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Opposing Certiorari In The United States Supreme Court

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Soon after you prevail in your appeal – just when you thought your case was finally over – your opponent files a petition for a writ of certiorari (or "cert petition") in the United States Supreme Court. Now, rather than putting away your files, you fear you may have to gear up for another fight. First, however, you have to decide whether it is worth the time and money to file an opposition or whether the cert petition is so weak you can safely waive your right to do so. This article explains the cert petition process, sets forth the considerations affecting whether to file an opposition, and discusses the indicia of a "certworthy" case.

The Odds

First, the good news. The odds of a cert petition being granted are extremely small, particularly when the case involves business issues. Every year, the Supreme Court receives approximately 7,000 cert petitions. The Court, however, decides the merits in only about 80 cases. During the term beginning in October 2002, 2,190 of the 9,406 pending cert petitions were "paid" petitions – like the one you will be filing – while 7,209 were filed in forma pauperis (generally by inmates and other indigent persons). (2003 Report of the Director on the Judicial Business of the United States Courts ("Report"), Table A-1, available at http://www.uscourts.gov/judbususc/judbus.html. Some cases are left over from previous terms.) During the 12 months ending September 30, 2003, 6,671 cases were considered for review, but review was granted in only 115 cases – less than 2%. (Report, Table B-2.) And, of those 115, only slightly more than half (61) were private civil cases. (*Id.*) Although the odds of a denial of certiorari are heavily in your favor, the possibility that it might be granted cannot be ignored.

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Most likely, you will first learn that your opponents are considering filing a cert petition if they move to stay the mandate. This must be done within 7 days of entry of judgment – well before the cert petition is due – and they must show that the cert petition will "present a substantial question and that there is good cause for a stay." (Federal Rule of Appellate Procedure ["FRAP"] 41(b).) Assuming the petitioner sought and obtained a stay of mandate or the state law equivalent, that stay will remain in effect until the Supreme Court reaches a decision: either at the cert petition stage or on the merits of the case. (FRAP 41(d)(2).)

Timing

The cert petition itself must be filed within 90 days of the entry of judgment in the court of appeals or the state court of last resort. (Supreme Court Rule ("SCR") 13(1).) If a petition for rehearing is filed (or if a petition for discretionary review in a state court of last resort is filed), the 90-day period runs from the date that review is denied or, if review is granted, the date of the entry of judgment. (SCR 13(1), 13(3).) The Circuit Justice assigned to the federal circuit in which the case originated can extend this period for up to 60 days for good cause, as long as the extension request is filed within 10 days of the petition's due date. (SCR 13(5).) Your opposition, if you chose to file one, is due within 30 days of the case being put on the Supreme Court's docket. (SCR 15.3.) It must be received by the Clerk of the Court by the 30th day unless you use the U.S. Postal Service and get an official postmark (not a postage meter stamp). (SCR 29.2.) If you do not file an opposition, the Clerk of the Court will circulate the cert petition to the Justices' chambers once the time for filing an opposition has elapsed. (SCR 15.5.)

Getting A Quick Decision

There are two ways to speed up a decision on a cert petition: file a formal waiver of the right to file an opposition or file your opposition before it is due. If you believe that the cert petition is meritless, you can file a formal waiver, and the Clerk of the Court will distribute the cert petition upon its receipt. (SCR 15.5.) As long as this occurs when the Court is in session (between October and June), the waiver will speed up the ruling on the petition. If, however, this occurs in the summer when the Court is in recess, the petition will not be disposed of until the first October Orders list. If you file an opposition, the Clerk will

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distribute it and the cert petition within 10 days of its receipt. (SCR 15.5.) The petitioner is permitted to file a reply brief addressing new points raised in the opposition, but the Clerk will not wait to receive the reply brief before distributing the petition and opposition. (SCR 15.6.)

The Risk In Waiving An Opposition

Waiving the right to file an opposition is not as risky as it might seem. As a practical matter, the Justices will not grant certiorari without requesting a response from the party opposing certiorari. So, if they are interested in the issues in the cert petition (or if they simply cannot figure out what went on below), they will call for your response before taking further action. Therefore, a request for a response does not mean they will grant review. Aside from saving time and money, the upside of waiving the right to respond is that it signals your belief that the cert petition is completely frivolous. The downside is that you lose the ability to influence the Court's first impression of your case.

Certworthiness

When deciding whether to file an opposition, the focus of your inquiry should not be whether the lower court's decision was correct on the merits (which you probably believe because you prevailed), but rather, whether the case is "certworthy," i.e., whether it meets one of the certiorari criteria used by the Court. One of the biggest errors a party seeking certiorari can make is focusing its argument on why the appellate court was wrong on the merits, ignoring the case's certworthiness, because the Supreme Court does not sit to correct all errors made by lower courts.

The Supreme Court looks for cases "involving unsettled questions of federal constitutional or statutory law of general interest." (Rehnquist, "The Supreme Court: How it Was, How it Is," 269 (1987).) Such cases fall into three general categories: (1) cases raising a federal question to which different courts (usually federal circuit courts) have given conflicting answers on an important federal question, (2) cases clearly raising an important federal question, and (3) cases which an appellate court decided in conflict with governing Supreme Court precedent. (SCR 10.)

The Cert Pool

If you decide to file an opposition, one of the most important things to remember is that it will be read first by two of the 35 Supreme Court law clerks: one clerk from Justice Stevens' chambers and one clerk from the "cert pool" of the other eight Justices who essentially share law clerks to review cert petitions. One clerk from the cert pool screens each cert petition. That clerk drafts a detailed memo summarizing the proceedings below, the arguments for and against granting certiorari, and a recommendation as to the action to be taken. The cert pool memos are collected by the Chief Justice and distributed to the other seven Justices, who have their own procedures for review. Although other law clerks weigh in on the cert pool memos by annotating them for their respective Justices and although Justice Stevens' law clerks independently review all cert petitions, what the one cert pool law clerk chooses to emphasize in his or her memo is very important.

The best strategy in writing an opposition is to keep it short and to the point. Remember that, in addition to the cases where review has been granted, cert pool law clerks deal with anywhere from 6-10 cert petitions a week. Your goal is to make their job as easy as possible by clearly outlining why the case is not certworthy without becoming embroiled in a discussion of the merits. The following arguments, if they can be made, substantially increase the odds that cert will be denied.

Ways To Oppose Cert

First, to be certworthy, at least two federal circuits usually must clearly disagree on a point of law. The alleged split between federal circuits regarding how to answer a question of federal law may be neither "clean" nor "deep." Although cert petitions often claim that the circuits disagree on a particular point of federal law, these "splits" can be exaggerated. Similar – yet not identical – legal standards or tests are generally not a sufficient split. Even if a split does exist, you can argue that it is too "shallow" to warrant a grant of certiorari, i.e., that not enough courts have weighed in on the question to warrant the Court's intervention. If the issue comes up very rarely, you can argue that it is not important enough to warrant review.

Conversely, if the issue is coming up with some frequency and the nature of the split is unclear, you may be able to argue that more courts should be permitted to weigh in, and, therefore, that further percolation is warranted.

Second, you can argue that the case does not present a question of federal law, but rather, presents a question of state law that only a state supreme court has the power to decide. This can occur in cases that involve questions of both federal and state law where the case was decided solely on state law grounds. Even if it is unclear whether the decision was based on state or federal law, that weighs in favor of denying certiorari. The Court does not want to grant a case only to find out later that there is no federal question presented.

Third, although the petition may present a question of federal law, the decision below could also rest on adequate and independent state law grounds. In other words, the court of appeals or the state court could have given alternative holdings – one based on state law and one based on federal law. If the state law ground can independently support the judgment, then, even if the federal law ground was reversed by the Supreme Court, the outcome would not change. With no practical impact, the Court's decision would merely be advisory, and the Court does not like to render such opinions.

Fourth, the decision below could be interlocutory. Although 28 U.S.C. § 1257 only limits the Court's jurisdiction over state court decisions to "[f]inal judgments or decrees," arguing that a federal court decision is interlocutory is also a good way to defeat certiorari. Often, the Court will pass over an issue in an interlocutory petition knowing that, if the issue remains material to the case, it could be raised in a cert petition when the case reaches its final stage.

Fifth, the issues raised in the cert petition may not have been properly preserved because they were not raised and argued below. A petitioner cannot raise new arguments in his petition for certiorari.

Sixth, the issues presented may be inextricably factbound. In other words, for the Court to change the outcome of the case, it would have to overturn some of the factual findings of the courts below. As noted above, however, the Court does not sit to correct all errors, especially factual ones. Thus, if the case presents complicated questions of fact or if the legal issue is inextricably linked with the facts of the case, the Court will likely decline to hear it.

Seventh, the case may fail to meet Article III's "case or controversy" requirements because either it is moot, it is unripe, or the petitioner lacks standing.

Eighth, your case may have been decided in an unpublished opinion. Although this is certainly not a bar to Supreme Court review, it may convince the Court not to take a case because the case lacks precedential value.

Finally, the cert petition may be untimely – a jurisdictional defect in civil cases.

If any of these arguments can be made, there is a good chance the cert petition will be denied. Even if they can't, the odds are still with you.