

Commercial Law League of America (CLLA)

Amicus Curiae

Policy and Procedures

Amicus Curiae—CLLA's role as Friend of the Court

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the fields of commercial law, bankruptcy, and reorganization. The CLLA has long been associated with the representation of creditor interests while seeking fair, equitable, and efficient treatment of all parties involved in the process of debt collection and judgment enforcement. CLLA members can be found in every state across America and many foreign countries. The CLLA regularly submits policy papers to Congress and CLLA members have testified on numerous occasions before Congress as experts in fields related to creditor interests, and, further, will seek to intervene as amicus curiae (Friend of the Court) in important pending appellate decisions to ensure that the court or tribunal is fully informed about the relevant issues that may impact the law.

Unlike the parties in litigations, who typically focus on the specific facts of a case and argue for a particular outcome, CLLA plays a neutral role, addressing only the legal issues. The amicus curiae mechanism can offer courts and other tribunals the benefit of CLLA's independent perspective and its deep knowledge and experience about the laws and legal issues arising in the fields of commercial law, bankruptcy, and reorganization. CLLA's involvement in these cases can strengthen legal discussions on such matters and improve decision-making in complex matters of public interest.

CLLA's submissions in such cases are prepared by the CLLA's Government Affairs Committee, known as the "Amicus Subcommittee."

PROCEDURE FOR REQUESTING CLLA'S INTERVENTION

To alert the Amicus Subcommittee of such a case or request that the CLLA file a brief or other submission, please follow the policy and procedure outlined below.

CLLA AMICUS BRIEF POLICY AND PROCEDURE

A. Policy Statement

1. Amicus curiae and other interventions are generally appropriate only in litigated matters: Generally, amicus curiae or other "Friend of the Court" submissions are appropriate in litigated matters, where a court or tribunal will be making a decision about the law. The amicus curiae process is not appropriate for legislative matters, such as arguments about the passage of new statutes, rules or regulations.

2. Criteria for amicus curiae submission: The matter must meet at least one of the following criteria:

- The views of CLLA have been specifically requested by the tribunal; or
- The question to be addressed directly affects CLLA's activities, or
- The matter involves, relates to or potentially affects fields of commercial law, bankruptcy, and reorganization, and a filing by CLLA would be reasonably likely to advance the strategic goals and objectives of CLLA, including supporting parties involved in the process of debt collection and judgment enforcement in order to promote fair and effective commerce.

The Amicus Subcommittee will consider all requests by third parties that comport with the Procedures outlined below. The Amicus Subcommittee also regularly monitors leading cases involving commercial law, bankruptcy, and reorganization and may recommend to the Government Affairs Committee that CLLA, on its own initiative, seek to file an amicus brief or similar type of intervention. At the Amicus Subcommittee's discretion, it may (but is not required to) reach out to parties in a case it is monitoring to ask whether an amicus brief or other submission by CLLA would be advisable, and whether the parties would like to make a formal request pursuant to this Policy. Other CLLA committees also routinely monitor developments in commercial law, bankruptcy, and reorganization, and they may recommend that the Amicus Subcommittee consider an amicus or similar filing in an appropriate case. The Amicus Subcommittee, in its discretion, may recommend an amicus brief or similar filing even if the parties oppose CLLA's intervention and/or even if a party subsequently withdraws a request that it previously submitted to the Amicus Subcommittee.

3. Conflict of Interest Policy. To ensure the independence and objectivity of CLLA's amicus process, Committee members (including invited experts or members of the Executive Committee) will not participate in the discussion or vote on any request that relates to a case in which they have a conflict of interest. Such a conflict of interest would arise:

- (a) when the participant or the participant's company or firm:
 - (i) is a party to the case;
 - (ii) is related to a party to the case (e.g., a parent, subsidiary, or affiliate for a corporate entity; a spouse, child, parent or other close relative for an individual party);
 - (iii) has a financial interest in the outcome of the case; or
 - (iv) represents an entity that is a party, is related to a party, or has such a financial interest; or
- (b) when a conflict would arise under any ethical rule otherwise applicable to the participant, such as rules of professional conduct imposed by a bar in the member's jurisdiction or the jurisdiction in which the case is pending. CLLA will not seek conflict waivers, even when permitted by the applicable rules of professional

conduct, to permit a conflicted participant to participate in an Amicus Subcommittee's deliberations, unless a waiver is necessary to help facilitate a quorum or in extraordinary circumstances.

4. Factors Supporting an Amicus Brief: In deciding whether to recommend that CLLA submit an amicus brief, the Amicus Subcommittee will generally take the following non-exclusive factors into account:

- Whether the matter raises an issue of commercial law, bankruptcy, and reorganization of potential interest to CLLA.
- The significance to parties involved in commercial law, bankruptcy, and reorganization industries involved in the case, both in the jurisdiction in which the case is pending and in other jurisdictions.
- Whether the case involves primarily legal, as opposed to factual, disputes.
- Whether the legal issue involved in the case is settled law or is the subject of a conflict between courts.
- Whether the proposed filing would be consistent with resolutions adopted by the CLLA Board of Directors or other promulgated CLLA's policies.
- The seniority or level of the tribunal before which the case is pending and, where relevant, the potential precedential value of the ruling for which amicus participation is sought.
- Whether other entities seek intervention as amicus curiae, or are or may be involved in the case, and, if so, their identity (e.g., those representing a particular industry sector or public interest group).
- The quality of and positions taken in other briefs submitted in the case by the parties and any other amici, including in prior stages of the litigation.
- The public interest, if any, in the legal issues involved in the case.
- Whether any request was made in accordance with CLLA's procedures and in sufficient time to permit the preparation of a quality brief.

Parties making requests should, to the extent appropriate, explain why their request is appropriate with reference to these factors and any other factors the requesting party believes are relevant. Parties are also asked to indicate whether the issues in the case are likely to have broader impact on commercial law, bankruptcy, and reorganization, other related areas of the law, or within the relevant industries, and to explain those issues fully so that CLLA can make an informed judgment.

In deciding whether to recommend that CLLA submit an amicus brief or other submission, the Committee generally will NOT take the following factors into account:

- Whether any of the parties to the case, or counsel to the parties, is an CLLA member;
- The absence of any established CLLA's policy or position;
- Whether the tribunal in question typically receives amicus filings (unless the Committee determines that there would be no mechanism whatsoever through which to submit CLLA's position to the forum);

- The possibility that the tribunal in question may reject the position advocated by CLLA.

It is important to emphasize that the Committee generally will recommend taking the position that it believes best advances CLLA's mission and strategic objectives, which includes the goals of supporting the development of commercial law, bankruptcy, and reorganization, and promoting fair commerce. Moreover, the Subcommittee expressly reserves the right to recommend positions that are different from those requested by the parties, including a party who is a member of CLLA.

5. Appropriate Tribunals for Amicus Filings: CLLA generally prefers to make amicus or similar filings at an appellate stage in the case, after a factual record has been established and an initial ruling has been made. Accordingly, a filing generally will not be made if the case is at the trial stage in the tribunal of first instance. However, in appropriate cases (such as a matter of significant importance, or where the principal issue in dispute at the court of first instance is primarily a legal issue), and in jurisdictions that permit amicus filings only in the tribunal of first instance, the Subcommittee will consider filing in the tribunal of first instance.

B. Procedure for Requesting a Filing by CLLA

1. Timing of Requests: CLLA takes the filing of amicus briefs very seriously and can only make submissions when the process has been timely initiated to allow careful consideration and drafting as well as full adherence to this Policy. Assessment of issues and preparation of amicus filings require substantial effort and time. This process requires significant commitments by member volunteers, who contribute their time and expertise on a *pro bono* basis. These commitments make it extremely difficult for requests to be considered and acted upon in less than 30 days, and even simple requests often demand up to 60 days to handle properly. Complex cases, such as those before the highest court of a jurisdiction involving novel issues of law, demand even more time to review. Accordingly, requests should be made as early as possible, preferably at least 30 days in advance of any filing deadlines. CLLA strongly suggests that requesters contact the Subcommittee as early as possible in the history of a case—even if a ruling has not yet been issued—if they believe that CLLA's involvement may be appropriate.

2. How to Make a Request: A requester may solicit consideration by CLLA of a possible filing by submitting an electronic request to the Amicus Subcommittee to the attention of the appropriate staff liaison member below:

CLLA Executive Vice President;

Phil Lattanzio, phil.lattanzio@clla.org; 312-240-1400

and

CLLA Government Affairs Committee Chair;

Daniel Kerrick, dckerrick@dkhogan.com; 302-656-7540.

The request should take the form of a letter that fully explains the basis for the request. Although there is no page limit, parties are encouraged to make their requests as succinctly as possible—a few pages is often all that is required—to facilitate the Subcommittee's prompt review of the request. The request should include:

- The case name, caption, number, and identity of the tribunal;
- A list of all litigants, counsel and other interested parties involved in the case, to facilitate conflict of interest clearance by Amicus Subcommittee members;
- A brief summary of the procedural and decisional history of the case;
- A description of the issue(s) the requester would like CLLA to address in its filing, and the requester's recommendation on the position CLLA should take (along with references to supporting case law);
- A discussion of whether the case is likely to have an impact beyond the parties, including any impact on other parties, on the development of commercial law, bankruptcy, and reorganization;
- A discussion as to why the issues are of significance to CLLA and its membership, and how CLLA's participation in the case is likely to make a material contribution to a decision;
- Identification of any risks to CLLA in seeking to participate as amicus (such as a risk of an award of costs against CLLA should its motion to intervene be denied); and
- The full briefing schedule, including the deadline for making the requested filing, or if the briefing schedule has not yet been set or finalized, the anticipated briefing schedule.

In addition, the request should include:

- Electronic copies of the opinion(s) of the lower tribunal(s);
- Electronic copies of both parties' briefs and supporting evidence related to the issue on which the requester seeks CLLA's intervention, including in prior stages of the litigation, if available;
- Electronic copies of any other material that the requester believes would be helpful to the Amicus Subcommittee's consideration; and
- An electronic copy of a complete description of the amicus or other procedure(s) permitted by the tribunal in question, and any rules applicable to such filings. (If there are no formal rules for amicus filings in the tribunal in question, but the tribunal would nevertheless accept an informal filing, such as an expert affidavit or letter, please provide as complete a description as possible of the procedures for such an informal filing in the tribunal at issue).

* All requests should include an estimate of costs that the CLLA will consider on a case-by-case basis.

Finally, along with any request for an amicus brief, the requesting party must provide CLLA with a separate letter, in a form suitable for filing with the tribunal if necessary, confirming its consent to CLLA's filing of an amicus brief in the matter, regardless of the position that CLLA ultimately decides to take and regardless of whether CLLA files an amicus brief in support of one of the parties or in support of neither party. Also, by making a request, the

requesting party(ies) acknowledge that CLLA can make it a condition of its seeking intervention that the requesting party(ies) has(ve) agreed that there be no (claim for a) costs order from its/their side in respect of CLLA's intervention.

3. Waiver of Electronic Submission Rule: The Amicus Subcommittee expects that most requesters will have access to the technology that allows them to submit their request and supporting materials electronically. If a party is unable to submit its request or some or all supporting documents in electronic form, the requester may contact the Amicus Subcommittee to explain the reasons for the inability to adhere to the electronic submission requirement and arrange for alternative means of submission (such as providing a sufficient number of hard copies of non-electronic materials for circulation to the Amicus Subcommittee).

4. Copy to the Parties and Responses: The request shall show that a copy of the request was sent by the requester to counsel for the other party (or both parties) to the case by electronic means (g., email). The other parties generally shall have five (5) business days from their receipt of the request to submit to the Amicus Subcommittee any response, which may include a request that CLLA file an amicus brief or other submission in support of a different position, or may explain why the party believes an amicus brief or other submission from CLLA would be unwarranted. In special circumstances, the Chair of the Amicus Subcommittee may shorten or lengthen the time for response.

Absent exceptional circumstances, the parties should not provide the Amicus Subcommittee with any further substantive submissions unless specifically requested by the Amicus Subcommittee. The parties should, however, keep the Amicus Subcommittee apprised of any material developments in the case that might impact the Amicus Subcommittee's consideration of the request, including both as to the merits and as to the timing.

5. Confidentiality: Once a request is made, in order to maintain CLLA's independence, the amicus process will proceed confidentially. CLLA will not disclose its deliberations to the parties, will not consult with the parties on the issues in the case and, if it decides to recommend the filing of an amicus or other submission, will not inform the parties of the positions that CLLA is likely to take. The parties generally will not be informed of CLLA's position until the day of the filing of the brief or other submission. The one exception to this rule is that, if CLLA is not able to file an amicus brief or other submission on its own in a particular jurisdiction, and if its filing can more appropriately be considered by the tribunal if it is submitted by a party (either with its evidence or its arguments), then CLLA may consult with that party to coordinate the filing of the amicus brief or other submission. In these circumstances, the party may need to be informed of CLLA's position and may need to be given an advance copy of CLLA's proposed filing, but any consultation with the party should address only the form of CLLA's submission and not its content.

Approved by the Board of Governors – February 12, 2024