The Influence of Amicus Briefs and Morrison

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The decision of the U.S. Supreme Court in *National Australia Bank* illustrates the influence of amicus briefs on the decisions of courts in the U.S. The Supreme Court expressly relied on the amicus briefs filed by foreign states and numerous international and European organizations, including the European Banking Federation, the International Chamber of Commerce, the French Business Confederation (MEDEF), and the Swiss Bankers Association. The Court held that the amici "all complain of the interference with foreign securities regulation that application of §10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence. The transactional test we have adopted . . . meets that requirement."

In recent years, one or more amicus briefs were filed in 85% of the cases pending before the U.S. Supreme Court. Although the number of cases decided annually by the Supreme Court has not materially increased over the last fifty years, the number of amicus filings during that period has increased by 800%. Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744, 749 (2000).

As demonstrated by the *National Australia Bank* decision, the presence of amicus briefs increases the likelihood that the Supreme Court will grant certiorari, and the likelihood of success on the merits. See Paul Chen, *The Information Role of Amici Curiae Briefs in Gonzalez v. Raich*, 31 S. Ill. U. L.J. 217, 220 (2007). First, the filing of an amicus brief constitutes a signal that an amicus believes the case is important, and that the amicus is sufficiently concerned to fund the preparation of such a brief. From this perspective, an amicus brief helps the court identify the range of interests affected by the case beyond the parties themselves. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 28 Am. Pol. Sci. Rev. 1109, 1112 (1988). In *National Australia Bank*, the amici included numerous international organizations concerned about the extraterritorial reach of U.S. law and the exposure to class action lawsuits for many non-US companies and banks. The amici also included non U.S. companies

that are themselves party to foreign-cubed class action lawsuits in the U.S.

Second, the decision of the U.S. Supreme Court in *National Australia Bank* demonstrates that amicus briefs, including briefs of international and European organizations, have an impact on the courts' substantive decision-making process and the issues considered by the court, especially where the amicus provides unique information or a different perspective on the specific issues pending before the court.

Courts in the U.S. have held that, if interested entities wish to have a formal voice in a U.S. lawsuit, they should move to intervene in the case or file an amicus brief. *See, e.g.*, *Reid L. v. Illinois State Board of Education*, 289 F.3d 1009, 1014 (7th Cir. 2002). Even in instances where the Supreme Court does not quote or cite an amicus brief, specific analyses of certain decisions of the Court demonstrate that justices are influenced by these briefs. "The arguments and information presented in the AC briefs had an impact on the Court's substantive decision-making, the issues the justices considered in deciding the case, the concerns they addressed in their opinion, and the arguments and information they marshaled to justify their positions." Chen, at 239. In the oral argument before the Supreme Court in *Morrisson v. National Australia Bank*, on March 29, 2010, Justice Breyer specifically referred to some of the amicus briefs filed in the case and asked the parties questions about them. Oral Argument Tr., Mar. 29, 2010, at 14:8-17; 40:21-41:18. Chief Justice Roberts also asked questions about the position of some of the non-U.S. amici. *Id.* at 50:9-14.

The influence of amicus briefs reflects the cultural approach of the common law, which contemplates that the development of a body of law should result from the aggregation of numerous individual decisions made by rigorous judges based on specific facts. This process of generalization begins with individual decisions. From this perspective, there is a significant difference between the judicial review exercised by the *Conseil Constitutionnel* in France through the *Question Prioritaire de Constitutionnalité*, which examines the constitutionality of a statute in the abstract, and the analyses performed by the U.S. Supreme Court and other federal courts, which always focus on concrete issues. *National Australia Bank* reflects that amicus briefs that have the most influence on the courts are those that address the specific issues in the case and that build on the parties' arguments and offer new perspectives within that framework.