

Appeal Docket No. 14-1754

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JOHANNA BETH McDONOUGH,

Plaintiff-Appellant,

vs.

ANOKA COUNTY, ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 13-cv-01889 (DSD/FLN)

**MEMORANDUM IN OPPOSITION TO MOTION OF ELECTRONIC
PRIVACY INFORMATION CENTER FOR LEAVE TO FILE AMICUS
CURIAE BRIEF OF APPELLEES BENTON, CARVER, GOODHUE,
MORRISON, RENVILLE, RICE, SHERBURNE, STEARNS, AND WRIGHT
COUNTIES**

INTRODUCTION

Electronic Privacy Information Center (“EPIC”) has requested permission to file an *amicus curiae* brief pursuant to Fed. R. App. P. 29(b) in this matter. Appellant is adequately represented by counsel with extensive knowledge in the applicable area of law. In addition, the proposed brief by EPIC presents no relevant arguments that will be useful to this Court in determining the limited

issues on appeal, which are: (1) whether Appellant failed to plead facts sufficient to state a claim under the Driver’s Privacy Protection Act; and (2) whether the standard rule of accrual applies to Appellant’s claims. For these reasons, County Appellees oppose the motion. Accordingly, Benton, Carver, Goodhue, Morrison, Renville, Rice, Sherburne, Stearns, and Wright Counties (“County Appellees”) respectfully request that the motion be denied.

ARGUMENT

To obtain leave to file an amicus brief, the proponent must show “why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App P. 29(b)(2). A motion for leave to file an amicus brief should be denied if the amicus brief “merely duplicates the brief of one of the parties” *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). However, this Court will not consider issues raised “by the amici and not by the parties.” *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 825 n. 6 (8th Cir. 2009). In exercising discretion to accept an *amicus curiae* brief, the court considers such factors as “whether the parties oppose the motion, the strength of information and argument presented by the potential *amicus curiae*’s interests, . . . the adequacy of the representation, and . . . perhaps most importantly, the usefulness of information and argument presented by the potential *amicus* to

the court.”” *Advanced Systems Technology Inc. v. United States*, 69 Fed. Cl. 355, 357 (Fed. Cl. 2006).

County Appellees request this Court deny the motion for leave to file an amicus brief because: (1) Appellees oppose the motion; (2) Appellant is adequately represented; and (3) the information presented by EPIC is duplicative or irrelevant to the present appeal.

I. APPELLEES OPPOSE THE MOTION.

For the reasons set forth herein, County Appellants adamantly object to the filing of the proposed amicus brief. In addition, it is County Appellants understanding that some, if not all, of the other appellants similarly object to this proposed filing. Opposition by parties to the filing of an amicus brief “should be given great weight by a court.” *Fluor Corp. v. U.S.*, 35 Fed. Cl. 284 (Fed. Cl. 1996).

II. THE PARTIES ARE ADEQUATELY REPRESENTED.

Although Appellant has consented to the filing of an amicus brief, the motion should be denied because Appellant is adequately represented by counsel from Sapientia Law Group. As this Court is likely aware, Appellant’s counsel is very familiar with the law surrounding this appeal. Sapientia Law Group has numerous similar cases pending in the Minnesota District Court and has appealed three (3) other cases brought pursuant to the DPPA and addressing the same issues.

Appellant initially sued approximately forty-five (45) separate entities. Given the adequate representation of Appellant, and the volume of briefing to be done in this matter by the numerous parties alone, there is simply no justification for filing of additional briefing materials with this Court. *See Voices for Choice v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (one of the reasons to deny motions for leave to file amicus briefs is that judges have “heavy caseloads and therefore need to minimize extraneous reading . . .”).

III. THE INFORMATION PRESENTED BY EPIC IS DUPLICATIVE OR IRRELEVANT.

County Appellees respectfully request that this Court deny the motion for leave to file an amicus brief because the proposed brief provides no information or argument that will be useful to this Court in determining: (1) whether the Appellant pleaded sufficient facts to support her claims under the DPPA; and (2) whether the standard rule of accrual applies to DPPA claims.

Initially, the legal argument submitted by EPIC is not distinguishable from that submitted by Appellant’s counsel. Both Appellant and EPIC request application of the discovery rule of accrual, in large part even citing to the same case law. *Amicus Brief*, p. 3-6. Courts should deny motions for leave to file amicus briefs that simply reiterate a party’s arguments. *See Voices for Choices*, 339 F.3d 542; *Scheidler*, 223 F.3d at 616. These arguments are simply not useful to the Court and waste valuable Court time reviewing and analyzing duplicative

briefs in a case where there will likely to be several briefs already, due to the number of Appellees named in a single lawsuit.

Moreover, EPIC devotes a significant amount of time to discussing identity theft. These arguments and information are simply irrelevant in determining whether the discovery rule of accrual applies. This is not an identity theft case. The DPPA does not discuss, or provide a cause of action related to, identity theft. Appellant has not alleged that her identity was stolen. Identity theft is simply not the harm alleged in this case. As such, whether identity theft has serious consequences or is difficult to learn of is irrelevant. Perhaps if Appellant had brought a claim pursuant to a statute protecting her from identity theft, these arguments would be relevant. In the present case, they provide no useful information to the Court. In addition, Appellant has not raised any arguments regarding identity theft. *See Solis*, 558 F.3d 815, 825 n. 6 (court will not consider issues raised only by amici).

Further, EPIC provides information regarding actions taken by departments of motor vehicles in other states. *Amicus Brief*, p. 16-22. Again, this information is wholly irrelevant in determining: (1) whether Appellant pleaded sufficient facts to state a claim under the DPPA; and (2) whether the standard rule of accrual applies to DPPA claims. The DPPA provides no cause of action for failure of a state or its department of motor vehicles to adopt another states' policies or

procedures. In fact, the DPPA would seem to explicitly prohibit these types of lawsuits as it prohibits lawsuits against states and their agencies. See 18 U.S.C. §2725(2). Thus, this information is likewise irrelevant. For the same reasons, EPIC's arguments regarding asymmetry of information between drivers and state departments of motor vehicles are irrelevant. See *Amicus Brief*, p. 25-29. The Appellees in this case have no control over the information maintained by the Minnesota Department of Public Safety. EPIC fails to distinguish between a department of motor vehicles that cannot be sued under the DPPA and the Appellees who were actually named as defendants in the present lawsuit. This distinction is critical and, when considered, demonstrates the irrelevancy of EPIC's proposed arguments.¹

¹ As an aside, in pages 29-31 of the Proposed Amicus Brief, EPIC discusses concern about budgetary constraints of state DMVs. However, at the same time, EPIC supports a position that would allow virtually unlimited liability to states and local governmental entities throughout the nation with, in practicality, no end to the trillions of dollars of liquidated damage claims made each year pursuant to alleged violations of the DPPA.

CONCLUSION

Based upon the foregoing, County Appellants respectfully request that this Court deny EPIC's motion for leave to file an amicus brief.

DATED: 6/12/14

JARDINE, LOGAN & O'BRIEN, P.L.L.P.

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**CERTIFICATES OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF**

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on June 12, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jamie L. Guderian