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High Court Reveals a Mind for Business

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For years, if not decades, leading U.S. Chamber of Commerce lawyer Robin Conrad has told anyone who will listen that a conservative Supreme Court is not always a pro-business Supreme Court.

For example, conservative Justices Antonin Scalia and Clarence Thomas have never been able to find, in their copies of the Constitution, any basis for limiting high punitive damage awards that are the bane of the business community.

But now, at the end of a course-changing, gut-wrenching Supreme Court term littered with heated 5-4 decisions, one bit of clarity is shining through: the Roberts Court, and especially its newest member, Samuel Alito Jr., are both very conservative and very pro-business -- more so than any Supreme Court in decades.

"We've been representing the business community before the Supreme Court for 30 years," Conrad says, "and this is our strongest showing since the inception" of the National Chamber Litigation Center, the chamber's litigation arm, where Conrad is executive vice president. She counts 13 wins in the 16 cases in which the center filed briefs on the merits.

In the rosy picture Conrad paints for business, there is no brighter star than Alito, who, even more than Chief Justice John Roberts Jr., has voted with business at almost every opportunity.

More than most novice justices, Alito has taken bullets for business in the term just ended, most notably for his controversial majority opinion in *Ledbetter v. Goodyear Tire & Rubber*, decided by a 5-4 vote on May 29.

Alito's opinion interpreted Title VII's 180-day filing deadline to foreclose employment discrimination claims that are

based on long-ago salary decisions -- even if recent paychecks reflect the discrimination. Editorialists attacked the decision as mean and tone-deaf to workplace realities, and Democrats in Congress have moved quickly to propose legislation to undo Alito's ruling.

In that case and on a range of others, business was the big winner. The biggest losers appeared to be plaintiffs in securities and antitrust litigation. Patents became easier to challenge, certain business sectors will have an easier time resisting antitrust lawsuits, and national banks can avoid state regulation.

"There wasn't a significant case in which a business argument was made where the business side did not prevail," says Mark Levy, who heads Kilpatrick Stockton's appellate practice. *Massachusetts v. Environmental Protection Agency*, which gave states standing to challenge the EPA's refusal to regulate greenhouse gases, is viewed as the term's biggest defeat for business interests, but Levy views that as more a matter of administrative law.

Latham & Watkins' appellate head, Maureen Mahoney, says the Court sometimes went even further in giving businesses what they want than the Bush administration asked for. Case in point: Mahoney's own victory in *Rockwell International v. United States*, a March 27 decision that companies hope will curtail whistle-blower qui tam lawsuits filed under the False Claims Act.

The Roberts Court is turning out to be "an even better forum for business" than the Court under the late Chief Justice William Rehnquist, Mahoney says. In its patent and antitrust decisions, Mahoney sees "the rise of the Chicago School," referring to a free market approach to laws and regulations affecting business.

Moreover, even at a time when the Court's docket is shrinking, the Court's interest in business cases seems to be on the rise. Fully half of the Court's 71 cases involved business. It was not that long ago that former Solicitor General Kenneth Starr could complain that the Court's business docket was declining because high court law clerks were more interested in nude dancing cases and other high-profile constitutional disputes. Now nude dancing cases are nowhere to be found on the Court's docket, replaced by less titillating disputes over pleading standards and vertical price restraints.

A NEWFOUND FOCUS

The Court's greater interest could reflect Roberts' arrival on the Court after a distinguished career in the private bar, in which he often, though not always, represented corporate clients seeking help and clarification from the Supreme Court.

But how to explain Alito's embrace of business? Alito's long career as a government lawyer and judge and his upbringing as the son of a civil servant of modest means don't necessarily point toward a pro-business stance. His financial disclosure reports are not festooned with holdings in blue-chip stocks -- unlike those of many of his colleagues, both liberal and conservative.

"All the pop-psychology theories about why a judge might vote in a certain way don't work for Justice Alito," says Roy Englert Jr. of Robbins, Russell, Englert, Orseck & Untereiner.

Levy, who has known Alito for years, explains it this way: "Sam is someone who likes order, likes having rules. That doesn't make him hard-hearted." The *Ledbetter* decision, Levy argues, was a faithful reading of Title VII, and it is up to Congress, not the courts, to change the law to give employees more leeway to make discrimination claims. Alito has made the same point in public appearances since the decision.

Yet four justices in dissent also thought they were applying the law when they came out the opposite way. "Title VII was meant to govern real-world employment practices, and that world is what the Court today ignores," Justice Ruth Bader Ginsburg said that day from the bench.

Alito's pro-business stance should not be a surprise, given his track record as a judge for 15 years on the 3rd U.S. Circuit Court of Appeals. When he was nominated to the high court in 2005, Alito was attacked by liberals for his record of opposing plaintiffs in sex discrimination claims. On the other side, the Chamber's Conrad was quoted as saying of Alito, "This is not a guy who is going to go off the reservation."

Former Sen. Dan Coats, R-Ind., who was Alito's Sherpa during the nomination process, says, "What we're getting now is what you saw then." Coats, now senior counsel at King & Spalding in Washington, D.C., adds, "This guy is brilliant" and says Alito is making a strong contribution to the Court. "But he is not letting his personal views dictate outcomes."

PUSHBACK ON PLAINTIFFS

The first big sign that Alito and Roberts were solid votes for business came on Feb. 20, when they voted with the majority -- and against Scalia and Thomas -- on the issue of punitive damages. In *Philip Morris USA v. Williams*, brought by the widow of a cigarette smoker, the Court ruled that jurors could not base an award in an individual case on the harm that tobacco companies did to others. Scalia and Thomas joined Ginsburg and Justice John Paul Stevens in dissent.

For Alito, as well as many of the other justices who have joined him or led him in business cases this term, suspicion of the plaintiffs bar might be one factor driving the pro-business trend.

"The entire Supreme Court has a mistrust of lawyer-driven litigation," Englert told a Washington Legal Foundation forum June 27. "The Court has inflicted a world of hurt on the plaintiffs bar. ... The justices don't see real, injured people. They see lawyers trying to extort settlements."

In *Bell Atlantic v. Twombly*, for example, Justice David Souter spoke repeatedly of the problem of "discovery abuse" by plaintiffs that "will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." The decision, which got few headlines but may have broad practical effect, spells out higher requirements for what must be included in initial pleadings that businesses hope will weed out baseless class actions and other litigation.

In another case this term, the Court also showed a mistrust of juries in deciding complex business cases. In *Credit Suisse v. Billing*, the Court said securities law should trump antitrust law, in part because the Securities and Exchange Commission had more competence than jurors in assessing possible antitrust violation in initial public offerings. But consumer groups worry that agencies such as the SEC are often too protective of the businesses they regulate.

In the *Credit Suisse* ruling, Justice Stephen Breyer wrote with concern: "Antitrust plaintiffs may bring lawsuits throughout the nation in dozens of different courts with different nonexpert judges and different nonexpert juries."

Next term the business drumbeat will continue. The Court has agreed to hear this fall the case of *Stoneridge Investments v. Scientific-Atlanta*, another class action in which the Court will be asked to determine whether investors can recover damages from third parties -- including lawyers, bankers, and accountants -- who stood by as companies engaged in fraud. Businesses have lobbied the government intensely to oppose that level of liability.

With two justices recused because of stock-ownership conflicts, Alito is regarded as the swing vote.