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Civil Procedure

'Call For Response' Signals SCOTUS Interest

By KIMBERLY STRAWBRIDGE ROBINSON AND CHRISTINA BRADY

A Supreme Court “call for response” signals that someone at the high court is interested in a case, and Bloomberg Law research shows that it slightly increases the likelihood that the case will get granted.

The grant rate goes from an abysmal 1 percent to 5 percent, based on data from the court’s past eight terms.

That boost is significant in the quest to nab a spot on the Supreme Court’s shrinking docket. The court receives about 7,000 petitions per year; in recent terms it has granted only about 65.

But court practitioners warn hopefuls not to read too much into any particular CFR.

The court can request a response to a cert. petition for any number of reasons. E. Joshua Rosenkranz, of Orrick, Herrington & Sutcliffe LLP, Washington, told Bloomberg Law. Not all of those reasons indicate that the court is more likely to grant the case, Rosenkranz, who has argued more than a dozen cases before the high court, said.

“A CFR is a positive development for a petitioner, but even afterwards the odds are still very much stacked in favor of denial,” Joseph Palmore, of Morrison & Foerster LLP, Washington, who has argued 10 cases at the Supreme Court, told Bloomberg Law.

Interest in Case When a Supreme Court petition is filed, the respondent can either file a brief in opposition, urging the court not to take up the case, or wait for a denial without responding, Kwaku A. Akowuah, of Sidley Austin LLP, Washington, told Bloomberg Law.

Waiting is usually not risky. The court will typically call for a response if the justices believe the petition has merit, a leading Supreme Court treatise, *Supreme Court Practice*, says.

Such a request signals that someone at the court is interested in the case, Akowuah said.

Single Clerk But a CFR may not signal widespread interest in the case, Palmore said. A single justice—or even a single law clerk—can call for a response.

The process for calling for a response differs substantially from chambers to chambers, Rosenkranz said. In “some chambers, the law clerk who is writing the pool memo has substantial freedom to trigger a CFR by him-

self or herself, without necessarily getting much input from the Justice,” he said.

Though a “CFR means that the petition has passed some level of plausibility,” the “large majority of petitions are denied even after a CFR,” Palmore said.

The Why Matters More important to a petition’s chances is not whether there is a CFR, but why there is one.

Some cases clearly warrant a response, Akowuah said.

Cases where there’s an alleged circuit split fall in that category, Rosenkranz said.

“In that kind of situation, the fact that a CFR has issued may tend to suggest that there is a realistic possibility that the petition will be granted, or at least that a legitimate issue has been raised,” he said.

Alternatively, “sometimes a cert. petition will be a bit incoherent and difficult to understand,” Rosenkranz said. In that instance a CFR might be requested to “help the Justices and their clerks understand what the petition is saying.”

In that case “the CFR does not necessarily indicate that there is any special likelihood that the cert. petition will be granted,” Rosenkranz said.

Paid Versus IPF Cases The grant rate following a CFR increases more if it’s a “paid case”—where the petitioner isn’t indigent and can pay the court’s filing fees, Rosenkranz noted.

The grant rate following a CFR in paid cases is just under 10 percent, whereas filings by indigent petitioners—“in forma pauperis” petitioners—is around 2 percent.

That could suggest that the court is more likely to be trying to figure out what is going on when issuing a CFR in an IFP case. A CFR in a paid case is more likely to reflect the higher possibility of a grant.

From Outside But there are other variables that can influence a CFR, Rosenkranz said.

There “may be more CFRs in the summer, when the clerks are new,” he said. “A new clerk may be less confident in his or her judgment, and may want a response to a petition to help figure out whether the case is a plausible cert. candidate. Later on in the clerk’s tenure, the clerk will have more experience and may have less need to rely on the opposing party’s response,” Rosenkranz said.

And “different chambers may tend to issue CFRs for different reasons,” he said. Some chambers that seem “more inclined to issue dissents from or statements with respect to cert. denials may also be more inclined on occasion to generate CFRs,” Rosenkranz said.

It's hard to know from the outside what's motivating a particular CFR, so the significance of any given CFR is really hard to assess, Akowuah said.

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