● Philip G. Kircher

No 'Scalito' Here

Wingnuts, stand down. Supreme Court nominee Samuel G. Alito, Jr. is no agenda-slipping, law-legislating extremist—at least not when it comes to insurance issues. Judge Alito is an intellectual stud more than qualified to become a Supreme Court justice. His delivery of insurance opinions is impressive. He writes with an efficiency and clarity that produces opinions that lawyers call "tight." He sets up the issues succinctly and then knocks them down with a combination of simple logic, clear writing and close attention to prior court precedent. He's a straight shooter, and a careful jurist.

The smart money, though, says that he probably will not be questioned about insurance matters when the U.S. Senate considers his nomination.

Indeed, it's not hard to see why our nation's senior statesmen on the Senate Committee on the Judiciary might appear befuddled on Alito's ruling about a marine insurer's right to a trial. Doesn't exactly make for riveting C-SPAN coverage now, does it?

No, when the politicians pick at Alito's qualifications for the high court, he'll probably get grilled about issues like abortion, freedom of speech, search and seizure, prisoners' rights and other national issues du jour.

And for good reason. Why dig through his past insurance caseload when there is no "Scalito" there? No, based on his published opinions since 1990, Judge Alito handles appeals involving insurance straight down the middle. Alito authored nine opinions between 1991 and 2005 addressing insurance issues. His record is an evenly divided 4-4-1; four in favor of insurance companies, four in favor of insureds and a "tie," where the case was decided on procedural grounds.

Looking at a sample of these nine cases, we see that Alito exercised proper and considered judgment, holding that:

• an insurer must pay on a credit-risk policy because it is a sophisticated party and, under Delaware law, can agree to an enforceable written waiver of a fraud defense—despite a "spectacular" fraud perpetrated against an insurance company by the policyholder.

• the insurer's cancellation of a commercial general liability policy for nonpayment is valid, despite a statewide regulation requiring the insured to certify in its mining permit that its insurer must give notice to a government agency before canceling the policy.

• an insurer (on a motor-vehicle underinsurance policy) cannot raise as a defense to a claim a "consent-to-settle" provision when it previously denied coverage and dillydallied for five months in responding to an insured's plan to settle with the negligent party.

• a marine insurer has a right to a trial on the issue of whether a Mexican port captain/ harbor master's directive to salvage a sunken vessel constitutes a removal that is "compulsory by law" and therefore within coverage.

• a pollution insurer need not defend nor indemnify the insured for a 1977 spill that was ordered by the state to be remediated in 1985 under policies in effect from 1979 to 1985.

• a pollution insurer provides no coverage where the insured could not establish the pollution exclusion clause exception of a "sudden and accidental" discharge.

Still awake? These cases are not exactly O.J.—or even Judge Judy—material, but they are the bread and butter of appellate courts. These decisions show that Alito will not adjudicate on insurance matters like a clone of Justice Antonin Scalia, spawning rulings in the elder associate justice's über-conservative constitutional mold.

PHILIP G. KIRCHER *co-chairs the commercial litigation department at the law firm of Cozen O'Connor. He can be reached at riskletters@lrp.com.*