Sequenom v. Ariosa: **Importance of the "Question Presented"**

It has been suggested that prospective *amici* should be able to make a decision whether to support the petition for *certiorari* in *Sequenom, Inc. v. Ariosa Diagnostics, Inc.,* Supreme Court No. 15A871, even before seeing the Petition and its "Question Presented."

This approach fails to take into account the Rules of the Supreme Court as it is difficult if not impossible in the ordinary case to redefine the *Question Presented* once *certiorari* has been granted.

***Question Presented*, More than a Mere Formality**: But, the *Question Presented* in the petition is more than a formality to gain *certiorari.* With few exceptions (none relevant, here) the *Question Presented* locks into place the argument that may be presented to the Supreme Court.

The Lesson of *Izumi Seimitsu*: A graphic example in a patent case where *certiorari* was granted but then ***vacated*** based upon a shift in argument away from the *Question Presented* is *Izumi Seimitsu Kogyo K.K. v. U. S. Philips Corp*., 510 U.S. 27 (1993)(*per curiam* dismissal for improvident grant of *certiorari*).

An excerpt from the opinion is attached.

Regards,

Hal

Izumi Seimitsu. v. U. S. Philips

"In order to reach the merits of this case, we would have to address a question that was neither presented in the petition for certiorari nor fairly included in the one question that was presented. Because we will consider questions not raised in the petition only in the most exceptional cases, and because we conclude this is not such a case, we dismiss the writ of certiorari as improvidently granted.

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"[In its petition for *certiorari*, Izumi] presented a single [*Question Presented*] for our review: 'Should the United States Courts of Appeals routinely vacate district court final judgments at the parties' request when cases are settled while on appeal?' *** In its brief on the merits, petitioner added the following to its list of questions presented: 'Whether the court of appeals should have permitted Petitioner to oppose Respondents' motion to vacate the district court judgment.'

"*** [Supreme Court Rule 14.1(a) provides:] 'Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.'

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"The intervention question being neither presented as a question in the petition for certiorari nor fairly included therein, 'Rule 14.1(a) accordingly creates a heavy presumption against our consideration' of that issue. *Ibid.* Rule 14.1(a), of course, is prudential; it 'does not limit our power to decide important questions not raised by the parties.' *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313, 320, n. 6 (1971). A prudential rule, however, is more than a precatory admonition. As we have stated on numerous occasions, we will disregard Rule 14.1(a) and consider issues not raised in the petition' 'only in the most exceptional cases.'" [*Yee* v. *Escondido*, 503 U. S. 519, 535 (1992)](quoting *Stone v. Powell*, 428 U. S. 465, 481, n. 15 (1976)); see also *Berkemer v. McCarty*, 468 U. S. 420, 443, n.38 (1984) ('Absent unusual circumstances, ... we are chary of considering issues not presented in petitions for certiorari')."

Izumi Seimitsu Kogyo K.K. v. U. S. Philips Corp., 510 U.S. 27, 30, 32 (1993) (per curiam dismissal of petition for grant of *certiorari*)(footnotes deleted)