***Sequenom v. Ariosa, Amicus* – or *Animus* – *Curiae* Briefing?**

As the April 1st deadline for filing the *certiorari* petition approaches in *Sequenom, Inc. v. Ariosa Diagnostics, Inc*., Supreme Court No. 15A871, the underlying ***facts*** seemingly compel industry *amici* support to make sure that the case reaches the merits stage at the Supreme Court. But, the ***real*** issue ***at this stage*** is whether an appropriate *Question Presented* is raised by petitioner – and whether the record supports an appeal on the issue raised.

Reasons *to* File as *Amicus*, or Refrain from Filing: If an excellent *Question Presented* is raised, then by all means *amici* should jump in as amici to make out the best case for grant of *certiorari.* Conversely, if a "losing" *Question Presented* is filed, then by all means industry should *refrain* from *amici* participation, as *certiorari*-stage *amici* filings create greater attention for a case and, therefore, *increase* the likelihood of grant.

The issue of an appropriate *Question Presented* is featured in *The Sequenom Predicate Issue: The "Question Presented"*(**SequenomFeb26.pdf**)

Merits Stage Participation (of course): No matter what happens at the *certiorari* stage, at the *merits* stage the cards are on the table, and *amici* participation at *that stage* is important no matter the *Question Presented* or petitioner's arguments.

Doubling Down, What Could be Worse than the *Ariosa* decision?
Industry is undeniably frustrated with the majority Federal Circuit opinion. *At least,* the opinion is only a ***panel*** opinion. Surely, there must be umpteen PTAB decisions coming down every month from which a test case can be chosen for a Federal Circuit panel to *distinguish Ariosa*. Or, if necessary, *en banc* review can be sought.

Either option is procedurally far, far easier to take to reshape the law than doubling down at the Supreme Court: An *affirmance* of *Ariosa* at the Supreme Court would be far, far more problematic. Doe industry need yet another "Bilski" to muddy the patent-eligibility waters?

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The Supreme Court as a Patent-Friendly Forum: Anyone who thinks the Supreme Court is a *better* or more *pro-patent* forum than the Federal Circuit is invited to review the statistics. *See* ***Supreme Court Patentability/Validity Decisions since 1952 (§§ 101-103, 112)***(SupremeCourtPatentStatistics.pdf)

Whither "Preemption"? Lost in the current shuffle as how the majority in *Ariosa* implicitly *accepts* the view that there *is* preemption of future research or use of a claimed invention. The better view is that there is a right to ***experiment on*** a patented invention, as explained by Professor Janice P. Mueller, and considered in detail in an excerpt from FIRST TO FILE PATENT DRAFTING (**FirstToFilePatentDraftingfeb28EXCERPT.pdf**)

(The writer does not suggest adding an additional *Question Presented* to raise this issue in *this* case, but queries whether industry should seek an appropriate test case *at the Federal Circuit* for en banc clarification that there is no preemption of experimentation ***on*** a patented invention.)

Regards,

Hal

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