Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Fed. Circ. En Banc Dissents Boost Odds Of High Court Review

By **Britain Eakin**

Law360 (August 17, 2020, 9:11 PM EDT) -- Denied requests for review by the full Federal Circuit that draw at least one dissent appear to boost the odds that the U.S. Supreme Court will take up a petition for certiorari, according to attorneys with Morrison & Foerster LLP.

The analysis from associates Samuel B. Goldstein and Seth W. Lloyd found that of the 33 petitions for en banc review that the Federal Circuit denied and that drew a dissent over the last five years, 25 resulted in petitions for certiorari, with the justices granting seven of those while three are still pending.

That means the odds of the Supreme Court granting certiorari for such petitions is 35%, a much higher rate than the 5% of all paid cert petitions the justices grant, the attorneys said.

Of the seven cases the justices took up, they affirmed in one case, reversed the Federal Circuit in five and vacated a judgment as moot in the other.

The attorneys also found that patent subject matter eligibility and issues related to interpreting the America Invents Act were the most common among denied Federal Circuit en banc petitions with at least one dissent. Goldstein told Law360 in an email that he was not surprised by that finding.

"Those are issues that have been heavily litigated in recent years and are ones over which reasonable minds can disagree," Goldstein said.

But he said he was surprised by something else.

"The cases that seem to draw the most dissents from en banc denials don't often seem to be the ones eventually taken up by the Supreme Court for review. For example, last year in a 101 case (Athena Diagnostics Inc. v. Mayo Collaborative Services LLC) there were multiple dissents and even concurrences from an en banc denial calling for Supreme Court review, yet the Supreme Court passed on the case," Goldstein said in an email.

He added that many factors underlie a decision to deny cert, and it's possible the justices might eventually grant another petition down the line involving the same issue.

Goldstein and Lloyd, who write for Morrison & Foerster's "Federal Circuitry" blog, said in an Aug. 14 post that their analysis was sparked by a July 31 denial of en banc review of a panel decision invalidating an

American Axle driveshaft patent for claiming a natural law.

The 6-6 decision, which equates to a denial, drew three dissenting opinions, one dissent without opinion and two concurring opinions. The attorneys said it made them wonder how often such dissents are filed, which kinds of cases draw more dissents and whether a dissent makes the Supreme Court more likely to take up a case.

So they dived into the data.

According to their findings, it's rare for an en banc denial to draw as many dissents as American Axle did.

"More often, only 1, 2, or 3 judges have noted dissents," the blog post said.

The attorneys looked at en banc denials with at least one dissent from Jan. 1, 2015, through Aug. 12, 2020. During that period, U.S. Circuit Judge Pauline Newman clocked in with the most dissents, lodging 27, nearly double that of U.S. Circuit Judge Evan J. Wallach, who had 14. Coming in third were U.S. Circuit Judges Jimmie V. Reyna and Kathleen M. O'Malley, with 11 each, they found.

The opinions of U.S. Circuit Judge Timothy B. Dyk drew the most dissents, 29, with opinions penned by U.S. Circuit Judges Kimberly A. Moore drawing 11 and those by Judge O'Malley, 10, according to the analysis.

Lloyd told Law360 in an email that looking at data over time brings interesting trends to the fore that can be less visible day to day.

"That was a big motivation for starting our Federal Circuitry blog — trying to collect all that data in one place and then see what kind of patterns or insights we can gain from it," Lloyd said.

--Additional reporting by Ryan Davis. Editing by Jill Coffey.