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SUPREME COURT NOMINEE ALITO'S ANTITRUST RECORD

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Supreme Court Nominee Alito's Antitrust Record

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The hearings on the nomination of Third Circuit Judge Samuel A. Alito, Jr., predictably focus our attention on the antitrust cases and associated issues he considered while on the appellate bench. The record includes eight cases over his 15-year judicial career. One case, *Stolt-Nielsen v. United States*, is still undecided, and another, *Danvers Motor Company, Inc. v. Ford Motor Company,* is "hot off the presses," having been decided on December 19.

During this period, Judge Alito found himself in the majority four times, authoring three opinions and concurring once. He was in the minority twice, authoring one dissent, and concurring in another. Lastly, he voted for reconsideration en banc in one case that the Third Circuit decided not to reconsider under its rules.

The antitrust issues considered by Judge Alito include antitrust standing, *Parker v. Brown* state action immunity, the business of insurance exemption under the McCarran-Ferguson Act, the interstate commerce requirement, the market power requirements in claims under Sections 1 and 2 of the Sherman Act, the *Noerr-Pennington* doctrine, exclusionary conduct under Section 2 of the Sherman Act, separation of powers as related to the enforcement of Antitrust Division leniency agreements and constitutional standing in a Robinson Patman Act case.

Judge Alito sided with plaintiffs three times and defendants three times in the six cases in which he participated in the decisions. In one of those cases, the government (the Federal Trade Commission) was a party. He sided with the private defendants against the FTC in that case.

If any conclusions can be drawn from the record, they are that Judge Alito (1) favors vigorous price competition and is concerned that antitrust courts may chill competition in cases alleging that above cost prices caused antitrust harm; (2) takes an expansive view of the business of insurance; (3) rigorously applies the "active supervision" requirement of the state action immunity doctrine; (4) understands the critical elements of antitrust standing; and (5) based on comments during oral argument in the *Stolt* case, may reject separation of powers arguments where the government seeks to avoid judicial review at the expense of individual constitutional rights.

The two most significant cases Judge Alito considered are *Ticor* and *LePage's v. 3M*. He dissented in both. In *Ticor*, Judge Alito sided with the defendant title insurers against the FTC and would have found the insurers exempt from the embrace of the antitrust laws under the McCarran-Ferguson Act. In *LePage's*, he sided with defendant monopolist 3M against its smaller competitor, *LePage's* because 3M's bundled discounted prices were not shown to be below cost, and LePage's alleged injury could have resulted from otherwise lawful practices.

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In a third case that may also turn out to be significant when it is eventually decided, *Stolt-Neilsen*, Judge Alito's questions of government counsel during oral argument showed evident concern with the government's separation of powers position that its antitrust leniency agreements are beyond pre-indictment review by the judicial branch as a matter of constitutional law.

The following are thumbnail sketches of six of the seven decided cases in which Judge Alito participated. The seventh case, *In re Lower Lake Erie Iron Ore Litigation* (MDL No. 587), is not included in the thumbnails because one cannot tell much from a naked vote in favor of rehearing en banc. We also provide a thumbnail of Judge Alito's participation in the 2005 oral argument in *Stolt-Nielsen v. United States*, which remains to be decided. We proceed in chronological order, beginning with his earliest case.

Decided Cases

1991

In *Miller v. Indiana Hospital*, 930 F.2d 334 (3d Cir. 1991), a physician built a medical facility opposite the local hospital at which he held staff privileges. The new facility could be used to house services in competition with the old hospital. Thereafter – and presumably due to factors unconnected to the new medical facility – one of the physician's patients died while under his care in the old hospital. His staff privileges there were subsequently revoked after notice and a hearing.

The revocation of privileges was sustained after the physician sued in the local courts. For a number of years, the physician continually applied for and was denied reinstatement. After a time, the hospital refused to consider his applications for staff privileges, and eventually refused even to give him new applications.

The physician filed a petition with the Pennsylvania Department of Health (PDOH) contending that the hospital's behavior was a violation of state and federal regulations. He asked PDOH to order the hospital to furnish him with an application and to process it. PDOH sent the petition to the hospital and instructed it to respond. The hospital answered that the physician had been afforded ample due process in accordance with the law, and the hospital's bylaws. PDOH then told the physician that PDOH regulations did not require the hospital to provide him with an application for medical staff privileges.

The physician's next step was to file a federal civil rights and antitrust action in federal court. The federal district court dismissed the antitrust claim, granting the hospital's motion for summary judgment. The Third Circuit remanded, finding that there were genuine issues of material fact. On remand, the district court again dismissed the antitrust claims, this time based on the *Parker v. Brown* state action immunity doctrine.

Judge Alito, writing for a unanimous three-judge panel, reversed and remanded, sending the case back to the district court for a further determination of whether Pennsylvania's regulation of hospitals met the "active supervision" requirement of the state action immunity doctrine. Judge Alito's reading of Pennsylvania law and regulations governing

hospitals did not permit him to find that the PDOH had the authority to review "actual decisions made by hospital peer-review committees." Because Pennsylvania did not actually supervise physician peer review at the time the physician was denied staff privileges, the hospital failed to demonstrate that it was entitled to state action immunity.

1993

In *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993), the Federal Trade Commission issued an administrative complaint alleging that five of the largest title insurance companies in the United States violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(i), by collectively setting uniform rates for title search and examination services through state-licensed "rating bureaus" in 13 states. The title insurance companies defended, relying on (1) the "business of insurance" exemption contained in the McCarran-Ferguson Act 15 U.S.C. §§ 1012(b), 1013(a), (2) the *Noerr-Pennington* doctrine and (3) the state action immunity doctrine.

The case was decided against the title insurance companies by an administrative law judge, and was appealed to the FTC, then to the Third Circuit and finally to the Supreme Court, which remanded the case back to the Third Circuit to determine whether the regulatory schemes of two of the states in which the title companies collectively set rates met the "active supervision" standard.

On remand, the title insurance companies again argued the same three defenses, as neither the *Noerr-Pennington* defense nor the McCarran-Ferguson defense had been ruled upon previously by the Third Circuit or the Supreme Court, both of which had focused exclusively on the state action immunity doctrine defense in their prior rulings. The Third Circuit found that none of the three defenses applied.

Judge Alito dissented on the narrow ground that the title insurance companies' conduct was exempt. He "believe[d] that the setting of uniform rates for title search and examination services is part of the 'business of insurance' within the meaning of Section 2(b) of the McCarran-Ferguson Act." Thus, he would have dismissed the complaint against the title insurers on that ground. His views on what constitutes the business of insurance are explained in his dissent.

1995

In *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d. Cir. 1995), Judge Alito again considered a hospital staff privileges case alleging violations of Sections 1 and 2 of the Sherman Act. This time he concurred in two parts of the three-part majority opinion authored by Third Circuit Chief Judge Sloviter.

The first issue that Judge Alito concurred in was whether the physician's complaint – that he was denied staff privileges at a local hospital – adequately alleged the interstate commerce requirement of the Sherman Act. The interstate commerce requirement is "satisfied by demonstrating that defendant's activities either are in interstate commerce or affect interstate commerce." Thus there was the question of whether a factual nexus existed between the restraint on the physician's ability to practice at a hospital within a local market, and interstate commerce.

In *Summit Health v. Pinhas*, the Supreme Court resolved the question, holding that such a restraint satisfied the interstate commerce requirement because the "competitive significance of [the single physician's] exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded."

The Third Circuit refused to countenance a restrictive reading of *Summit Health v. Pinhas*. It reasoned that the plaintiff physician alleged that defendants conspired to suspend his privileges in a biased and unfair peer-review process. The effect of the defendants' alleged action was to deny him access to the relevant geographic market *and* other markets because dissemination of news of the adverse action taken against the plaintiff prevented him from obtaining a position elsewhere.

The second issue in which Judge Alito concurred was whether the complaint contained sufficient allegations of defendants' market power. Here the Third Circuit was unwilling to affirm the District Court's dismissal because neither the district court nor the parties made the distinctions necessary to analyze whether the market power allegations were sufficient under Section 1 or 2 at the pleading stage. Thus, the case was reversed and remanded for further proceedings in the trial court.

<u>1997</u>

In *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178 (3d Cir. 1997), a telemarketing company entered into a contract with a pharmaceutical manufacturer to market a hepatitis-B vaccine to nursing homes. Under the contract, the telemarketing company provided information regarding the vaccine to the nursing homes and solicited orders. The telemarketer was not licensed to buy or sell pharmaceuticals, so it passed on the solicited orders to a licensed pharmacist, General Injectibles and Vaccines, Inc., which bought the vaccine from the manufacturer and resold it to the nursing homes. The telemarketer earned commissions to pay for its marketing activities based upon General Injectible's sales of the vaccine.

After the program was launched there was a "flood" of complaints from licensed pharmacists who traditionally supplied the manufacturer's vaccines and other pharmaceutical products to nursing homes. The manufacturer allegedly "bowed to the pressure" and terminated its contract with the telemarketer.

The telemarketer brought suit under Section 1 of the Sherman Act, alleging a conspiracy between the manufacturer and pharmacists to restrain competition in the nursing home market for the hepatitis-B vaccine. The manufacturer moved for summary judgment on the ground that the telemarketer was neither a consumer nor a competitor in the alleged market and, therefore, lacked antitrust standing. The District Court agreed and dismissed.

The Third Circuit, with Judge Alito writing for a unanimous panel, affirmed. Judge Alito carefully analyzed the telemarketer's functions in the alleged market ("all hepatitis vaccine *sold* to nursing homes,") and found that because the telemarketer lacked a license to *sell* pharmaceuticals, it was not a competitor in that market. The telemarketer argued,

however, that because it provided the marketing and order-taking services, while General Injectibles did the buying and selling, together they had a "program" that competed in the marketplace, and that the nursing homes viewed the program to be in competition with the other pharmacists.

Judge Alito rejected this argument, preferring to regard the telemarketer as a supplier of services to the pharmaceutical manufacturer rather than as a participant in the alleged market. In his view, the telemarketer functioned as an advertiser or a broker for the manufacturer, and he noted that no case law has held that either has standing to sue for antitrust violations. Because the telemarketer was not a competitor or consumer in the relevant product market, it could not allege the kind of injury contemplated by Section 4.

In reaching this conclusion, Judge Alito declined to adopt conflicting precedents in the Ninth and Tenth Circuits that arguably would have permitted the Third Circuit to find antitrust standing in this case: *Bahn v. NME Hospitals, Inc.*, 772 F.2d 1467 (9th Cir. 1985); and *Telex Corp. v. Int'l Business Mach. Corp.*, 510 F.2d 894 (10th Cir.), cert. *dismissed*, 423 U.S. 802 (1975), because of the "realities of competition" in this case. Thus, he distinguished them away.

Overall, the case provides an excellent insight into Judge Alito's thinking on antitrust standing and the interplay of the *Associated General Contractors* factors.

2003

In LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), LePage's, a manufacturer of private-label transparent tape, alleged that 3M, the manufacturer of "Scotch" brand tape and private-label tape, engaged in exclusionary conduct such as exclusive dealing and bundled rebates (above-cost discounts) and thereby monopolized the sale and distribution of transparent tape in the United States in violation of Section 2 of the Sherman Act.

3M appealed to the Third Circuit from a district court order declining to overturn a jury verdict in LePage's favor on the legal ground that "a plaintiff cannot succeed in a Section 2 monopolization case unless it shows that the conceded monopolist sold its product below cost." An en banc panel of the Third Circuit affirmed the district court's decision, holding that exclusionary conduct can sustain a verdict under Section 2 even if there is no evidence of pricing below cost.

Judge Alito joined a three-judge dissent to the seven-members of the en banc majority decision. The dissent, authored by Circuit Judge Greenberg, concluded that, "as a matter of law, 3M did not violate Section 2 . . . by reason of its bundled rebates even though its practices harmed competitors."

The dissenters were concerned that the majority decision "risks curtailing price competition and a method of pricing beneficial to customers because the bundled rebates effectively lowered their costs." They embraced *Brook Group's* "strong stance favoring vigorous price competition and expressing skepticism of the ability of a court to separate anticompetitive actions from procompetitive actions when it comes to above-cost strategic pricing."

2005

In *Danvers v. Ford Motor Company,* F.3d (3d Cir.2005), a case decided in December, a putative class of Ford dealers claimed that Ford's "Blue Oval" program violated the Robinson Patman act, and other state and federal statutes. The program raised the price paid by dealers for Fords by 1 percent. Dealers who meet Ford's Blue Oval "certification requirements" (dealer quality requirements) received bonus payments of 1.25 percent, and other discounts, but dealers who declined to join the program or failed to meet the requirements did not receive any bonus or discount, and allegedly risked termination.

The district court dismissed the case for lack of injury in fact – constitutional standing. It found that the alleged threat of termination was too speculative and remote. Dealers' claims that the increased cost of obtaining and maintaining certification constituted injury fell on deaf ears.

Judge Alito, writing for a unanimous panel thought otherwise. "The complaint is replete with assertions of cognizable harm." The complaint amply alleged four types of injury: out of pocket expenses to become certified; loss of control (to Ford) over day-to-day dealership activities; the loss of interest payments on the 1 percent per vehicle mark-up; and the future threat of decertification. "Injury-in-fact is not Mount Everest," according to Judge Alito.

The Circuit reversed and remanded for further proceedings. The panel did not decide whether the dealers' alleged antitrust standing or any other issue other in the case other than injury in fact.

Undecided Cases

Judge Alito also sat on the Third Circuit panel that heard oral argument during 2005 in an antitrust-enforcement-related case, *Stolt-Nielsen v. United States*. The case raises the issue of whether a federal district court has jurisdiction to consider the validity of the Antitrust Division's decision to revoke a criminal leniency agreement – before the Division issues an indictment.

Stolt-Nielsen Transportation Group (SNTG) entered into a leniency agreement with the Antitrust Division and was granted conditional amnesty from prosecution for its participation in a conspiracy to fix prices and allocate customers for the transportation of chemicals in "parcel tankers." SNTG cooperated with the Division, and the Division successfully prosecuted SNTG's co-conspirators.

Subsequently, the Division learned (probably from the co-conspirators) that SNTG terminated its involvement in the conspiracy several months later than the Division believed SNTG's lawyers had represented in order for SNTG to qualify for amnesty. To be eligible for leniency, the Division requires that an applicant take prompt and effective steps to terminate its participation in the underlying crime. The Division became

convinced that SNTG had not done so. Consequently, the Division told SNTG that it planned to revoke the conditional amnesty and proceed to indictment.

SNTG responded by taking the unusual step of filing a civil complaint under seal in federal district court to enforce its written leniency agreement, as well as a motion for preliminary injunction to prohibit the Division from seeking an indictment. The District Court granted the injunction. It found that the Division received the full benefit of its bargain with SNTG and that SNTG did not breach the written agreement with the government because the agreement did not include any representation by SNTG regarding the timing of its termination of its illegal activities.

The Antitrust Division appealed to the Third Circuit, relying on a "separation of powers" theory, arguing that the judicial branch could not act pre-indictment to prevent the executive branch from seeking an indictment. Rather, the government argued, the courts must wait to see if an indictment issues, and then consider – post-indictment – whether the alleged breach of the conditional leniency agreement is a defense to the indictment.

In their questioning of the Assistant Chief of the Antitrust Division's Appellate Section, Judges Alito and Restani (Chief Judge of the Court of International Trade, sitting by designation) appeared reluctant to accept the separation of powers argument. Their questions indicate that they believe the courts can enjoin a government prosecution if the prosecution would cause irreparable harm to the defendant, for instance by interfering with the defendant's constitutional rights.

The panel was interested in the bilateral contractual nature of the leniency agreement, questioning the government's lawyer about the effect of an agreement that said that the government "shall not prosecute." Judge Alito asked whether a party who fully performs under such a leniency agreement may still be prosecuted. The government responded that the Antitrust Division has an eligibility requirement for leniency – prompt and effective termination of participation in the underlying crime. If that requirement is not met in the first instance, as in this case, then the leniency agreement is not enforceable against the government.

During the government's rebuttal, Judge Alito returned to the contractual issue to ask whether, if this was an ordinary breach of contract case, the government would be in breach of the leniency agreement by seeking the indictment. The government's lawyer replied no, that the government might seek an indictment but might not get one from a grand jury. Thus merely seeking an indictment was not enough to breach the leniency agreement.

With respect to the appellees argument, Judge Alito reportedly played a limited role. He asked one of the appellees whether the government should ever be able to revoke a leniency agreement and seek an indictment. The response was that the government should be required to postpone seeking indictment until after judicial review of the leniency agreement and the government's reasons for revocation. The other members of the panel, Judges Ambro and Restani, appeared to express concern that such a ruling would risk opening the "floodgates" to a multitude of pre-indictment challenges of leniency agreements. But we note that this is the first time in the history of antitrust

leniency agreements that one has been revoked. Thus, this promises to be a "trickle," not a flood.

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