

No. A08-2124

STATE OF MINNESOTA
IN SUPREME COURT

RACHEL FLEEGER,

Plaintiff,

v.

WYETH, AND ITS DIVISION WYETH
PHARMACEUTICALS, INC., AND
GREENSTONE, LTD.,

Defendants.

**BRIEF OF *AMICUS CURIAE* BAYER CORPORATION
IN SUPPORT OF DEFENDANTS**

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LEGAL ISSUE

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?

INTEREST OF *AMICUS CURIAE*¹

Bayer Corporation formerly marketed the prescription cholesterol-reducing medicine Baycol. In August of 2001, Bayer voluntarily withdrew Baycol from the market. *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1035 (D. Minn. 2007). For the last eight-and-a-half years, Bayer has been defending product liability actions brought by plaintiffs who allege injuries and economic losses caused by their use of Baycol.

Although the litigation is winding down, as it should be, plaintiffs from around the country continue to file Baycol cases in Minnesota, hoping to use the Minnesota statute of limitations to revive their stale claims. Nowhere else in the country are former Baycol users attempting to commence new product liability cases.

Bayer's experience in the Baycol litigation illustrates some of the practical problems created by the possibility that a court may apply the six-year Minnesota limitations period to claims that have no connection whatsoever to this State.

Accordingly, Bayer submits this brief in support of defendants' position that non-resident

¹ Pursuant to Minnesota Rule of Appellate Procedure 129.03, counsel for Bayer Corporation certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than Bayer Corporation made a monetary contribution to the preparation or submission of the brief.

plaintiffs should not be allowed to take advantage of the Minnesota statute of limitations when their claims have no connection to the State.

ARGUMENT

As one commentator put it, “Minnesota has become to out-of-state plaintiffs what a light bulb is to flying bugs.” Sean Costello, *Minnesota – Still on the Road to Recovery*, Drug & Device Law, Jan. 22, 2008.² Minnesota is one of a small handful of states with six-year statutes of limitations for tort claims, and it is the only one of those states in which the statute of limitations has been said by some courts to apply regardless of where the cause of action arose. Compare, e.g., *Glover v. Merck & Co.*, 345 F. Supp. 2d 994, 999 (D. Minn. 2004), with *Danielson v. National Supply Co.*, 670 N.W.2d 1,11 (Minn. Ct. App. 2003); see also Defs. Br. 37-38. The plaintiffs’ bar is explicitly directing its members to file here claims that have no connection whatsoever to this State. Recent filings in Baycol product liability litigation are part of the trend. See *infra*, Part I.

This forum-shopping burdens industry by making it difficult to achieve closure of litigation arising from events that happened long ago. See *infra*, Part II. No benefit redounds to Minnesota from this practice. To the contrary, Minnesota residents bear the costs of metastasizing tort litigation, and a court system jammed with cases from other states, while receiving no reciprocal protection from other states. See *infra*, Part III.

There is no reason to interpret the statute of limitations in a manner that does so much harm to this State, with no correlative benefit, when that interpretation is

² available at <http://druganddevicelaw.blogspot.com/>.

not mandated by decisions of this Court or statutory language — which, as explained below and in defendants’ brief, it most certainly is not. This Court should therefore answer the certified question in the negative.

I. THE BAYCOL LITIGATION SHOWS HOW PLAINTIFFS ARE ABUSING MINNESOTA COURTS IN AN ATTEMPT TO REVIVE STALE CLAIMS AND PROLONG MASS TORT LITIGATION.

Bayer’s experience in the Baycol litigation shows how forum-shoppers are coming to Minnesota in an attempt to revive stale claims. In the years following the highly publicized withdrawal of Baycol from the market in August of 2001, more than 50,000 plaintiffs filed suits alleging that Baycol caused an array of physical injuries and economic losses. In December of 2001, the Judicial Panel on Multidistrict Litigation established a multidistrict litigation (“MDL”) in the District of Minnesota and transferred the federal Baycol cases to that MDL. *See In re Baycol Prods. Liab. Litig.*, 0:01-md-01431 (Dec. 19, 2001). More than 22,000 plaintiffs’ claims have been filed in or transferred to the District of Minnesota. To resolve the Baycol litigation, Bayer has:

- paid more than 1.168 billion dollars to settle the claims of 3,135 persons who suffered the specific side effect that led to the withdrawal of Baycol;
- tried six jury cases — all to defense verdicts; and
- through enforcement of discovery requirements and other motion practice, achieved dismissal of virtually all remaining claims.

Only approximately 265 plaintiffs still have cases pending.

In short, the Baycol litigation is winding down — or would be, were it not for plaintiffs hoping to take advantage of the Minnesota statute of limitations. Minnesota is the only state in which new Baycol cases have been filed since 2007. Most of the cases

recently filed here have been brought by plaintiffs who reside outside Minnesota, who purchased and used Baycol outside of this State, and whose claims have no connection to Minnesota. (Bayer is an Indiana corporation with its principal place of business in Pennsylvania.)

In every instance, the law of the state in which these plaintiffs reside would bar prosecution of their stale claims:

Florida:	4 year limitations period
Idaho:	2 year limitations period
Kentucky:	1 year limitations period
Michigan:	3 year limitations period
Mississippi:	3 year limitations period
Ohio:	2 year limitations period
Texas:	2 year limitations period
Washington:	3 year limitations period
West Virginia:	2 year limitations period

These plaintiffs, whose alleged injuries occurred no later than 2001, have filed in Minnesota in the hope that, by combining Minnesota's six-year limitations period with tolling from class actions, they can pursue their stale claims. *See generally Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (discussing class action tolling); *In re Baycol Prods. Litig.*, 218 F.R.D. 197 (D. Minn. 2003) (denying class certification). To the best of Bayer's knowledge, plaintiffs' attorneys continue to advertise seeking former Baycol users to commence new lawsuits against Bayer.

Bayer's experience is part of a growing problem. In the last decade, thousands upon thousands of non-residents have flocked to Minnesota to file claims that would be barred elsewhere. *See Mark Hansen, Lawsuits Travel Up North*, A.B.A.J., Dec. 2007, at 16-17. Plaintiffs' attorneys have spread the word that Minnesota will accept

otherwise time-barred claims that have no relation to Minnesota. *See A Statute of Few Limitations*, Twin Cities Bus. Monthly, December 2004, at 95 (“Some attorneys are [using] this state’s lengthy statute of limitations . . . as a marketing tool. . . . [T]here is a little cottage industry of lawyers in Minnesota who are advertising in other states . . .”).

Indeed, a presenter at a 2003 conference of the Association of Trial Lawyers of America explicitly instructed plaintiffs’ lawyers to bring otherwise stale claims in Minnesota — and forthrightly advised them to wait until claims were time-barred elsewhere before filing in Minnesota, in order to fight a motion for forum transfer:

In order to successfully keep your client’s claim in Minnesota, you must be certain that no other valid forum exists for your client’s claim. In other words, your client’s statute of limitations must have clearly ran [sic] in all other jurisdictions. . . . Forum shopping is considered a bad thing by our courts So to be in the best possible position to survive a forum non conveniens challenge, you must start with a case whose statute of limitations has clearly passed, with no possibility of fact issues on the subject for a jury to decide.

Gale Diane Pearson, *Statutes of Limitations and Choice of Law Issues in Multi-District Practice*, 2003 ATLA-CLE 2541 (2003). Following such advice, more than 500 non-resident plaintiffs brought claims in Minnesota in 2004. Hansen, *supra*, at 16-17. That number nearly doubled to 951 in 2005. *Id.* And in 2006 the number of non-residents bringing claims in Minnesota “skyrocketed” to 6,891. *Id.* Filings in the District of Minnesota jumped by more than 12 percent in 2007, after a 59 percent increase in 2006. Admin. Office of U.S. Courts, *Judicial Caseload Profile – District of Minnesota*, Sept. 30, 2007, at <http://www.uscourts.gov/cgi-bin/cmsd2007.pl>. In fact, “out-of-state plaintiffs make up about 93 percent of drug and medical device cases filed in Minnesota’s

state and federal courts” since 2004. Hansen, *supra*, at 16-17. While some of those filings may be due to the presence of MDLs in the District of Minnesota, Bayer’s experience confirms that many cases have been brought by plaintiffs whose claims would be time-barred in their home states.

The trend shows no sign of abating, and there is every reason to believe that the pace of filings will accelerate over the next 18 months. The borrowing statute, Minn. Stat. § 541.31, applies only to causes of action arising from events that occurred after August 1, 2004, thereby establishing a presumptive deadline of August 1, 2010, for non-resident plaintiffs to file their claims in Minnesota. Based on experience in the Prempro and Baycol litigations, Minnesota courts can expect a rash of filings as attorneys rush to beat the deadline and exploit Minnesota law for their own benefit. *See Hansen, supra; see also John Share, Minnesota Statute Attracts High Number of Personal-Injury Cases, Minneapolis/St. Paul Bus. J., May 9, 2008.* And these filings will not stop in August 2010. Non-resident plaintiffs whose claims relate to events that occurred before August 2004, but whose injuries purportedly did not surface until later, may invoke the discovery rule or other tolling principles to support continued filings in Minnesota long after August 2010. As a practical matter, there is no cut-off date after which Minnesota (and companies subject to personal jurisdiction here) will be spared from stale tort claims by non-residents, if the certified question is answered in the affirmative.

II. ALLOWING PLAINTIFFS FROM OTHER STATES TO TAKE ADVANTAGE OF MINNESOTA'S LIMITATIONS PERIOD HAS UNREASONABLE ADVERSE CONSEQUENCES FOR COMPANIES SUED IN MINNESOTA.

The flood of stale claims by non-residents carries a number of adverse consequences for companies sued in Minnesota. These consequences can be loosely grouped under three headings: fair litigation of claims, ability to assess exposure and achieve litigation closure, and financial planning and reporting.

Fair litigation of claims. Defendants are, of course, entitled to seek discovery relating to plaintiffs' claims. In the Baycol litigation, where plaintiffs' medical histories are key, the Court ordered that defendants could obtain medical and other records for the ten years preceding each plaintiff's alleged injury. *See* Pretrial Order 10, Attachment A at 19 (<http://www.mnd.uscourts.gov/MDL-Baycol/index.shtml>). Thus, for a plaintiff alleging injury in 2000, Bayer is entitled to obtain medical records now almost twenty years old. In Minnesota, where healthcare providers are accustomed to a long limitations period, there might be some hope that old records still exist. But in Kentucky, where plaintiffs' claims are subject to a one-year limitations period, the possibility of locating medical records that would be relevant to plaintiffs' claims is remote.

Witness availability poses an additional problem. Memories fade, and employees leave their positions and relocate, often without informing the company of their new locations. In the Baycol litigation, many individuals whose positions related to the drug left the company years ago. This makes it difficult to produce for trial witnesses who have personal knowledge of the events giving rise to a claim. The problem increases exponentially if, rather than defending a few cases brought by Minnesota residents under

the six-year limitations period, a corporate defendant is required to produce witnesses in myriad stale cases brought by plaintiffs from all over the country.

Assessment of exposure and closure of litigation. The foregoing problems concern defense of particular cases. But the potential application of Minnesota's limitations period to the claims of non-resident plaintiffs gives rise to additional case management problems in mass tort litigation. When hundreds of thousands of people have taken a medicine or used a product, a corporate defendant must be able to evaluate its potential exposure in order to decide whether to litigate or settle, and — if settlement is an option — how much to pay claimants. Such determinations depend on a defendant's ability to project with reasonable accuracy the number of claims that may be filed.

Until statutes of limitations have expired in most jurisdictions, it is hard to make such projections and develop and implement a settlement plan. *See generally* Fed. Judicial Ctr., *Manual for Complex Litigation, Fourth* § 22 (2004). Application of Minnesota's six-year limitations period only to the cases of Minnesota residents introduces only a modest amount of uncertainty into this calculation. But if Minnesota's six-year limitations period is available to non-residents who file in this State, possible resolution of mass torts may be deferred because plaintiffs' lawyers will be able to hold case inventories and to advertise across the country for new plaintiffs whose home-state limitations periods have expired. *See Few Limitations, supra*, at 95; Pearson, *supra*, 2003 ATLA-CLE 2541 (advising plaintiffs' lawyers to wait until other states' limitations periods had run before filing suit in Minnesota). Settlement payments to plaintiffs may

be delayed and, in the interim, the parties and the courts must incur the costs of litigating thousands of cases that might be dismissed.

More fundamentally, application of Minnesota's six-year limitations period to the claims of non-residents delays closure of litigation. Here, Bayer took the unusual step of implementing a settlement program within a year of withdrawal of Baycol from the market, but that program was limited to a narrow subset of cases (plaintiffs who suffered the specific serious side effect that led to withdrawal of the medicine from the market). The company has aggressively litigated other cases. At a point when every case remaining in the MDL was subject to a pending dispositive motion, the company was confronted with a new wave of stale cases brought by plaintiffs with no connection to Minnesota. If these plaintiffs are allowed to take advantage of the Minnesota limitations period, the duration of the Baycol MDL may be extended for years.

Financial planning and reporting. The possibility that plaintiffs' attorneys may hold large inventories of stale claims, in anticipation of filing in Minnesota, makes it difficult for companies such as Bayer to evaluate their litigation exposure for planning and reporting purposes. A corporate defendant facing mass tort litigation must be able to assess exposure in order to negotiate with insurers and to determine whether to take litigation reserves.

Accurate assessment of litigation exposure is important to investors. *See, e.g., Mark Lander, Bayer Stock Falls As Drug Lawsuits Frighten Investors, N.Y. Times, Feb. 27, 2003* (discussing reaction to uncertain valuations relating to litigation exposure in Baycol). Indeed, a branch of the plaintiffs' bar now specializes in filing securities

actions based on the claim that corporate defendants inaccurately reported litigation exposure. Bayer was targeted in such a lawsuit, based on the Baycol litigation. *In re Bayer AG Secs. Litig.*, No. 03-cv-1546, 2004 WL 2190357 (S.D.N.Y. 2004).

Information on litigation exposure also is critical to overall business planning. The information is not only necessary for litigation budgeting. Potential litigation exposure is a key consideration for any company contemplating a merger, sale of assets, or other restructuring. Needless uncertainty is created by the possibility that unknown numbers of non-resident plaintiffs will file their stale claims in Minnesota. Indeed, only ten percent of the Baycol plaintiffs who filed suit in the District of Minnesota between May 17, 2004 and December 31, 2008 live in the State.

The remedy for all these problems, one which accords with the approach of other states and Minnesota's own best interests, is to deny the benefit of the Minnesota statute of limitations to non-residents (or, more particularly, their attorneys) who bring claims in Minnesota only to take advantage of the State's statute of limitations.

III. ALLOWING PLAINTIFFS FROM OTHER STATES TO TAKE ADVANTAGE OF MINNESOTA'S LIMITATIONS PERIOD HAS ADVERSE CONSEQUENCES FOR THE STATE AND ITS CIVIL LITIGATION SYSTEM.

Mass torts are some of the most procedurally complex and difficult cases to adjudicate, requiring a substantial commitment of judicial resources for administration and supervision over the course of several years. *See generally Manual for Complex Litigation, supra*, § 22. The Baycol MDL, for instance, has lasted for more than seven years and, for most of that time, has constituted a large part of Chief Judge Michael Davis's caseload. Admin. Office of U.S. Courts, *Civil Justice Reform Act March 2007*

Report 50 (2008) (noting that Judge Davis's "[t]hree-year-old caseload consists mostly of personal injury cases relating to multidistrict litigation"). Mass tort cases brought in Minnesota state courts bring similar burdens: "Dockets are getting longer and courts are getting overwhelmed[,] . . . impair[ing] the quality of justice." *Few Limitations, supra*, at 55. And most of these cases, which draw the most resources from this State, have no connection to Minnesota and are brought by and against parties outside Minnesota. *See Hansen, supra*, at 95 ("out-of-state plaintiffs make up about 93 percent of drug and medical device cases filed in Minnesota's state and federal courts [since 2004]").

Minnesota receives no corresponding benefits from these non-resident filings. The average filing fee in Minnesota state courts, around \$250, *see Minn. Judicial Ctr., Court Fees*, at <http://www.mncourts.gov>, is far outweighed by the costs of administrative and judicial staff and resources required for case coordination, motions practice and discovery, and trials. The costs of state court lawsuits by non-residents are paid not by the parties or the attorneys but by the people of Minnesota, who have no connection to the parties and no vested interest in resolution of the cases. *See Few Limitations, supra*, at 55. Minnesota's citizens also shoulder the burden less directly, through delays in the adjudication of their own claims. *Id.*

Other states offer no reciprocal benefits to Minnesota residents. Most states requires their own citizens to meet shorter limitations periods than Minnesota's and explicitly deny non-residents the ability to take advantage of their statutes of limitations, when those statutes exceed the limitations period provided by the plaintiffs' home state. *See Defs. Br. 37-38*. Thus, the policy advocated by plaintiffs in this case not only

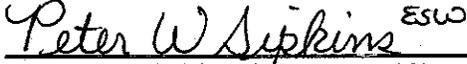
pointlessly taxes Minnesota, but impinges on the policy determinations of other states by granting a benefit to their resident plaintiffs (and imposing a burden on defendants) that those states have rejected as a policy matter.

There is no reason for this result. Application of the statute of limitations to non-residents was committed to this Court's determination as a result of the legislature's repeal of the former borrowing statute in 1977. *See Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983) (citing *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973)). That issue should be resolved by this Court by reference to the relevant underlying policy considerations, including the impact on state operations and residents and on companies subject to personal jurisdiction here. *See id.* All of these interests converge in this circumstance to demonstrate that the statute of limitations should be interpreted — as the legislature has explicitly mandated in the August 2004 statute — not to apply to claims by non-residents with no connection to Minnesota.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the negative and hold that, in a case commenced in Minnesota, the Minnesota statute of limitations does 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.

Respectfully submitted,

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