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—*Judge Steven A. Brick*

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ndants are not allowed w to create a vigilante orce the law," Alioto said. dants do it and the effect t artificially high prices , which it is and that is l, that is a violation of the Act [California's antitrust

for Novartis, Aton l Sean Morgenstern of r LLP, argued the mo- defendants' behalf but mment on the matter. e-mailed a statement is that read: "There is that [Novartis], or any defendants, agreed with o set or keep prices for ts higher in California, ited States generally, for similar products in re prices are govern- ed ... [Novartis] is o conducting business responsibly."

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said he hopes the ex- spur the university to ciplinary process. After protests of the 1960s, other universities had from the philosophy l was supposed to take rents.
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Associated Press

"Jeopardy!" contestant Ken Jennings, who won a record 74 consecutive games, refers to his opponent, an IBM computer called "Watson."

Computers Don't Sue for Overtime Pay — Yet

By Eli M. Kantor and Zachary M. Cantor

With the coming of Watson — I.B.M.'s new synthetic *Jeopardy!* contestant — jobs that require discretion and independent judgment may become a relic of the pre-digital age. This forecast may only exacerbate the plaintiffs' angst in *Hodge v. Aon Insurance Services*, 2011 DJDAR 3006, whom the 2nd District Court of Appeal designated as exempt administrative employees.

Kenneth Hodge was a class representative in a class action against his former employer, Cambridge — the parent company of Aon Insurance Services. Hodge routinely worked more than eight hours in a single workday or more than 40 hours in a workweek. But he was not paid overtime compensation because Cambridge designated him as an exempt administrative employee. His job required him to investigate claims, review evidence, determine coverage questions, set reserves, and authorize settlement or litigation of claims. Hodge and his cohorts claimed they were misclassified, and they demanded overtime pay.

In rendering its holding, the court relied on the direct language of the Industrial Welfare Commission's Wage Order No. 4 (as amended in 2001), rather than now-distinguished precedent. In its broadest terms, Wage Order No. 4 requires an employer to pay overtime wages to an employee who works more than eight hours per workday or more than 40 hours per week, unless he or she falls under an exemption. An employee falls under the administrative exemption if that employee: "performs office or non-manual work directly related to management policies or general business operations" of the employer or customers; *and* "customarily and regularly exercises discretion and independent judgment."

This most recent version of Wage Order No. 4 expressly states that exempt and non-exempt work shall be construed similarly to federal regulations. This includes 29 Code of Federal Regulations Section 541.205, which provides that the phrase "directly related to management policies or general business operation" of an employer "limits" the administrative exemption to those persons "who perform work of substantial importance to the management operations of the business." This means that the work that so-called white-collar workers perform (i.e. advising, planning, negotiating, and promoting) "affects policy" or "affects business operations to a substantial degree."

In light of the 2001 version of Wage Order No 4, the court distinguished Hodge's circumstances from the insurance adjusters in the leading case on insurance adjusters and the administrative exemption, *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805. The court in *Bell* applied an "administrative/production worker dichotomy" in analyzing whether an insurance adjuster was exempt under former Wage Order No. 2. But the *Hodge* court rejected the suggestion that every enterprise can be subjected to "a simplistic parsing of its primary business function, for purposes of labeling administrative versus production-level, rank-and-file workers." Instead, the dichotomy is but one analytical tool, and all the facts must be considered.

> I.B.M.'s executives have said that they intend to commercialize Watson to provide a new class of question-answering systems in business, education and medicine.

In *Bell*, the insurance adjusters' authority to settle claims was generally set at $15,000 or lower. And on matters of greater importance, the claims representatives would gather information and pass it to their supervisors, who would dictate the resolution.

In *Hodge*, however, the court reasoned that the claims representatives did not act as mere "paper pushers," "conduits of information to supervisors," or "go-betweens" in conveying data to attorneys. Rather, they were highly skilled, specialized employees doing "important" and "critical" work, which, if not done well, could lead to substantial interference with business operations and even failure or bankruptcy of a client. Moreover, Hodge and his co-workers regularly made "independent conclusions about elements such as causation and appropriate compensation, using their personal judgment and discretion and specialized training, experience and skills." Basically, Hodge had the authority to use his own discretion in cases involving sums approaching $1 million.

Turning back to the computer that may make workers like Hodge obsolete, Watson cannot make such decisions — at least not the current model. For example, on day two of the *Jeopardy!* challenge, host Alex Trebek gave a clue in the category "U.S. Cities." The clue was, "Its largest airport is named for a World War II hero; its second largest for a World War II battle." Both human contestants correctly answered: "What is Chicago?" Watson didn't just name the wrong city; its answer, Toronto, is not even in the United States. This kind of blunder would surely lead to the substantial interference with business operations that Hodge was employed to avoid.

The ability to exercise discretion and independent judgment means discerning relevant from irrelevant facts. But Watson doesn't understand relevance at all. It only gathers information and measures statistical frequencies. And so Watson cannot exercise the discretion and independent judgment that the administrative exemption requires. Still, many exempt workers are using computers to bolster their performance, and even replace their personal judgment and discretion. And this may affect their exempt status.

In fact, many insurance adjusters now use a program called "Colossus" to evaluate a wide range of insurance claims. Colossus uses data that the adjuster inputs, and calculates the average settlement — taking into account similar past settlements. The adjuster plugs in factors such as vehicle damage, expected length of medical treatment, allowable cost of treatment, and many other variables to calculate the value of a personal injury claim.

Nevertheless, Colossus cannot compute the full extent of the claimant's actual pain and suffering. That involves a human touch. For example, Colossus cannot fully compute the cost of injuries to a secretary who was T-boned at an intersection, breaking her arm and leg and killing her husband. Colossus cannot understand how her injuries might affect her future work performance or her ability to hold and nurse her baby, or the difficulty of raising that child without a partner. Certainly, it is up to the adjuster to consider those human conditions (or, perhaps, a jury). But insurance companies are increasingly trusting Colossus' impartiality over human empathy for maintaining a reliable bottom-line.

Colossus has replaced the personal judgment and discretion, experience and skills that make adjusters like Hodge exempt. And therein lies the problem. Of course, programs like Colossus streamline settlements — promoting optimal efficiency. But in striving for efficiency, the insurance company may sacrifice prudence.

And so, computer programs have not only already begun to supplant independent judgment and to limit discretion, they even evaluate the value of human life. To be sure, I.B.M.'s executives have said that they intend to commercialize Watson to provide a new class of question-answering systems in business, education and medicine. And Watson's capabilities may evolve enough to rival human judgment and dwarf the faculties of Colossus.

Regardless of whether or not a computer program can truly replace the "personal judgment and discretion" of an exempt employee, its implementation will likely affect worker classification. Had the plaintiffs in *Hodge* used a program like Colossus, they would have been stripped of their independent judgment and discretion — and, thus, their exempt status.

For now, employers should think twice before replacing exempt workers with the likes of Watson. Employers who replace human judgment and discretion with computers and their algorithms may sacrifice common sense. And because those workers then become non-exempt, employers will also likely have to pay overtime where overtime was not previously due. Even though the *Hodge* decision reaffirms the administrative exemption, employers still must be extremely careful about whom they classify as exempt under Wage Order No. 4. And Watson will be of little help in making this legal distinction.

Eli M. Kantor has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor, employment and immigration law. He can be reached at (310) 274-8216 or at ekantor@beverlyhillsemploymentlaw.com.

Zachary M. Cantor, an associate at the Law Offices of Eli Kantor, represents employers and employees in all aspects of labor, employment and immigration law. He also writes and illustrates children's books. Visit his website at: www.zacharycantor.com