

FRANKEL-Y APPEALING

BY TRACY L. FRANKEL, ESQ.

Confession time. I *enjoy* reading appellate decisions. I do not simply read these decisions for professional reasons. I actually read them because I find the law and its evolution, interesting. That being said, I have never fooled myself into thinking that those outside of the legal profession would share this particular interest of mine. That is, perhaps until now. Imagine my excitement when, during my morning news surfing, I saw an article from ESPN.com that was entirely centered on the arguments made in an amicus brief signed by representatives of the U.S. National Soccer Team Players Association (USNSTPA), and filed in support of the U.S. Women's National Team's (USWNT) appeal in connection with its class action against the United States Soccer Federation (USSF), citing unequal pay claims under the Equal Pay Act and Title VII, and unequal working conditions claims under Title VII (see, <https://www.espn.com/soccer/united-states-usaw/story/4441393/us-soccer-sends-corrosive-message-toward-second-class-uswntsays-mens-union>). ESPN! Just like that, the article, written by Caitlin Murray, sent the masses a message: amicus briefs are important, powerful tools used by non-parties to aid the Courts in making their decisions.

In fact, the issues presented on appeal in the USWNT's lawsuit against the USSF have such widespread impact, that four other groups and/or consortiums submitted amicus briefs as well: The Equal Employment Opportunity Commission; former officials of the Equal Employment Opportunity Commission; the National Women's Law Center (NWLC) (joined by the Anti-Defamation League and 63 other organizations); and Georgetown Law's Institute for Constitutional Advocacy and Protection. In turn, these amicus briefs are garnering attention in sports and news publications alike (see, <https://www.sportico.com/law/analysis/2021/uswnt-amicus-briefs-1234635910/>; <https://theathletic.com/news/us-womens-soccer-players-get-support-from-mens-team-in-equal-pay-lawsuit/RuptQbC5tByR>; <https://www.washingtonpost.com/sports/2021/07/30/usmnt-supports-uswnt-equal-pay/>).



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For those who have not been following this lawsuit, in May 2020, the U.S. District Court for the Central District of California granted summary judgment to USSF on USWNT's unequal pay claims, holding that the USWNT had not established a violation of the Equal Pay Act because it had been paid more than the men on a per-game basis (see, Morgan v. United States Soccer Fed'n, Inc., No. 2:19-cv-0 1717-RGK-AGR [C.D. Cal. May 1, 2020]). The USWNT is now appealing the District Court Decision to the 9th Circuit Court of Appeals.

The widespread press coverage of the various amicus briefs submitted in support of the USWNT's appeal in non-legal publications underscores, though likely unintentionally, the import of amicus curiae practice to our judicial system.

Ms. Murray's article addresses a critical value of amicus curiae practice-to provide the Courts with data, or a particular expertise, which may not be included or emphasized in the briefs filed by the parties to an appeal. Specifically, Ms. Murray points to the USNSTPA's argument that, "the district court's oversimplified math made the women victims both of their own success and of the men's atypical struggles in 2017-2018". The USNSTPA argued that the court reached its conclusion that the women were actually paid more than the men, without distinguishing between appearance fees and performance bonuses and by solely analyzing an atypical period of the men's performance. It argued that during the period covered in the lawsuit, the women won two World Cups while the men failed to qualify for a World Cup for the first time in more than 30 years, which entitled the women to bigger performance bonuses. The USNSTPA further argued that in almost every scenario, the win bonuses available to women were lower than those available to the male players.

Likewise, in its amicus brief, the National Women's Law Center (NWLC) broadened the arguments made by the U.S. Women's National Team, by exploring the pattern of sex and gender inequity in athletics beyond women's soccer and provided statistics in connection with the lack of opportunity for athletic participation by women. As stated in the NWLC's brief, "Amici submit this brief to provide additional context regarding the broader struggle for women's pay equity and to highlight significant errors in the district court's decision. The gender wage gap harms hundreds of millions of women in the United States and is persistent across every segment of the labor market, including professional sports, where women receive fewer resources, less support, and far less pay."



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By highlighting that part of the USNSTPA’s amicus brief that argued that the pattern of discrimination employed by the U.S. Soccer Federation, “sends a corrosive public message to women and girls that, even at the highest level, no matter how hard they work or how much they succeed, they can and will be diminished and undervalued by their employers.”, Ms. Murray touches on one of the most important values of amicus curiae practice—to draw attention to the potential consequences of the Court’s eventual decision *to the public*, or to industries or other interested groups, and not just to the parties to the lawsuit.

The amicus brief can be very influential to a Court’s determination, as evidenced by the data published in an article written for the National Law Journal, published on November 18, 2020. According to this article, over ten terms, amici filed more than 8,000 briefs, participated in 96 percent of all argued cases, and were cited by the justices in more than half of their rulings. This article reported that the Justices, “were drawn to briefs that did not just reiterate the parties’ arguments but instead provided real-world information that contextualized the difficult questions before the court.” Id.

In my opinion, some of the hallmarks of amicus curiae practice (i.e. providing Courts with a real-world context for the issues presented as well as identifying the potential consequences to those individuals, entities the Courts’ decisions that go beyond the parties as well) can also add value to the appellate briefs submitted by parties in State Court or Federal Actions, depending on the issues being raised. Courts appreciate public policy arguments made by the parties, as it is in Courts’ interests to consider ramifications that they may wish to avoid by carefully crafted decisions. For example, in Matter of Carr v. De Blasio, 2021 NY Slip Op 04412, ¶ 13 (1st Dept. 2021), the First Department’s Decision to uphold the lower court’s order granting a petition for a summary inquiry under NY City Charter §1109 in connection with alleged violations of neglect of duty involving the stop and arrest of Eric Garner, was influenced by public policy arguments as well as statistics surrounding the number of Section §1109 petitions brought and granted before the Court. Specifically, the Court held that while the separation of powers doctrine forbids a summary inquiry from being invoked solely as a tool for exposing poor policy, here, it found that the testimony adduced at the inquiry may raise important public policy issues. The Court found that the requirement that the petition be rooted in allegations of violation or neglect of duty, was met. The Court also disagreed with the respondent’s argument that upholding the order would result in a flood of summary inquiry petitions, utilizing data showing that in nearly 150 years, only approximately 20 summary inquiry petitions had been brought, and, of those, only two were granted. Accordingly, the Court found that this case presented the rare circumstance in which allegations of significant violations

of duty and a clear lack of substantial investigation and public explanation conjoined to warrant a summary inquiry.



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