

No. A08-2124

STATE OF MINNESOTA
IN SUPREME COURT

In re: Prempro Products Liability Litigation

Rachel Fleeger,

Plaintiff,

vs.

Wyeth, et al.,

Defendants.

**BRIEF OF AMICI NOVARTIS PHARMACEUTICALS CORPORATION,
AVENTIS PHARMACEUTICALS, BARR LABORATORIES, INC., DURAMED
PHARMACEUTICALS, INC., KING PHARMACEUTICALS INC., ORTHO-
MCNEIL-JANSSEN PHARMACEUTICALS, INC., SOLVAY
PHARMACEUTICALS, INC., WARNER-CHILCOTT, AND WATSON
LABORATORIES, INC.**

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Introduction

This Court has accepted and reformulated this Certified Question from the United States District Court, Eastern District of Arkansas:

In a case commenced in Minnesota, does the Minnesota statute of limitations apply to the personal injury claims of a non-Minnesota resident against a defendant not a resident of Minnesota, where the events giving rise to the claims did not occur in Minnesota and took place before August 1, 2004?

Novartis Pharmaceuticals Corporation, Aventis Pharmaceuticals, Barr Laboratories, Inc., Duramed Pharmaceuticals, Inc., King Pharmaceuticals Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., Solvay Pharmaceuticals, Inc., Warner-Chilcott, and Watson Laboratories, Inc. (“the Amici Defendants”)¹ submit that the Court should answer that question in the negative.

Identification of Amici

Although they are not parties in the *Fleeger v. Wyeth* action, the Amici Defendants are hormone-therapy-manufacturer defendants in cases coordinated in the federal *In re Prempro Products Liability Litigation* pending as Multi-District Litigation (“MDL”) No. 1507 in the United States District Court for the Eastern District of Arkansas. Like Defendants Wyeth and Greenstone in *Fleeger*, each Amicus Defendant has been sued in Minnesota state and federal courts by plaintiffs who do not reside in Minnesota and did not use any hormone therapy products in Minnesota.

¹ No person other than counsel for the undersigned amici authored this brief in whole or in part. No person other than the undersigned amici made any monetary contribution to the preparation or submission of this brief. See Minn. R. Civ. App. Proc. 129.03.

Summary of Argument

This Court should answer the Certified Question in the negative. In determining *which state's* substantive laws apply, Minnesota courts consider five factors:

1) predictability of results; 2) maintenance of interstate order; 3) simplification of the judicial task; 4) advancement of the forum state's interests; and 5) application of the better rule of law. Those factors could and should similarly influence how this Court construes the statute of limitations for purposes of which conflicts rule should apply. As discussed below, allowing non-residents to exploit Minnesota's long statute of limitations to avoid the time-bars of their home states encourages forum shopping, and thereby disrupts interstate order, reduces predictability of results, complicates the judicial task, does not advance the interests of Minnesota as the forum state, and applies a rule of law that the Minnesota Legislature (for cases after 2004), the Restatement, and most other states have all determined is *not* the "better rule."

In Part I of this Brief, the Amici Defendants discuss the evolution of the Minnesota borrowing statutes and case law. Part II explains why Minnesota has no governmental interest in making its courts available to non-residents whose claims are time-barred in their home states. Part III demonstrates how allowing non-residents to utilize Minnesota's long statute of limitations disrupts interstate order, complicates the judicial task, and burdens courts, parties, and citizens. Part IV assembles the authorities that view the "better rule of law" as one that conforms the limitations period to that of the state whose substantive law will apply to particular claims. Finally, Part V shows that the decision of this Court to clarify years of ambiguity in Minnesota law is appropriate.

Argument

I. Prior Decisions of this Court Do Not Bind this Court on the Certified Question.

Although decisions of this Court over the past quarter century have discussed statutes of limitations and the distinctions between procedural and substantive issues, this Court never has addressed the situation presented by the Certified Question. Indeed, if there were binding precedent, the MDL Court likely would not have certified, and this Court likely would not have accepted, the question now presented.

Analysis of the issue turns not only on case law, but also on analysis of Minnesota's "borrowing statutes." In *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973), this Court abandoned the doctrine of *lex loci* in the field of conflict of laws in favor of a five-factor test to determine which state's substantive law should govern. Decades before *Milkovich*, this Court treated statutes of limitations as "procedural" under the traditional rule that applied the law of the forum to "procedural" issues and the law of place of the wrong to "substantive" issues. However, during that period, Minnesota's "borrowing statute" provided that when a cause of action arose outside of Minnesota and would be barred by the place where it arose, the action also would be barred in Minnesota "unless the plaintiff be a citizen of the state [Minnesota] who has owned the cause of action ever since it accrued." See 2 Mason Minn. St. 1927, § 9201, later numbered Minn. Stat. § 541.14 (repealed by 1977 Minn. Laws, c. 187, § 1).

The Minnesota Legislature repealed the borrowing statute in 1977. See 1977 Minn. Laws, c. 187, § 1. The Honorable Jack Davies, who served in the Minnesota State

Senate before his appointment to the Minnesota Court of Appeals, sponsored the legislation that led to that repeal as a way to “just free the Minnesota ... courts to apply that modern [*Milkovich*] theory of choice of law by getting rid of that old statutory language.” Remarks of Senator Davies, Judiciary Committee (March 9, 1977); *see* Wyeth/Greenstone Brief at 15-16 & n.16. However, no case presented to this Court since then has provided a definitive occasion to do so.

In 2004, the Minnesota Legislature enacted a new borrowing statute, applying to claims “arising from incidents occurring on or after August 1, 2004.” *See* 2004 Minn. Laws, c. 211, codified as Minn. Stat. §§ 541.30 -541.36 (2008). That legislative history left a gap in the statutory directive for applying statutes of limitations to claims arising between 1977 and 2004 that have no connection to Minnesota. Nevertheless, both the statutory directives and the *Milkovich* analysis point to answering “No” to the Certified Question.

Given the parallel statutory guidance of the pre-1977 and post-2004 borrowing statutes, this Court is not bound by its pre-*Milkovich* precedents regarding choice-of-law in the context of statutes of limitations. The existence of the borrowing statute distinguishes all those pre-*Milkovich* cases. Moreover, in 1983 this Court recognized that determining the precedential value of any pre-*Milkovich* conflicts decision requires consideration of “the transformation of conflict law in the intervening years.” *Davis v. Furlong*, 328 N.W.2d 150, 152 (Minn. 1983). The 5-4 majority in *Davis* held that “the *Milkovich* analysis should not be extended to conflicts of procedure.” *Id.* at 153

(applying that conclusion to deny joinder of an insurer in an automobile accident case, but not categorizing any other issues as substantive or procedural).

Nevertheless, as the four dissenting justices in *Davis* observed, “[r]ules of law do not fall neatly on either side of the substantive-procedural line.” *Id.* That observation applies with particular force to statutes of limitations, which “have both procedural and substantive aspects.” *State v. Johnson*, 514 N.W.2d 551, 555 (Minn. 1994).² Likewise, in *State v. Lemmer*, 736 N.W.2d 650 (Minn. 2007), this Court stated that “in some instances a rule may be both procedural and substantive in nature,” *id.* at 657-58, and that statutes of limitations are “procedural in that they regulate when a party may file a lawsuit and are *substantive in that they are outcome determinative*,” *id.* at 658 (*quoting Johnson*, 514 N.W.2d at 555) (emphasis added). It continued:

When discussing the possibility of rules containing both a substantive and procedural element, we note that the statute of limitations is both procedural and substantive because as a procedural rule it regulates when a claim may be brought but as a substantive rule it determines outcomes because when the statute of limitations has tolled the claim can no longer be brought. ... *We believe that a key consideration in determining that the statute of limitations is substantive is that the statute of limitations will always bar claims if the statute has tolled.* In contrast, the application of collateral estoppel will not consistently preclude litigation of the claim because collateral estoppel only prevents the relitigation of issues, leaving open the possibility that a claim could still proceed even absent the ability to address the estopped issue.

Id. (emphasis added).

² For example, in the context of diversity cases filed in the District of Minnesota, the statute of limitations is tolled by service of the complaint (as provided in the Minn.R.Civ.P. 3.01) rather than by filing (as provided in Fed.R.Civ.P. 3). *Larsen v. Mayo Med. Ctr.*, 218 F.3d 863, 867 (8th Cir. 2000).

Lemmer signaled that the “key consideration” of statutes of limitations – that they are *always* outcome determinative if the statute has tolled – points to their being substantive, rather than procedural. Indeed, as this Court also has stated repeatedly, the first step in choice-of-law analysis is to determine whether a conflict exists, and a “conflict exists if the choice of one forum’s law over the other will determine the outcome of the case.” *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000).

In determining *which state’s* substantive laws apply, the *Milkovich* approach considers five factors: 1) predictability of results; 2) maintenance of interstate order; 3) simplification of the judicial task; 4) advancement of the forum state’s interests; and 5) application of the better rule of law. 203 N.W.2d at 412. Those factors might also similarly influence how this Court construes the statute of limitations for purposes of *which conflicts rule* should apply. Following sections of this brief will discuss them in that context. Amici Defendants respectfully submit that allowing non-residents to exploit Minnesota’s long statute of limitations in order to avoid the outcome-determinative time-bars of their home states encourages forum shopping,³ and thereby disrupts interstate order, reduces predictability of results, complicates the judicial task, does not advance the interests of Minnesota as the forum state, and applies a rule of law that the Minnesota

³ Defendants Wyeth and Greenstone stipulated to personal jurisdiction for purposes of this Certified Question. Therefore, for purposes of this Court’s response, the Certified Question presumes personal jurisdiction exists over the non-resident defendant. Amici Defendants note that the question as to the applicable statute of limitations in an action by a non-resident plaintiff against a non-resident defendant is secondary to the question of personal jurisdiction.

Legislature (for cases after 2004), the Restatement, and other states have determined is *not* the “better rule.”

II. Minnesota has No Interest in Encouraging the Forum Shopping that has Erupted in this State by Non-Resident Plaintiffs Hoping to Exploit its Unusually Long Statutes of Limitations.

The lack of clarity in Minnesota’s choice-of-law rules since 1977 has led many non-residents to file suit in this State long after their claims had become time-barred elsewhere. Minnesota has a particularly long statute of limitations: six years for negligence, Minn. Stat. § 541.05, subd. 1(5), and four years for strict product liability claims, Minn. Stat. § 541.05, subd. 2. Most other states have two-year or three-year limitation periods. *See generally* Product Liability Desk Reference: A Fifty-State Compendium (Morton F. Daller ed., Aspen Publishers 2008 ed.). States with longer limitations periods often explicitly do not permit out-of-state residents to pursue lawsuits against out-of-state defendants where the claims would be time-barred in their home states. For example:

North Dakota has a six-year statute of limitations. N.D. Cent. Code § 28-01-16(5). However, if a claim is substantively based upon the law of another state, the limitation period of that state applies. N.D. Cent. Code § 28-01.2-02.

Missouri has a five-year statute of limitations. Mo. Rev. Stat. § 516.120(4). Its borrowing statute, Mo. Rev. Stat. § 516.190, provides: “Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar

shall be a complete defense to any action thereon, brought in any of the courts of this state.”

Utah has a four-year statute of limitations. Utah Code Ann. § 78B-2-307.

Its borrowing statute, Utah Code Ann. § 78B-2-103, provides: “A cause of action which arises in another jurisdiction, and which is not actionable in the other jurisdiction by reason of the lapse of time, may not be pursued in this state, unless the cause of action is held by a citizen of this state who has held the cause of action from the time it accrued.” This language echoes Minnesota’s pre-1977 statute.

The absence of any post-1977 decision of this Court addressing the applicable statute of limitations in cases involving personal injury claims of a non-Minnesota resident where the events giving rise to the claims did not occur in Minnesota has led some federal and lower state courts to allow non-Minnesota residents to invoke Minnesota’s unusually long limitations periods years after their claims had become time-barred elsewhere. *See* Wyeth/Greenstone Brief at 41-42.

Such rulings in turn have attracted more non-Minnesota resident filings. As Judge Wilson stated in Paragraph 13 of his certification order in the present case, in the *Prempro* litigation alone approximately 4,000 non-resident plaintiffs have filed suit in Minnesota courts. Massive as it is, that number is only a fraction of the non-resident plaintiffs who have exploited Minnesota’s long statutes of limitations and actually understates even the number of such plaintiffs in the hormone therapy litigation. Even Wyeth’s count of 5,707 “Non-Resident Plaintiffs Who Filed Against Wyeth in

Minnesota” (see Wyeth/Greenstone Brief at 4 & n.4) is under-inclusive, because although Wyeth is a defendant in most hormone therapy cases, it is not a defendant in every case.

Because Minn.R.Civ.P. 3.01 allows actions to be commenced by serving the complaint and some actions thus never are filed with the court, it is impossible to determine *all* of the civil actions commenced in Minnesota by non-residents.

Nevertheless, extensive information is publicly available through the electronic systems in the United States District Court for the District of Minnesota. The Amici Defendants’ Appendix B consists of a spreadsheet that assembles and extracts data from such public documents.⁴ The spreadsheet identifies 13,288 individual plaintiffs who between May 17, 2004, and December 31, 2008, commenced product liability actions for personal injury or wrongful death in the state courts (removed to federal court) or federal court in Minnesota against non-Minnesota manufacturers of pharmaceuticals, medical devices, over-the-counter medications, or other allegedly toxic substances (this excludes cases transferred into the District of Minnesota as part of an MDL or pursuant to 28 U.S.C.

⁴ Where material is a matter of public record and could be reviewed in the course of the court’s own research if it were so inclined, a party may appropriately submit it in an appendix and discuss it in the party’s brief. See *In re Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986). Thus, a court may take judicial notice not only of its own records but also of related proceedings in other courts if those proceedings have a direct bearing on the matters at issue, and it may draw reasonable inferences from the judicial notice it takes of those records. See *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 211 (5th Cir. 1983); *In re. A H Robins Co., Inc.*, 107 F.R.D. 2, 12 (D. Kan. 1985). Similarly, an *amicus* may provide material that lies in the public domain and provides pertinent information to the court’s consideration of public policy concerns in the matter before it and that otherwise might have escaped the court’s attention. *Camacho v. Todd and Lieser Homes*, 706 N.W.2d 49, 52 n.3 (Minn. 2005). Appendix B summarizes the relevant data from the voluminous federal court. See Minn. R. Ev. 1006.

§ 1404(a) (*forum non conveniens*). The complaints or civil cover sheets identified 12,304 of those individual plaintiffs (92.6%) as residents/citizens of states other than Minnesota or countries other than the United States. Broken down by case type:

(a) HRT – 6,251 individual plaintiffs (including many who did not assert claims against Wyeth); 373 (6.0%) allege they are Minnesota residents; 2 plaintiffs are of unknown residency;

(b) Vioxx – 2,469 individual plaintiffs; 264 (10.7%) allege they are Minnesota residents;

(c) Zyprexa – 1,419 individual plaintiffs; 33 (2.3%) allege they are Minnesota residents;

(d) Baycol – 1,043 individual plaintiffs; 105 (10.2%) allege they are Minnesota residents; 2 plaintiffs are of unknown residency;

(e) Mirapex – 367 individual plaintiffs; 16 (4.3%) allege they are Minnesota residents;

(f) Seroquel – 434 individual plaintiffs; 9 (2.1%) allege they are Minnesota residents;

(g) Propulsid – 229 individual plaintiffs; 8 (3.5%) allege they are Minnesota residents;

(h) Ortho Evra – 175 individual plaintiffs; 7 (4.0%) allege they are Minnesota residents.

Broad analysis of those filings suggests that most of these non-Minnesota plaintiffs chose a Minnesota forum because of this State's statute of limitations. As

explained in the Wyeth/Greenstone Brief at 5-10, in HRT cases the month of July 2002 is viewed by some as a significant point for statute-of-limitations analysis. One thus may reasonably conclude that many HRT plaintiffs who were diagnosed with cancer before July 9, 2002, but who commenced actions in Minnesota in 2006 or later, did so to avoid the application of earlier-expiring statutes of limitations in their home jurisdictions. In June and the first nine days of July, 2006 – on the eve of the four-year anniversary – more than 1,400 listed non-resident HRT plaintiffs commenced actions in Minnesota. During June and the first nine days of July, 2008 – leading up to the six-year anniversary – more than 2,800 non-resident HRT plaintiffs brought suit in Minnesota. A strikingly similar surge in the commencement of new actions in Minnesota by more than 250 non-resident plaintiffs occurred in late July and August, 2005 in the Baycol litigation – four years from the August 8, 2001 date upon which Baycol was withdrawn from the market. One may reasonably conclude that such filing surges were influenced by a desire to preserve claims that had already expired in the plaintiffs’ home jurisdictions but that might be “saved” by Minnesota’s four- and six-year limitations periods applicable to personal injury claims. Indeed, some plaintiffs *expressly allege* that they filed suit in Minnesota to avoid a dismissal of their case on statute of limitations grounds had they filed suit in their home states. *E.g.*, Complaint in *Barbara J Grumbles v. Wyeth, Inc. et al.*, No. 08-3371 (D. Minn.), filed on June 27, 2008, at 1-2 (AD-AppA 2, 2-3).

In its *amicus* petition at 2, the Minnesota Association for Justice asserted that many plaintiffs have “rel[ied] on Minnesota’s relatively longer limitations periods” in order to “investigate fully their allegations so the litigants sue the right parties, for proper

causes of action, based on an accurate analysis of the facts.” That assertion runs counter to the actual experience of the Amici Defendants, who frequently have been sued by plaintiffs who never even used their products. Although most such claims eventually are dismissed in one fashion or another,⁵ they burden the wrongfully sued defendants and the courts that must process the dismissals. The following chart summarizes such dismissals in this hormone therapy litigation:

Amici Defendant	# of dismissals by Minnesota-filing plaintiffs as of Feb. 9, 2009	Remaining Minnesota-filing plaintiffs with claims as of Feb. 9, 2009 (dismissals still possible as to some, but not finalized)
Aventis	2	3
Barr/Duramed	1,889	221
King Pharmaceuticals	130	12
Novartis	1,317	65
Ortho-McNeil-Janssen	63	27
Solvay	1,448	254
Warner-Chilcott	117	62
Watson Laboratories	1,307	54

Other plaintiffs first sued Wyeth in other states years ago, and then separately sued other manufacturers in Minnesota for the *same injuries*, rather than seeking to add them as defendants in the original cases. For example, one plaintiff sued Novartis in

⁵ In the *Prempro* litigation, the MDL Court established Practice and Procedure Order 8 (“PPO 8”) on October 17, 2005, to dismiss manufacturers that plaintiffs had named as defendants but whose products those plaintiffs had never used. (AD-AppA 35-38.) It also established PPO 3 to dismiss plaintiffs who failed to provide any elementary product-identification information at all. (AD-AppA 39-43.) The chart reflects PPO 8 dismissals, PPO 3 dismissals, and some additional voluntary dismissals based upon case-specific considerations.

Minnesota four years after identifying that company's products in discovery responses in an MDL case first filed in her home state of Texas. *Wilkins v. Novartis*, No. 4:08-cv-1765, Doc. No. 11 (Nov. 20, 2008) (Novartis memorandum) (AD-AppA 44); *id.*, Doc. No. 14 (Nov. 21, 2008) (order denying dismissal motion without prejudice) (AD-AppA 66). Two plaintiffs (Roberta Marder and Patricia McNamara) sued Aventis in Minnesota more than 14 months after their earlier MDL claims against Novartis were dismissed because the product at issue was manufactured by Aventis rather than by Novartis during the times of alleged use. (See MDL dismissal memoranda and orders as to Novartis from April 2007 and Minnesota complaints as to Aventis from June 2008, reproduced at AD-AppA 67-199.) Such claim-splitting, duplicative lawsuits simply attempt to use the Minnesota courts to salvage plaintiffs' failure to identify known or suspected manufacturers in their first-filed actions.

Duplicative lawsuits have also been filed by non-Minnesota plaintiffs who sued in Minnesota as a hedge against statute-of-limitations dismissals in cases they previously filed in other states. See *Kirkland v. Wyeth*, No. 4:08-cv-04196, Doc. Nos. 30, 34, 35 (E.D. Ark. 2008) (Judge Wilson dismisses claims of 54 non-Minnesota residents who had prior pending claims), *appeal pending* (AD-AppA 200-224).

Minnesota has no substantial interest in accommodating non-resident procrastinators by allowing them to take advantage of this State's longer statute of limitations. *Jepson v. General Casualty*, 513 N.W.2d 467, 471 (Minn. 1994) ("Minnesota does not have an interest in encouraging forum shopping."); *Schmelzle v. ALZA Corp.*, 561 F.Supp.2d 1046, 1050 (D. Minn. 2008) ("Minnesota's interest in

compensating tort victims is lessened where the injury occurred in another state, the injured party is not a Minnesota resident and did not receive medical care here.”). This Court should answer “No” to the Certified Question.

III. Applying Minnesota’s Long Statutes of Limitations to Personal Injury Claims of Non-Minnesota Residents, where the Events Giving Rise to the Claims Did not Occur in Minnesota, Substantially and Unreasonably Burdens the Courts.

This Court itself best knows the strain that financial pressures and rising caseloads have placed upon the courts of Minnesota. Five years ago, when the apparent volume of non-resident-plaintiff filings was far less, the Minnesota Legislature concluded that it would take action to ease similar pressures by prospectively foreclosing statute-of-limitations forum-shopping by applying the limitations period of the state whose substantive law would govern such plaintiffs’ claims, enacting 204 Minn. Laws, c. 211, codified as Minn. Stat. §§ 541.30 -541.36. Sponsoring Rep. Paul Kohl told fellow legislators that the bill would prevent Minnesota courts from becoming a “potential dumping ground” for mass torts. *See* Minnesota House Legislative Floor Sessions, H.F. No. 2444 (May 5, 2004) (2:02:45 to 2:31:55), at 2:08:08 to 2:08:23, available at http://www.house.leg.state.mn.us/htv/archivesHFS.asp?ls_year=83. He argued that it was intended to help Minnesota taxpayers and “our already overburdened courts.” *Id.* at 2:12:10 to 2:13:33. He pointed to information that at least one time-barred-non-resident case per month was being filed in Minnesota courts, and “whether it’s 12 cases or 24 cases or 100 cases” the bill would reduce “litigation that has no business being in our courts.” *Id.* at 2:14:30 to 2:15:24. Rep. Eric Lipman characterized cases brought in Minnesota courts by non-Minnesota plaintiffs against non-Minnesota defendants as “a

corrosive result.” *Id.* at 2:22:00 to 2:23:18. As discussed above, such filings have increased more than a hundred-fold from the “dumping ground” and “corrosive” numbers that prompted legislative action just five years ago.

Non-residents who file claims in Minnesota to avoid their own states’ statute of limitations burden more than this State’s judges and court personnel. When such cases eventually reach trial, Minnesota citizens must serve as jurors. “Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511 n.4 (Minn. 1986).

Although many cases involving non-resident plaintiffs are filed in or removed to federal court, this only shifts rather than removes the burden on the judiciary from otherwise time-barred claims. The District of Minnesota has one of the highest per-judge caseloads in the country. For the 12-month period ending September 30, 2007, the District of Minnesota ranked 7 out of 94 in total number of pending cases and 3 out of 94 in “weighted filings” per judgeship. See U.S. District Court – Judicial Caseload Profile for Minnesota, available at <http://www.uscourts.gov/cgi-bin/cmsd2007.pl> (AD-AppA 1). When the cases reach trial, Minnesotans must serve as jurors whether the cases are in state or federal court.

An unwarranted judicial burden remains even if cases are transferred outside Minnesota for consolidated pretrial proceedings in multidistrict litigation pursuant to 28 U.S.C. § 1407(a). All such MDL cases are to be remanded to Minnesota at the conclusion of pretrial proceedings. See e.g., *Lexecon Inc. v. Milberg Weiss Bershad*

Hynes & Lerach, 523 U.S. 26, 40 (1998). Minnesota courts thus ultimately bear the burden of trials and related proceedings in these mass filings.

The “maintenance of interstate and international order” *Milkovich* factor is primarily concerned with whether the application of Minnesota law would manifest disrespect for [the other state’s] sovereignty [or vice versa] An aspect of this concern is to maintain a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other’s interests in areas where their own interests are less strong. ... *By approaching choice of law questions with these considerations in mind, the opportunities for forum shopping may be kept within reasonable bounds.*

Jepson, 513 N.W.2d at 471 (emphasis added). If non-residents evade their home state’s statute of limitations by suing in Minnesota, Minnesota will subvert the “complicated temporal balance” that those states have chosen to strike among the interests of the plaintiffs, the defendants, and the government. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 736 (1988) (Brennan, J., concurring). *See also* Minnesota House Legislative Floor Sessions, H.F. No. 2444 (May 5, 2004) (2:02:45 to 2:31:55), at 2:23:18 to 2:24:16 (statement of Rep. Eric Lipman) (applying the limitations period of the state whose substantive law applies is about “comity and respect for the other states”).

The “simplification of the judicial task” factor has received little attention in this Court’s precedents, and may involve mostly “the clarity of the conflicting laws.” *Nodak*, 604 N.W.2d at 95. Nevertheless, so long as Minnesota’s courts entertain claims by non-resident plaintiffs whose claims are time-barred outside this State and are subject to the substantive laws of other states, Minnesota judges inevitably will have to decide some questions of foreign law for which no clear precedents exist. Also significantly, non-resident plaintiffs who earlier sued some defendants in other states have brought claims

years later against other defendants in Minnesota courts, meaning that each of these plaintiffs is pursuing separate HRT actions in two different states. *E.g., Wilkins v. Novartis Pharmaceuticals Corporation*, No. 4:08-cv-01765-WRW, Doc. No. 16 (NPC Memorandum filed 1/16/09) (AD-AppA 225); *id.* at Doc. No. 21 (2/10/09 Order denying motion to dismiss) (AD-AppA 240); *Young v. Berlex Laboratories LLC*, No. 4:08-cv-01853-WRW, Doc. No. 14 (NPC Memorandum filed 1/16/09) (AD-AppA 241); *id.* at Doc. No. 19 (2/10/09 Order denying motion to dismiss) (AD-AppA 257). Such claim-splitting complicates the judicial task.

Finally, the predictability of results factor “represents the ideal that litigation on the same facts, regardless of where the litigation occurs, should be decided the same to avoid forum shopping.” *Nodak*, 604 N.W.2d at 94. Everyone who suffers an injury in a particular state should be similarly situated, no matter where they choose to file their suit. The misapplication of Minnesota’s longer statute-of-limitations period creates an element of unpredictability when those who abandon their home states or places where their claims arose and swarm upon Minnesota obtain a different result than those who file where they live or where their cause of action arose. The result is often magnified given the mass filings in Minnesota in recent years, as discussed above. This Court’s explicit adoption of the modern conflicts rule regarding statutes of limitations will enhance predictability and avoid forum shopping.

IV. The “Better Rule of Law” Supports Answering the Certified Question “No.”

A. The Minnesota Legislature has expressed its preference for applying the limitation period of the State upon whose substantive law the claim is based (except as to Minnesota residents).

Twenty-seven years after repealing the old borrowing statute, the Minnesota Legislature acted to combat forum-shopping and enacted Minn. Laws 2004, ch. 211, codified as Minn. Stat. §§ 541.30-541.35. The purpose was to reduce the burden on Minnesota courts and taxpayers from non-resident plaintiffs whose “litigation ... has no business being in our courts.” See Minnesota House Legislative Floor Sessions, H.F. No. 2444 (May 5, 2004) (2:02:45 to 2:31:55), at 2:14:30 to 2:15:24 (comments of Rep. Kohl). The legislative policy position for post-August 1, 2004 cases thus leads to the same results as the common-law articulation of the Restatement.

B. The Restatement has abandoned the “substance-procedure” distinction and favors applying the limitations period of the state with the more significant relationship to the parties and the occurrence.

More than 20 years ago, the Restatement (Second) of Conflicts of Laws (1988), abandoned the traditional “procedural/substantive” view of statutes of limitations being governed by the law of the forum. Instead, Section 142 provided that the forum would not apply its own statute of limitations if maintenance of the claim would serve no substantial interest of the forum and if the claim would be barred under the statute of limitations having a more significant relationship to the parties and the occurrence.

In *Washburn v. Soper*, 319 F.3d 338, 342 (8th Cir. 2003), the Eighth Circuit concluded that the “Iowa Supreme Court’s commitment to the Restatement supplies the requisite ‘clear and persuasive indication’ that it will modify its approach to conflicts

involving statutes of limitations when presented with the issue” and applied the 1988 Revision. Other federal courts similarly have applied the 1988 Revision’s “most significant relationship” approach when deciding statutes of limitations issues. *See Ortiz v Gaston County Dyeing Machine Co.*, 277 F.3d 594, 594-96 (1st Cir. 2002) (in case commenced in Massachusetts and applying Massachusetts choice-of-law, barring plaintiff’s personal injury claim under the Pennsylvania statute of limitations because Pennsylvania was more significantly related to the parties and the occurrence); *Warner v Auberge Gray Rocks, Inn, Ltee.*, 827 F.2d 938 (3d Cir. 1987); *Curl v Greenlee Textron, Inc.*, 404 F. Supp.2d 1001, 1011 (S.D. Ohio 2005) (applying 1988 Revision to Restatement § 142 based on Ohio’s long-term commitment to the Restatement’s functional analysis of choice-of-law issues).

This Court likewise for decades has demonstrated a commitment to the legal articulations of the Restatement in many contexts. For instance, in *Larson v. Wasemiller* the Court explained: “we have frequently relied upon the Restatement of Torts to guide our development of tort law in areas that we have not previously had an opportunity to address.” *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007); *see also Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 771 (Minn. 2005) (finding the Restatement’s zone-of-danger approach to negligent infliction of emotional distress “persuasive”); *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 586 (Minn. 2003) (“We find the Restatement instructive.”); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 557 (Minn. 2003) (concluding that the Restatement “best addresses the invasion of privacy cause of action” and “appropriately limits the publication of private facts cause of

action.”); *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 575 (Minn. 2005) (adopting the Restatement view as “more appropriate” than competing view); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 338-40, 154 N.W.2d 488, 500-01 (Minn. 1967) (adopting the strict liability test of Section 402A to hold a manufacturer liable for injury caused by a product defect).

The Court similarly has relied upon the Restatement to guide its analysis in many other areas of the law, including trusts, *see, e.g., Morrison v. Doyle*, 582 N.W.2d 237, 243 (Minn. 1998) (applying Restatement (Second) of Trusts § 199), contracts, *see, e.g., Cretex Cos., Inc. v. Construction Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984) (“We hereby adopt the intended-beneficiary approach outlined in the Restatement (Second) of Contracts § 302 (1979).”), and judgments, *see, e.g., Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 534 (Minn. 2003) (“[T]he Restatement (Second) of Judgments § 85 informs our decision.”).

This Court also has applied the Restatement to address conflict-of-law issues. Just a few years ago, the Court considered whether to apply Minnesota’s or Wisconsin’s physician-patient privilege statute to determine whether to admit certain evidence. *State v. Heaney*, 689 N.W.2d 168, 173 (Minn. 2004). After recognizing that this evidentiary question had both substantive and procedural components, the Court adopted the Restatement (Second) of Conflicts of Laws § 139 to answer that question because the Court concluded that the Restatement test took into account both the procedural and substantive aspects of the privilege issue. *Id.* at 174-176. Under Section 139, the Court focused on the state with the “most significant relationship with the communication.”

Id at 175 (quoting Restatement (Second) of Conflicts of Laws §139 (1971)); *see also State v. Schmidt*, 712 N.W.2d 530, 536 (Minn. 2006) (applying the most significant relationship approach).

In keeping with this Court's long line of cases embracing the Restatement, this Court should answer "No" to the Certified Question, consistent with the approach of the Restatement (Second) of Conflicts of Laws, Section 142. Like Section 139, which the Court applied in *Heaney*, Section 142 employs a "most significant relationship" test that takes into account both the substantive and procedural aspects of the statutes of limitations issue before this Court. By taking this approach, this Court would prevent non-residents from exploiting Minnesota's long statute of limitations to avoid the time-bars of the state whose substantive law will govern their claims.

C. Other states do not apply their own statutes of limitations to claims brought by non-residents whose claims would be time-barred elsewhere.

Other states do not open their courts to out-of-state plaintiffs whose claims would be time-barred elsewhere. Some have enacted the Uniform Conflict of Laws-Limitations Act 1982, similar to Minn. Stat. §§ 541.30-541.35. Those states are Colorado (Col. Rev. Stat. §§ 13-82-101 to 13-82-107), Montana (Mont. Code §§ 27-2-501 to 27-02-507), Nebraska (Neb. Rev. Stat. §§ 25-3201 to 25-3207), North Dakota (N.D. Cent. Code §§ 28-01.2-01 to 28-01.2-05), Oregon (Or. Rev. Stat. §§ 12.410 to 12.480), and Washington (Wash. Rev. Code §§ 4.18.010 to 4.18.904). More than 30 states have some other form of borrowing statutes, similar to Minnesota's pre-1977 situation. *See* Wyeth/Greenstone Brief at 37 n.54.

Some states rely on common-law choice-of-law principles. *E.g.*, *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 418 (N.J. 1973) (“We are convinced the time has come ... to discard the mechanical rule that the limitations law of this state must be employed in every suit on a foreign cause of action. We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will ‘borrow’ the limitations law of the foreign state.”).

Whatever the path, the destination is the same: the forum state does not apply its own statute of limitations and bars the claims of non-resident plaintiffs arising in other states when those claims are time-barred in the state with the most significant relationship with the case (usually the state where plaintiffs reside or the cause of action arose).

V. This Court Can and Should Clarify the Common-Law Rules of Conflicts of Laws to Claims Arising between August 1, 1977 and August 1, 2004.

For many years, there has been “some ambiguity as to what approach Minnesota follows” on choice-of-law in the statute-of-limitations context. *Danielson v. National Supply Co.*, 670 N.W.2d 1, 5 (Minn. App. 2003). Addressing the Certified Question in this case provides the opportunity for this Court at last to accept the invitation that the Legislature extended in 1977 when it repealed the old borrowing statute. Decisions of this Court generally have retroactive effect. *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 767 (Minn. 2006); *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002). By

applying the *Milkovich* choice-of-law principles to the outcome-determinative issue of statutes of limitations, this Court would neither establish a completely new principle of law nor over-rule clear past precedent. *See* Point I above. Indeed, the very wording of the Certified Question as reformulated by this Court implies that the decision in this case will apply to *all* “case[s] commenced in Minnesota, ... [involving] the personal injury claims of a non-Minnesota resident against a defendant not a resident of Minnesota, where the events giving rise to the claims did not occur in Minnesota and took place before August 1, 2004.”

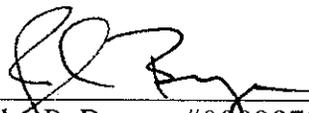
This Court should end the decades of ambiguity that have encouraged procrastinating non-resident plaintiffs to burden the Minnesota judicial system with lawsuits that had become time-barred under the laws of their home states.

Conclusion

This Court should answer the Certified Question in the negative. It should hold that in a case commenced in Minnesota the Minnesota statutes of limitations do not apply to the personal injury claims of a non-Minnesota resident against a defendant not a resident of Minnesota, where the events giving rise to the claims did not occur in Minnesota and took place before August 1, 2004.

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No. A08-2124

**STATE OF MINNESOTA
IN SUPREME COURT**

In re: Prempro Products Liability Litigation

Rachel Fleeger,

Plaintiff,

vs.

Wyeth, et al.,

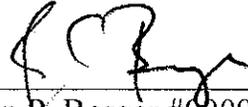
Defendants.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,228 words. This brief was prepared using Microsoft Word 2003 software.

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