

Alito's record shows backing of business interests

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By Jess Bravin and Jeanne Cummings, The Wall Street Journal

In 15 years on the federal bench, Judge Samuel Alito often has sided with positions backed by business leaders -- and shown himself a strict interpreter of contracts -- in cases ranging from employment discrimination and commercial speech to shareholder suits.

Indeed, legal experts said that, while the immediate focus of supporters and critics Monday was on social issues like abortion, Judge Alito's extensive track record on business and regulatory issues at the Philadelphia-based court is likely to play a large role in his nomination process.

Judge Alito's Third Circuit is one of the smaller federal jurisdictions, but it hears a disproportionate share of business-related cases because its three-state territory includes Delaware, where many companies are incorporated, and the heavily industrial New Jersey and Pennsylvania.

For those assessing Judge Alito, there are dozens of business cases to sift, some of which are widely known and many which are more technical. One of the best-known is a 1997 dissent in which Judge Alito argued against a racial-discrimination claim made by a black housekeeping manager who was denied promotion to a job at a Marriott International Inc. hotel. The position, at a hotel in Park Ridge, N.J., went to a white woman. While the court ruled the woman could take the case to a jury, Judge Alito argued that, although she might be able to claim she had been treated unfairly, that wasn't enough to let her sue.

"What we end up doing then is ... allowing disgruntled employees to impose the cost of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly," he wrote. "This represents an unwarranted extension of the anti-discrimination laws."

Last year, Judge Alito wrote an opinion striking down a Pennsylvania law that barred alcoholic-beverage advertising in college newspapers. The law violated advertisers' First Amendment rights, he found, while doing little to prevent underage drinkers from seeing liquor ads, since they were prevalent in many other media to which students had access.

And in 1997, Judge Alito affirmed the dismissal of a shareholder class action filed against Burlington Coat Factory Warehouse Corp., of Burlington, N.J., after its earnings fell far short of its projections and its stock fell 30 percent in one day. He ruled that shareholder plaintiffs had failed to specify how the company's performance amounted to fraud, in a close reading of applicable statutes.

Judge Alito has insisted on enforcement of contract terms challenged as unfair or otherwise as void, such as provisions that require consumers to use arbitration rather than lawsuits to pursue complaints, said Larry E. Ribstein, a law professor at the University of Illinois. Such contract

terms can be "a very useful technique that business has today in avoiding excessive litigation," said Mr. Ribstein, who specializes in business legal issues and has served as editor of the University of Chicago's Supreme Court Economic Review.

Major business groups, which have pressed the White House for business-friendly judges, Monday said they had yet to fully scrutinize Judge Alito's docket sufficiently to reach their own conclusions. Robin Conrad, senior vice president of the U.S. Chamber of Commerce's Litigation Center, said her lawyers are beginning a review of more than 700 opinions written by Judge Alito, including dozens on labor and employment cases and race and sex discrimination.

"There is a lot of stuff to look at," she said. "We're looking to see if there is a demonstrated understanding of business and economic issues."

Some critics, however, said they already saw warning flags. "Judge Alito's record on the bench demonstrates that he would go to great lengths to restrict the authority of Congress to enact legislation to protect civil rights and the rights of workers, consumers and women," said Sen. Patrick Leahy of Vermont, the Judiciary Committee's ranking Democrat.

Hans Bader, general counsel of the Competitive Enterprise Institute, a free-market think tank in Washington, said Judge Alito's rulings "have ... shown a grasp of the regulatory and legal challenges facing business and an appreciation of the value of free markets." In particular, Mr. Bader said, "he has upheld freedom of contract by enforcing contracts as written. ..."

A case just last month reflects his approach. In that ruling, Judge Alito went against Royal Indemnity Co., an insurer that had refused to pay a claim to a student-loan provider because, it said, the beneficiary had obtained its protection through a "spectacular fraud."

Judge Alito pointed to a policy term giving the beneficiary an "absolute" right to collect regardless of "any fraud with respect to the student loans." He dismissed Royal's argument that the terms covered only "microfraud of individual schools or students, not the macrofraud" of the lender, Student Finance Corp.

"The scope of Royal's obligations turns not on a boilerplate ... clause but on waivers sculpted by parties of exquisite legal and financial sophistication," the judge wrote. In such cases, he reasoned, courts shouldn't protect parties who made a bad contract.

One potentially hot-button case was a 2001 opinion joined by Judge Alito that set aside Environmental Protection Agency orders to clean up ammonia from a fertilizer plant that polluted drinking-water wells in Lansing, Mich. In that case, the majority found the agency lacked a "rational basis" for the remediation it required of W.R. Grace & Co., the fertilizer-plant operator.

A dissenting judge wrote that while EPA's order may have suffered from "poor draftsmanship," judges are not "expert environmental toxicologists" and should defer to the agency. Monday, the advocacy group Earthjustice issued a statement claiming Judge Alito repeatedly has sought to scale back congressional power "to enact laws that protect our health and environment."

Prof. Ribstein, in a posting on his blog, cited several other Alito opinions as evidence that he "will decide business cases with some sensitivity to the value of free markets and the problems firms face from litigation and regulation." Among them:

-- In *Hakimoglu v. Trump Taj Mahal Associates*, Judge Alito rejected a claim by a casino patron who sought to recover gambling losses allegedly caused by the casino's serving him free liquor and allowing him to continue gambling after he became drunk.

-- In *Barton & Pittinos Inc. v. SmithKline Beecham Corp.*, Judge Alito ruled against the plaintiff, a pharmaceutical marketer whose program of marketing SmithKline vaccine to nursing homes was terminated after pharmacists objected. He wrote that B&P lacked an antitrust injury sufficient to support standing to sue because it was not in competition with pharmacists -- a strict interpretation of the law.