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## 2nd Circ. Novartis Ruling Muddies Sales Rep OT Issue

By Elaine Meyer

Law360, New York (July 09, 2010) -- The U.S. Court of Appeals for the Second Circuit's July 6 decision finding that drug industry representatives at Novartis Pharmaceuticals Corp. were not exempt from the nation's overtime laws muddies the legal landscape and leaves the contentious issue ripe for a definitive ruling, employment lawyers say.

Although the Second Circuit opinion — which found that drug representatives should not be subject to either the outside sales or administrative exemptions of the Fair Labor Standards Act — is the most decisive appeals court ruling to date, it differs from many district courts, and the U.S. Court of Appeals for the Third Circuit, on the issue.

The split has left employment lawyers wondering whether future appellate court rulings on a legal challenge that has been asserted against many of the major drug companies, including Eli Lilly & Co., Abbott Laboratories and GlaxoSmithKline PLC, will use the Second Circuit's reasoning or break with it.

"There are strong, differing views, as reflected by some of what I think are well-reasoned district court decisions," said John Langel, chair of Ballard Spahr LLP's labor and employment group.

Those decisions fan out across the country, including two by the U.S. District Court for the Central District of California, one by the Southern District of Indiana and one by the District of Arizona. An appeal is currently pending in the U.S. Court of Appeals for the Ninth Circuit, and lawyers say one could soon be filed in the Seventh Circuit.

Whether those circuit courts will find the Second Circuit's interpretation of the outside sales exemption compelling and to what degree they will give deference to the U.S. Department of Labor, which weighed in with an amicus brief in favor of the sales rep plaintiffs in the Novartis case, remains to be seen.

In its opinion, the Second Circuit reversed a ruling by the Southern District of New York, finding that the drug reps — who are prevented by federal law from making sales — are not salespeople

under the FLSA. Novartis reps' visits to doctors merely serve to promote the company's products, the appeals court ruled.

The opinion gave significant deference to the interpretation expressed in the DOL's amicus brief, which advised the court to read FLSA regulations in a light that would find sales reps not exempt.

The DOL's decision to file a brief in the case, which several attorneys said was fairly uncommon, gave the Second Circuit a decisive push toward the plaintiffs and may push other courts to do the same.

"The question of whether to give deference to Labor Department interpretations and, if so, what degree of deference to give, has always been an important question, and it's becoming even more important," said John Thompson, an employment partner at Fisher & Phillips LLP.

To Judge Frederick J. Martone, who penned an opinion in November in favor of GlaxoSmithKline that approved the outside sales exemption in the District of Arizona case, the agency's interpretation deserved much less deference.

Responding in February to a request for reconsideration of his opinion in light of the DOL's amicus brief in the Novartis case, Judge Martone said the department was not entitled to controlling deference and that its reasoning that drug reps are exempt because they don't technically make sales is an "absurdity."

"Not only is the DOL's current interpretation inconsistent with the statutory language and its prior pronouncements, but it also defies common sense. Pharmaceutical sales representatives are salespeople. They make sales the way that sales are made in the pharmaceutical industry," the judge said.

How the conflict might continue to play out in the appeals court is anyone's guess.

Attorneys who represented the Novartis plaintiffs found it significant that the broader Second Circuit decision was handed down in a case where the DOL weighed in, as opposed to a narrower decision from the Third Circuit in February that found a Johnson & Johnson sales rep subject to the administrative exemption of the FLSA.

This makes it unlikely that Novartis could successfully appeal the issue to the U.S. Supreme Court, or even secure en banc review by the Second Circuit, said Sanford Wittels & Heisler LLP's Jeremy Heisler, an attorney for the plaintiffs in the Novartis case.

Novartis spokeswoman Anne Frable said the company is "currently assessing its legal options."

"I suppose Novartis could try a 'Hail Mary' and petition for cert, but I think the chances don't favor the company," Heisler said. "I don't think Novartis could successfully argue that there is a circuit split on the issue of the administrative exemption."

But attorneys for plaintiffs in other drug rep cases say they believe the Novartis decision — if not technically precedential — will offer strong guidance, especially because of the input of the DOL.

"On the threshold legal issues, from a legal perspective, the Second Circuit is very clear, and other Circuits can rely on it," said David Sanford, of Sanford Wittels & Heisler LLP, who is lead counsel for the plaintiffs in the Novartis case and in a number of other pharmaceutical rep cases.

The Seventh Circuit, which may soon hear an appeal, is known for its adherence to a strict statutory interpretation, and thus could side with the Second, according to Stephen A. Weiss of Seeger Weiss LLP, who represents the plaintiffs in the Lilly case in Indiana.

"We think the reasoning in Novartis will be highly influential in adjudication of the issue by the Seventh Circuit," he said.

Management-side attorneys, however, say there is no guarantee the Second Circuit's decision will be so weighty.

They point out that even if drug reps cannot be subject to the sales exemption under the Novartis standard, they may still be subject to the administrative exemption.

David Prather, an attorney at Ford & Harrison LLP, said the question of whether that exemption applies to drug representatives has not been definitively answered, even by the Second Circuit in the Novartis case, which applied only a fact-based analysis to the rule in favor of the Novartis representatives.

"You're not in a situation where all pharmaceutical sales representatives are going to be precluded from meeting the administrative exemption by virtue of the Novartis case," Prather said.

The cases mentioned in this article are *In re: Novartis Wage and Hour Litigation*, case number 09-0437, in the U.S. Court of Appeals for the Second Circuit; *Smith v. Johnson & Johnson*, case numbers 09-1223 and 09-1292, in the U.S. Court of Appeals for the Second Circuit; *Yacoubian v. Ortho-McNeil Inc.*, case number 07-cv-00127, in the U.S. District Court for the Central District of California; *Delgado v. Ortho-McNeil Inc.*, case number 07-cv-00263, in the U.S. District Court for the Central District of California; *Schaefer-LaRose v. Eli Lilly & Co.*, case number 07-cv-01133, in the U.S. District Court for the Southern District of Indiana; and *Christopher v. SmithKline Beecham Corp.*, case number 08-cv-1498, in the U.S. District Court for the District of Arizona.

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