SPECIAL REPORT

MEDIA LAW OPINIONS OF SUPREME COURT NOMINEE SAMUEL A. ALITO, JR.

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MEDIA LAW OPINIONS
OF SUPREME COURT NOMINEE
SAMUEL A. ALITO, JR.

Judge Samuel A. Alito, who was nominated Monday for the U.S. Supreme Court, has been a judge of the Third Circuit Court Appeals for 15 years. During this period he has been involved in several cases of interest to in-house and outside media defense counsel, although he has written opinions in relatively few of them.

This report provides details on cases of interest to media defense counsel that Judge Alito participated in as a member of the Third Circuit. In addition to defamation, privacy and other First Amendment and free speech concerns, these cases address issues such as the application of anti-trust laws to newspapers and regulation of employment by newspapers.

Judge Alito ruled in favor of media defendants in all three of the media libel appeals that he heard. But he ruled for parties of those imposing restrictions in all but one of the four prior restraint cases that he participated in; the exception being a case involving restrictions placed on famed inmate Mumia Abu-Jamal.

Judge Alito has ruled in only one reporters privilege case, joining a unanimous panel which held that the man who was employed as the “voice” of a wrestling promoter’s 900 phone number was not a journalist under Pennsylvania’s shield law.

Judge Alito has been a strong supporter of First Amendment protection for commercial speech. In addition to the widely publicized decision in which he found restrictions on alcohol advertising in college media unconstitutional, he has also voted against billboard restrictions in Delaware and against a preliminary injunction barring an advertisement comparing competing health benefits.

His jurisprudence on freedom of information and access, meanwhile, shows a clear desire for courts to make specific findings regarding the competing interests regarding disclosure of government information. He was on a panel that created a seven-point test to balance these interests and determine whether particular information should be released,[1] and another that ordered the district court to undertake this analysis.

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1. These factors are neatly summarized in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir.1995) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-91, 22 Media L. Rep. 1641 (3d Cir. May 2, 1994)).

DEFAMATION

The only media defamation case in which Judge Alito wrote a decision for the Third Circuit was in *Tucker v. Fischbein*, 237 F.3d 275, 29 Media L. Rep. 1161 (3d Cir. Jan 9, 2001).

Tucker was a sequel to anti-gangsta rap activist Delores Tucker's 1997 suit against the estate of murdered rapper Tupac Shakur, who had mentioned her in some of his songs. The "loss of consortium" claim in that suit received a lot of media attention, and was often characterized as relating to Tucker's sexual relationship with her husband. Tucker and her husband filed a new suit over these statements, naming Richard Fischbein, the attorney for Shakur's estate, and several news magazines and reporters. The trial court granted summary judgment to defendants, and plaintiffs appealed.

Judge Alito found that the statements about the loss of consortium were capable of a defamatory meaning since they could imply that Tucker and her husband were "insincere, excessively litigious, avaricious, and perhaps unstable," as well as hypocritical by making their sex life a matter of public record in pursuit of pecuniary gain. Alito held that there were fact issues regarding whether the attorney's statements about the loss of consortium claim were false and made with actual malice, and reinstated the claims against him. But he ruled that the magazines and reporters had not acted with actual malice, and affirmed summary judgment for those defendants.

Finally, the appellate court held that the District Court had correctly denied the Tuckers' motions to depose in-house counsel at *Time* and *Newsweek*. "The communications with in-house counsel involved here were clearly for the purpose of rendering legal advice and therefore are privileged," Judge Alito wrote for the court, rejecting as "frivolous" the Tuckers' argument that the privilege was waived because in-house counsel reviewed stories "in the regular course of business."

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Judge Alito recently wrote an opinion for the Third Circuit in a non-media employment defamation case. In *Overall v. University of Pennsylvania*, 412 F.3d 492 (3d Cir. June 27, 2005), plaintiff sued for employment discrimination and included a claim for defamation over statements made about her at a university grievance hearing. The district court granted summary judgment to defendants on all claims. As to the defamation claim, the district court ruled that the grievance hearing was "quasi judicial" and therefore statements made there were absolutely privileged. Judge Alito affirmed dismissal of the employment discrimination claim, but reinstated the defamation claim, finding no authority in Pennsylvania law to accord quasi-judicial status to entirely private hearings.

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Judge Alito was part of a unanimous panel that affirmed the lower court's denial of a new trial in *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 33 Media L. Rep. 2254 (3d Cir., Sept. 12, 2005). At trial, the jury had found that the *New York Times* article was false and

defamatory but that plaintiff had not suffered any harm and thus awarded no damages.

On appeal, the plaintiff argued that the lower court's failure to instruct the jury on presumed damages and defamation *per se* merited a retrial. The panel disagreed. First, the plaintiff had not objected to the jury instructions previously. Second, any award of presumed damages would have required a finding of actual malice, and the jury did not find that the New York Times had acted with actual malice. "Accordingly," the appeals court wrote, "the District Court's omission of a presumed damages instruction cannot constitute a fundamental error resulting in a miscarriage of justice, if it was error at all." Finally, while the jury was not instructed on defamation per se, it was told that Franklin Prescriptions was not required to prove financial harm, and that it could award compensation based on harm to reputation alone.

* * *

Judge Alito was part of a unanimous Third Circuit panel that affirmed dismissal of libel and related claims over an advertisement for the United Negro College Fund published in the New York Times. *Botts v. New York Times Co.*, 106 Fed.Appx. 109, 32 Media L. Rep. 1993 (3d Cir. July 20, 2004). The ad depicted "Larry Botts," "a fictional African-American male who turned to alcohol and 'wasted' his mind because he could not afford a college education."

The Court held that the advertisement was not "of and concerning" a father and son in New Jersey with the same name; it did not misappropriate plaintiffs' identities; and the coincidental use of plaintiffs' name was not sufficiently outrageous to support claim for intentional infliction of emotional distress.

* * *

In a diversity suit brought by trust beneficiaries against the executor of grantor's estate and grantor's personal care provider, a Third Circuit panel including Judge Alito held that plaintiff's claims for punitive damages based on state-based slander and tortious interference with inheritance claims could satisfy the amount in controversy requirement for diversity jurisdiction. *Golden ex rel. Golden v. Golden*, 382 F.3d 348 (3d Cir. Sept. 3, 2004).

* * *

In *In re Prudential Ins. Co. of America Sales Practice Litigation*, 47 Fed.Appx. 78 (3d Cir. Sept. 3, 2002), a former manager was fired after it was alleged that he had concealed video tapes from regulatory compliance inspectors, made misrepresentations, and refused to answer deposition questions about document destruction in litigation involving Prudential's sales practices. When the manager sued, Prudential moved to compel arbitration under the National Association of Securities Dealers (NASD) rules. The NASD arbitration panel held that the termination was arbitrary and capricious and awarded damages, but rejected the fired employee's claim that Prudential had defamed him. The District Court upheld the arbitration result.

The Third Circuit affirmed. "Berrafato contends he was defamed in a newspaper article by a Prudential spokesman who allegedly stated, *inter alia,* that Berrafato removed tapes from the local office in order to avoid regulatory compliance review. But since "[t]he only evidence put

before the arbitrators was the newspaper article," and the plaintiff "fails to make more than a conclusory statement in his brief that he was defamed," the arbitration panel's ruling on the claim was upheld.

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Judge Alito was part of a unanimous Third Circuit panel that affirmed dismissal of defamation claims in *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. Jan 25, 2001). Plaintiff, a Pennsylvania attorney, sued a former client and his agents for breach of contract and defamation for statements in letters that, among other things, accused plaintiff of attempting to "extort money." The district court dismissed the case on jurisdictional grounds and for failure to state a claim.

The Third Circuit reinstated the breach of contract claims, but affirmed dismissal of the defamation claims, holding that the district court did not have jurisdiction because the letters, although sent to plaintiff's Pennsylvania office and read by people there, were not targeted at the state. The court also held that the letters themselves were not defamatory because they were "rhetorical hyperbole" and/or opinions based on disclosed facts.

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Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996 (3d Cir. 1994) was an anti-trust case brought by wallpaper dealers who sold their wares through 1-800 telephone numbers against competing retailers and wallpaper manufacturers. In addition to the anti-trust claims, the plaintiffs claimed that the defendants' trade association had defamed them by publishing articles and editorials referring to 800-number dealers as "pirates." The district court entered summary judgment in favor of defendants, and plaintiffs appealed.

The Court of Appeals reversed on the anti-trust claims, but affirmed dismissal of defamation and contractual claims. As to the defamation claims, the appeals panel held that the number of 1-800 wallpaper dealers – 20 to 25 – was too large and there was no other evidence "which could support a conclusion that any of the plaintiffs' individual reputations were injured by NDPA's statements about 800-number dealers in general."

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In a non-media case involving the possible remedies for libel, the Third Circuit held that the district court could not enjoin the defendant from repeating libelous statements and from communicating with anyone doing business with the plaintiff, and lacked authority to compel defendant to make retractions and withdrawals, or to impose associated contempt citations. *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. Oct 15, 1991).

PRIVACY

Although the merits of the claims were not at issue in *Rogal v. American Broadcasting Companies, Inc*., 74 F.3d 40, 34 Fed.R.Serv.3d 388, 24 Media L. Rep. 1497 (3d Cir. Jan 12, 1996), it is the only case in which a panel decision by Judge Alito dealt with privacy claims against media defendants.

The case stemmed from defamation and false light invasion of privacy claims brought against ABC and reporter John Stossel, which led to a jury verdict for the defendants.

When the defendants then moved for sanctions, the trial court imposed a $256,360 sanction against the plaintiff for his false trial testimony. The court imposed this sanction without holding an evidentiary hearing.

In an opinion by Judge Alito, the Third Circuit held that due process required an evidentiary hearing prior to imposition of sanctions, and remanded.

* * *

McFarland v. Miller, 14 F.3d 912, 22 Media L. Rep. 1205 (3d Cir. Jan 25, 1994) was brought by the estate of the actor who played "Spanky" in the "Our Gang" / "Little Rascals" films against the owner of a restaurant that used the character's name and image. Claims in the suit included invasion of privacy, unjust enrichment, Lanham Act violations, and violations of the New Jersey Consumer Fraud Act. The district court granted summary judgment to the defendants, and plaintiff appealed.

The appellate panel held that under New Jersey law a public figure's right of publicity survives death, that the evidence raised a genuine issue of material fact as to whether the decedent had become so inextricably identified with the character that his own identity was invoked by name of character, and that the employment contract between the movie studio and the actor did not deprive the actor and his estate of standing to enforce his right of publicity in name of movie character. Thus the case was reversed and remanded.

REPORTERS' PRIVILEGE / WHISTLEBLOWING

Judge Alito was part of a Third Circuit panel that considered the scope of Pennsylvania's shield law in *In re Madden*, 151 F.3d 125 (3d Cir. Aug. 6, 1998). Wresting promoter Titan Sports sued Turner Broadcasting, which owned a competing promoter, alleging unfair trade practices, copyright infringement and other state law claims. In discovery, plaintiff subpoenaed Mark Madden, a Pennsylvania resident who was employed by defendant as the voice of its 900 phone number information line, which offered updates on matches and other news regarding Titan's wrestling events and personalities.

During his deposition, Madden refused to reveal the source of a statement made on the phone service, asserting the Pennsylvania reporters privilege. The district court held Madden to be a journalist covered by the statute.

The Third Circuit reversed. "Madden's activities in this case cannot be considered 'reporting,' let alone 'investigative reporting,'" the panel concluded. "By his own admission, he is an entertainer, not a reporter, disseminating hype, not news. Although Madden proclaims himself to be 'Pro Wrestling's only real journalist,' hyperbolic self-proclamation will not suffice as proof that an individual is a journalist."

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In *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995), current and former employees of the Veterans Administration Medical Center in Pittsburgh alleged that administrators retaliated against them for criticizing patient care. The district court granted summary judgment for defendants, saying that the plaintiffs had not pursued their administrative remedies before filing suit. In an opinion by Judge Alito, the Third Circuit held that plaintiffs could bring suit for injunctive and declaratory relief, but not damages.

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Persico v. City of Jersey City, 67 Fed.Appx. 669 (3d Cir. April 29, 2003) involved a whistle-blower: a retired police sergeant who alleged that he was constructively discharged in retaliation for speaking out about illegal activity with a street paving project.

The trial court dismissed the suit and a Third Circuit panel that included Judge Alito affirmed, holding that the evidence supported a finding that the sergeant's free speech rights had not been infringed; and that he had received procedural due process. The court added that plaintiff failed to rebut the presumption that he voluntarily resigned, did not establish requisite constitutional injury to maintain respondeat superior liability claim under § 1983. "Assuming that Persico's claim, broadly construed, involves speech about a matter of public concern," the court wrote, "the fact remains that the Police Department's substantial interest in maintaining its rules and regulations outweighs Persico's interest in the speech."

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Feldman v. Philadelphia Housing Authority, 43 F.3d 823 (3d Cir. Dec 22, 1994) involved the former head of a public housing authority's Internal Audit Department, who alleged that he was fired for issuing internal reports critical of management practices in violation of the First Amendment and Pennsylvania's whistleblower statute. The district court entered judgment on jury verdict for plaintiff.

The Court of Appeals affirmed, with Judge Alito in the majority, holding that the plaintiff's reports were protected speech, and that the evidence supported the finding that he was discharged in retaliation for those reports.

PRIOR RESTRAINTS

In *Swartzwelder v. McNeilly*, 297 F.3d 228 (3d Cir. July 19, 2002), a police officer who testified as an expert witness in excessive force cases sought to enjoin enforcement of a police policy requiring prior authorization before providing such expert testimony.

The lower court granted the officer's motion for preliminary injunction, and the Third Circuit panel affirmed in a decision by Judge Alito. He reasoned that since the policy restricted speech that was a matter of public concern, it had to balance the parties' interest. Judge Alito wrote, "it is apparent that important First Amendment interests are implicated" by the restriction; but on the other hand, "There is no question that the effective functioning of a government office may be undermined by employee testimony on matters relating to the office."

But after noting that "the question before us here is not even whether [the policy] can ultimately be sustained, but only whether the District Court abused its discretion in holding that the plaintiff was likely to succeed in challenging them," the court ultimately concluded that "[o]n the record before us, we hold that the District Court did not abuse its discretion in making that determination."

Thus the appeals panel upheld the preliminary injunction. "While the preliminary injunction may impinge on significant interests of the City, the preliminary injunction leaves the City free to attempt to draft new regulations that are better tailored to serve those interests," Judge Alito wrote for the majority. "On the other hand, if the preliminary injunction had been denied, Swartzwelder and those who might have benefitted from his testimony would have suffered an important loss."

* * *

In *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), famed death row inmate Mumia Abu-Jamal challenged a rule prohibiting inmates from carrying on a business or profession. Although Abu-Jamal had been able to write about 40 articles and conduct radio interviews, his requests to record radio commentaries for the Prison Radio Project and National Public Radio were denied. As he garnered more attention, prison authorities increased scrutiny of Abu-Jamal's mail, including forwarding letters to and from his attorneys to the governor's legal staff, and denied visits with several individuals identified by Abu-Jamal as paralegals and investigators in his legal case, unless they could show that they actually were credentialed in these fields.

The district court denied Abu-Jamal's request for a preliminary injunction against enforcement of the rule and of the policy regarding his visitors, but enjoined the monitoring of mail between Abu-Jamal and his attorneys, except to investigate "violations of prison regulations or other misconduct."

The Third Circuit, in a unanimous panel decision including Judge Alito, held that Abu-Jamal had a reasonable probability of showing that application of the business or profession rule to him violated the First Amendment, and directed the lower court to enjoin this.

"There is no evidence," the court wrote, "... that Jamal's prison writing, any more so than that of

other inmates, has strained prison resources, contributed to unrest among the inmate population, or enhanced Jamal's stature as a prisoner, resulting in danger to himself or others." But it declined to order an injunction against the visitor restrictions, saying that "the Department has articulated a valid, content neutral reason for applying more strict visitation rules to Jamal's visitors."

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In *Prudential Ins. Co. of America v. Massaro*, 38 Fed.Appx. 828 (no footnotes), *republished at* 47 Fed.Appx. 618 (3d Cir. July 18, 2002), a former in-house counsel at Prudential had allegedly been disclosing confidential or privileged information to Prudential's legal adversaries. The company sought to permanently enjoin him disclosing any such information about the company, which it claimed constituted an unjustifiable breach of his duty as Prudential's attorney and fiduciary. The District Court agreed, granted summary judgment to Prudential, and ordered a permanent injunction to silence Massaro.

A panel that included Judge Alito affirmed. "The central issue on appeal is whether Massaro's disclosures can be justified under the crime-fraud exception to the attorney-client privilege and the duty of confidentiality," the appals court wrote. "We hold that Massaro's disclosures were not justified by the crime-fraud exception."

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The plaintiff in *Tomalis v. Office of Attorney General of Com. of Pa.*, 36 Fed.Appx. 45 (no footnotes), *republished at* 45 Fed.Appx. 139 (3d Cir. June 3, 2002) was a senior deputy attorney general who was hired under a Republican attorney general but was asked, along with the entire staff of the office, to resign when a Democrat was elected. Instead of resigning, plaintiff wrote a letter criticizing the mass firing, which he released to the media. He was subsequently fired.

He then sued, alleging that his termination violated his First Amendment free speech and associational rights. The district court dismissed the case on Eleventh Amendment grounds, and also granted summary judgment for the defendant.

The Third Circuit held that "While Tomalis' right to speak out on the issues he chose to address is indeed significant, on balance, we believe it is superseded in this case by [the employer's] interest in promoting the 'efficiency of the public service' he and the OAG performs. Tomalis' comments could undercut the morale of the OAG, cause disruption, and hinder its operations."

FREEDOM OF INFORMATION / COURT ACCESS

In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 22 Media L. Rep. 1641 (3d Cir. May 2, 1994), newspapers sought access to a sealed settlement of a former police chief's civil rights suit against the borough and borough officials. The district court denied the newspapers' motions.

The Court of Appeals, in a panel that included Judge Alito, held that the settlement agreement –

which had not been submitted to the court – was not a "judicial record" subject to public access. But it further held that the district court should have considered the competing public and privacy interests before entering a confidentiality order, and it remanded the case to the district court for such a balancing. The parties then reached an agreement before the district court reconsidered the case.

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A Third Circuit panel that included Judge Alito reinforced the *Pansy* decision earlier this year. In *Shingara v. Skiles*, 420 F.3d 301 (3d Cir. Aug. 24, 2005), the state police sought a protective order to prevent a former employee suing the agency for alleged First Amendment retaliation from disclosing discovery material to the media. The district court granted the motion. The district court also granted the Philadelphia newspapers' motion to intervene, but denied the newspaper's motion to vacate the protective order. The newspaper appealed.

The appeals panel vacated the order, ruling that the arguments for closure had not met the requirements set out in *Pansy*. "[A] district court may determine that good cause exists only based on reasoning that is true to the direction, language and spirit of *Pansy*," the court wrote.

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In *Herring v. U.S.*, 424 F.3d 384 (3d Cir. Sept. 22, 2005), Judge Alito was on a panel that rejected an effort to re-litigate a case that led the U.S. Supreme Court to recognize a "military secrets privilege" for sensitive military information.

Plaintiffs were the daughters of two civilian employees of an Air Force contractor who were killed in a 1948 plane crash. They asked that the case be re-opened in light of recently declassified documents which they argued show that the military improperly invoked military secrecy in the original proceeding to withhold reports concluding that the planes were "not considered to have been safe for flight."

After their motion with the U.S. Supreme Court seeking to petition for a writ of error *coram nobis*, for re-evaluation of the court's decision in *U.S. v. Reynolds*, 345 U.S. 1 (1953), the daughters then filed a new case seeking damages. The trial court dismissed the suit.

The Third Circuit affirmed, finding that the government's actions in the original litigation did not constitute "clear, unequivocal and convincing evidence" of "the most egregious misconduct directed to the court itself."

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In *Federal Labor Relations Authority v. U.S. Dept. of Navy*, 966 F.2d 747 (3d Cir. May 26, 1992), Local 1156 stemmed from an effort by the American Federation of Government Employees to obtain the home addresses of all Philadelphia Naval Shipyard employees, both union members and non-members. The the Navy denied the request, the Federal Labor Relations Authority (FLRA) eventually ordered the disclosure, finding failure to do so a "unfair labor practice." In a 1998 decision, a Third Circuit panel that did not include Judge Alito upheld the

FLRA determination and ordered disclosure. U.S. Dept. of Navy v. Federal Labor Relations Authority, 840 F.2d 1131 (3d Cir. Mar 2, 1988). The U.S. Supreme Court denied certorari. 488 U.S. 881 (1988).

Although the Navy eventually released the addresses for union members, it refused to disclose the addresses of non-union employees. Once again, the union sought relief from the FLRA, which issued an order requiring disclosure. In the Navy's appeal of the FLRA order, the majority of an *en banc* panel ordered disclosure under the Freedom of Information Act because the public interest in collective bargaining for federal employees outweighed the employees' privacy interest in their homes and disclosure would not be a "clearly unwarranted invasion of personal privacy."

Judge Alito dissented, in an opinion joined by Judge Stapleton, writing that "It seems clear to me that all federal employees – from Cabinet officers to GS1's – have a privacy interest of *some* weight in their home addresses and that there is no public interest cognizable under FOIA in the disclosure of these addresses." Judge Alito's opinion also noted that he dissented for essetnially the same reasons as Judge Rosenn's separate dissent, which argued that the disclosure of employees' addresses was barred by the Privacy Act.

COMMERCIAL SPEECH

As has widely been reported, Judge Alito wrote a majority opinion striking down a Pennsylvania statute prohibiting alcoholic beverage advertising in college and university media, reversing a grant of summary judgment to the state. *Pitt News v. Pappert*, 379 F.3d 96, 132 Media L. Rep. 2032 (3d Cir. Jul 29, 2004).

Judge Alito wrote that the statute failed the *Central Hudson* test because it did not directly advance the governmental interests asserted, and was not narrowly tailored to achieve those objectives. He also ruled that the statute was "presumptively unconstitutional because it targets a narrow segment of the media," and unjustifiably imposed a financial burden on only a specific type of media – university and college media – without adequate justification.

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Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160 (3d Cir. Dec 21, 2001) involved a Lanham Act claim over an advertisement placed by UPMC Health Plan that compared benefits with those offered by Highmark. The district court denied a motion to dismiss, and granted a preliminary injunction barring continued dissemination of advertisement.

A unanimous appellate panel that included Judge Alito held that the federal courts had jurisdiction because the advertisement substantially affected interstate commerce; that the Lanham Act claim was not barred by McCarran-Ferguson Act, which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ...;" and that the district court had abused its discretion in granting injunctive relief.

In *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. Mar 11, 1994), a former political candidate brought a civil rights action challenging a Delaware law banning outdoor advertising within 25 feet of any state highway. The district court found the law unconstitutional, and the state appealed.

The Court of Appeals held that the Delaware law prohibiting all signs was unconstitutional because the exceptions for signs advertising local cities, industries and meetings were not content-neutral.

Judge Alito filed a concurring opinion, saying that he would have invalidated the statute on the grounds that it was not narrowly tailored to the valid state purpose of maintaining highway safety.

OTHER

<u>Prisoners' Access to Media</u>

In addition to the Abu-Jamal case, which involved an inmate's ability to write articles and record commentaries for use by outside media and is discussed *supra*, two of the cases that the Third Circuit handled during Judge Alito's tenure involved prisoner's ability to access media from outside prison.

In *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. June 30, 1999), Judge Alito wrote a panel decision upholding a New Jersey statute that restricted access to pornographic materials by prisoners sentenced for sex offenses, holding that the law "bears a valid, rational connection to the legitimate penological interest put forward to justify it."

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Banks v. Beard, 399 F.3d 134 (3d Cir. Feb. 25, 2005) involved a state corrections department policy restricting access by inmates placed in prison's long-term segregation unit to newspapers, magazines, and photographs. Although the trial court granted summary judgment to the state, the Third Circuit's majority opinion reversed, holding that there were not valid, rational connections between policy and the state's stated objectives of rehabilitation and prison security

Judge Alito dissented, writing that the restrictions were "impose[d] as a last resort on the most disruptive and dangerous .1% of [the] prison population." Citing *Turner v. Safley*, 482 U.S. 78 (1987) for the proposition that courts should extend considerable deference to judgments of correctional officials," Judge Alito wrote that, "On their face, these regulations are reasonably related to the legitimate penological goal of curbing prison misconduct, and I would therefore affirm the decision of the District Court."

A petition for certiorari has been filed with the U.S. Supreme Court in this case. See *Banks v. Beard*, No. 04-1739, 74 USLW 3014 (filed Jun 20, 2005).

Copyright / Trademark

In a suit by the publisher of "The Sporting News" against the publisher of a competing publication named "Las Vegas Sporting News," the district court issued a preliminary injunction on the grounds of a dilution claim.

Judge Alito was on a Third Circuit panel that affirmed, holding that the trademark "The Sporting News" was famous in niche market and was thus entitled to protection from dilution in that market; that the Federal Trademark Dilution Act (FTDA) did not require showing of distinctiveness beyond that of distinctiveness acquired through secondary meaning; and that the plaintiff had established likelihood of success on the merits. *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 165 A.L.R. Fed. 783 (3d Cir. Apr 28, 2000).

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In a decision that was vacated by the Supreme Court, a Third Circuit panel affirmed dismissal, for lack of subject matter jurisdiction, of a copyright infringement lawsuit brought by the authors and performers of a song against licensees that used the song in television commercials after the license term had expired. *Raquel v. Education Management Corp.*, 196 F.3d 171 (3d Cir. Nov. 9, 1999), *cert. granted and judgment vacated*, 531 U.S. 952 (2000).

The Third Circuit majority affirmed the dismissal, holding that technical errors made plaintiff's copyright registration ineffective, and thus the suit was barred by the registration requirement. But Judge Alito dissented, writing that "I believe that the majority's decision elevates form over substance and works a forfeiture of a valid copyright because of a misstatement that the trial court had already labeled inadvertent."

The U.S. Supreme Court granted certorari and simultaneously vacated the Third Circuit's ruling, remanding the case "for further consideration in light of the position asserted by the Solicitor General in his brief for the United States, as *amicus curiae*, filed September 20, 2000, and the Copyright Office's July 5, 2000, Statement of Policy." 531 U.S. 952 (2000). The government's brief, which is available at http://www.usdoj.gov/osg/briefs/2000/2pet/6invit/1999-1489.pet.ami.inv.html, said that the Copyright Office does not – and had recently verified in the Statement of Policy that it does not – undertake as technical a reading of copyright filings as the Third Circuit did in this case.

The parties stipulated to dismissal of the case before it returned to the Third Circuit.

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In *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 27 Media L. Rep. 2322 (3d Cir. Aug 20, 1999) (vacating 174 F.3d 377, 27 Media L. Rep. 1993 (3d Cir. 1999)), Judge Alito was on an *en banc* panel which held that Pennsylvania's Feature Motion Picture Fair Business Practices Law, which required movie distributors to expand distribution after 42 days of exclusive first run licensing by licensing another exhibitor in the same geographic area, was preempted by the Copyright Act. The en banc decision vacated an earlier panel decision in the case.

Antitrust as Applied to Newspapers

In *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 23 Media L. Rep. 1833 (3d Cir. Apr. 14, 1995), *reh'g and suggestion for reh'g in banc denied* (May 11, 1995), a direct mail marketing company an brought action alleging that newspaper which had entered preprinted advertising market was engaged in predatory pricing in violation of Sherman Act. The newspaper moved for summary judgment, which was granted by the district court.

The Third Circuit panel affirmed, finding the plaintiff had not established a violation of anti-trust laws.

Employment by Newspapers

Reich v. Gateway Press, Inc., 13 F.3d 685, 22 Media L. Rep. 1257 (3d Cir. Jan. 6, 1994) was a civil enforcement action by the Labor Department against the publisher of 19 local weekly newspapers, alleging willful violations of minimum wage, overtime, and records requirements of the Fair Labor Standards Act (FLSA) with respect to wages it paid its reporters. The district court held that the publisher had violated FLSA, but that the violations were limited to only certain reporters and were not willful. Both parties appealed.

After holding that the "small newspaper" exemption from FLSA was inapplicable, the Third Circuit panel held that reporters were not "professionals" within meaning of professional employee exemption from FLSA; and that publisher's violations were not willful.

Judge Alito dissented in part, saying that there was no basis in FLSA or its legislative history for the majority to gauge whether a newspaper employer was covered by the "small newspaper" exemption by totaling employees of the entire "enterprise," rather than the employees of each individual newspaper.

Nude Dancing

The plaintiffs in *Conchatta, Inc. v. Evanko*, 83 Fed.Appx. 437 (3d Cir. 2003) were a "gentleman's club" operator and two erotic dancers who challenged a Pennsylvania liquor regulation prohibiting "lewd, immoral, or improper entertainment" in a facility holding a liquor license. The majority decision, which included Judge Alito, affirmed the district court's denial of a preliminary injunction against the rule, holding that the plaintiffs had not shown irreparable harm, since there was no past or threatened citation of the plaintiffs for violation of the regulation.

The district court subsequently held that the regulation was unconstitutional. *See Conchatta, Inc. v. Evanko*, No. 01-01207, 2005 WL 426452 (E.D.Pa. Feb. 23, 2005).

Campus Speech Codes

In Saxe v. State College Area School Dist., 240 F.3d 200 (3d Cir. Feb. 14, 2001), Judge Alito wrote a majority opinion striking down a school district's anti-harassment policy on the grounds that it was unconstitutionally overbroad. "In short, the Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech," Judge Alito wrote. Thus it failed the test of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), "which requires that any school's restrictions on speech be necessary to prevent substantial disruption or interference with the work of the school or the rights of other students."