTER ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

I served the documents on the persons below, by placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.

Ira Spiro
Katherine J. Odenbreit
Justian Jusuf
Spiro Moss Barness LLP
11377 W. Olympic Blvd., 5th Floor
Los Angeles, CA 92101

Steven W. Pepich
Lerach Coughlin Stoia Geller
Rudman & Robbins LLP
655 West Broadway, Suite 1900
San Diego, CA 92101

Timothy Cohelan
Cohelan & Khoury
605 C Street, Suite 200
San Diego, CA 92101-5305

Michael L. Carver
Law Offices of Michael L. Carver
1600 Humbolt Road, Suite 3
Chico, CA 95928-8100

Douglas R. Hart
Geoffrey D. Deboskey
Sheppard, Mullin, Richter
& Hampton LLP
333 S. Hope Street, 48th Floor
Los Angeles, CA 90071

Robert J. Stumpf, Jr.
William V. Whelan
Karin Dougan Vogel
Sheppard, Mullin, Richter
& Hampton LLP
501 West Broadway, 19th Floor
San Diego, CA 92101-3505

The Honorable Carolyn B. Kuhl
Los Angeles Superior Court
Department 323
600 S. Commonwealth Avenue
Los Angeles, CA 90005-4001

Clerk of the Court
Second District, Court of Appeal
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor
San Francisco, CA 94102

Ronald A. Reiter
Supervising Deputy Attorney General
Consumer Law Section
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Consumer Law Section
Los Angeles District Attorney
210 W. Temple St., Suite 1800
Los Angeles, CA 94102

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 10, 2007, at Palo Alto, California.

Kristine Surzynski