Published on *The National Law Review* https://natlawreview.com

Supreme Court Grants Myriad's Petition for Cert.

Article By:

I feel a bit like Al Pacino in "The Godfather – Part 3" when he shouts, "Just when I thought I was out, they pull me back in!" (Repeated memorably by Silvio Dante in "The Sopranos".) Now the Supreme Court has granted cert. to resolve one question: "Are human genes patentable?" In isolation, presumably, since I have been explaining to patent "civilians" for years that no one can patent a gene – or any other chemical – as it occurs in situ in the human body and then demand a royalty from anyone using the gene to live.

Of course, defining what the term "human gene" means will be a major part of the opinion. If you would like to see a cogent review of the steps necessary to obtain the ca. 100,000 bp BRCA1 gene (including introns and exons) AND then the steps needed to produce the mRNA and reverse transcribe it into "Myriad-made" BRCA1 cDNA having only about 5914 bp (and no introns), take a look at the amicus brief filed by Gilead on Oct. 29, 2010 (s. 2). It certainly impressed Judge Moore, who came close to splitting with Judge Lourie and finding that the isolated BRCA 1 gene (100K bp) is a patent-ineligible natural product, while the cDNA (eg, claim 2 of the '282 patent) is a non-naturally occurring product. Perhaps that is the ultimate holding that awaits us, but it could be worse.

The legal answer to this question will duck the broader question of whether or not any "genes" isolated and purified from any creature – plant or animal – are patent-ineligible natural products. Given the importance of this question to, say, agricultural biotechnology, it may not be long before the question presented is much, much broader.

National Law Review, Volume II, Number 338