

STATE OF MINNESOTA
IN SUPREME COURT

A08-2124

RACHEL FLEEGER

Plaintiff,

v.

WYETH and its division WYETH PHARMACEUTICALS INC.,
and GREENSTONE LTD.,

Defendants

BRIEF ON CERTIFIED QUESTION OF PLAINTIFF
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STATEMENT OF THE ISSUE
("The Certified Question")

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?

STATEMENT OF THE CASE

This matter arises from a question certified to the Supreme Court by Judge William R. Wilson, Jr., who presides over *In re Prempro Products Liability Litigation*, MDL-1507, a multi-district litigation pending in the United States District Court for the Eastern District of Arkansas. After Plaintiff Rachel Fleegeer filed a complaint in the United States District Court for the District of Minnesota on April 6, 2007, the Judicial Panel on Multidistrict Litigation transferred her case to the MDL proceedings.

Defendants Wyeth and Greenstone Ltd. ("Greenstone") moved for summary judgment on the ground that Ms. Fleegeer's claims are time-barred under Pennsylvania law and requested that the MDL court certify a question to this Court regarding Minnesota's choice-of-law rule for conflicting statutes of limitation. Over Ms. Fleegeer's objection and that of the MDL Plaintiffs' Steering Committee, the MDL court granted Defendants' motion to certify and denied Defendants' motion for summary judgment without prejudice, pending the Court's answer to the Certified Question.

This Court accepted the reformulated Certified Question on January 12, 2009.

STATEMENT OF FACTS

Plaintiff Fleegeer and Her Pennsylvania Claims

Plaintiff Rachel Fleegeer alleges that the hormone therapy prescription drugs she took for six years caused her breast cancer.¹ She used Premarin, an estrogen-only drug manufactured by Wyeth, in combination with generic medroxyprogesterone acetate (“MPA”), a progestin drug manufactured by Greenstone, for part of that period. And she used Prempro, an estrogen-plus-progestin drug manufactured by Wyeth, for the balance of the period. The FDA continues to approve all three drugs as safe and effective.

Ms. Fleegeer filed her lawsuit in Minnesota federal court in April 2007, although (i) the events giving rise to her claims did not occur in Minnesota, (ii) she is not (and never has been) a resident of Minnesota, (iii) Wyeth is not (and never has been) a Minnesota corporation, and (iv) Greenstone is not (and never has been) a Minnesota corporation.

Ms. Fleegeer is a resident of Pennsylvania. She graduated from high school in Pennsylvania, married and raised five children in the state, and received her medical care there. In 1995, when she was 52 years old, her doctor in Franklin, Pennsylvania, prescribed hormone therapy for her. She continued to reside in Pennsylvania for the six years that she used hormone therapy, and filled the prescriptions at an Eckerd pharmacy in the state. From 1983 to the present, she had annual mammograms at the University of

¹ The facts regarding Ms. Fleegeer set forth in this brief are found in her Complaint or in her verified Fact Sheet, filed in MDL-1507 pursuant to the MDL court’s order. *See* Wyeth’s Motion to Certify Question to Minnesota Supreme Court and Motion for Summary Judgment re Statute of Limitations, Case No. 4:07-CV-00506-WRW (Nov. 12, 2008) at Exs. 1 and 2. [Defendants’ Appendix (“DA”) I-29; I-40]. Citations to the Appendix refer to the volume and page number.

Pittsburgh Medical Center Northwest in Franklin, Pennsylvania. In April 2001, the mammogram was abnormal, and her local doctor diagnosed breast cancer. The lumpectomy was performed in Pennsylvania, and Ms. Fleeger received all her subsequent care there. She has lived at the same address in Franklin, Pennsylvania since 1993. In the verified Fact Sheet submitted pursuant to the MDL court's order, all the fact witnesses that she identified are Pennsylvania residents.

Wyeth is a Delaware corporation with its principal place of business in Madison, New Jersey. Wyeth Pharmaceuticals, an unincorporated division of Wyeth with direct responsibility for prescription drugs, including Premarin and Prempro, has its headquarters in Pennsylvania.² Neither Wyeth nor Wyeth Pharmaceuticals has ever been incorporated in Minnesota or had its principal place of business there.

Greenstone is a Delaware limited liability company with its principal place of business in New Jersey. During the time that Ms. Fleeger used Greenstone's drug, the company's principal place of business was in Michigan. It, too, has never been incorporated in Minnesota nor had its principal place of business there.

² This brief refers collectively to Wyeth and its unincorporated division, Wyeth Pharmaceuticals, as "Wyeth." The Complaint names as defendants "Wyeth, and its division Wyeth Pharmaceuticals, Inc." [DA-I-29]. Wyeth has answered on behalf of itself and its division, the correct name of which is "Wyeth Pharmaceuticals." *See* Master Answer to Amended Master Complaint and Affirmative Defenses of Wyeth, Case No. 4:07-CV-00506-WRW (Jan. 12, 2009) at 1 n.1 [DA-I-134].

It is undisputed that Ms. Fleeger and her claims against Wyeth and Greenstone have no connection to Minnesota. She admittedly filed her claims in Minnesota because, by 2007, the two-year Pennsylvania statute of limitations barred them.³

Ms. Fleeger and the Thousands of Plaintiffs Like Her

The Judicial Panel on Multidistrict Litigation in 2003 established *In re Prempro Products Liability Litigation*, MDL-1507. It has since transferred to the federal court in Little Rock, Arkansas, the claims of more than 10,000 plaintiffs who, like Ms. Fleeger, allege that hormone therapy caused their breast cancer (or other injuries).

Among the MDL plaintiffs, Ms. Fleeger is not unusual for having filed her lawsuit in Minnesota. She is one of 5,700 plaintiffs who are *not* Minnesota residents and whose claims arose elsewhere, but who filed their lawsuits in the Minnesota courts. The 5,700 plaintiffs are listed, by state of residence, in Defendants' Appendix.⁴ The claims of

³ Ms. Fleeger has so stipulated. See Plaintiff's Opposition to Wyeth's Motion to Certify Question to Minnesota Supreme Court and Motion for Summary Judgment re Statute of Limitations, Case No. 4:07-CV-00506-WRW (Nov. 12, 2008) at 3 n.5 [DA-I-94].

⁴ The exact tabulation is 5,707. See Non-Resident Plaintiffs Who Filed Against Wyeth in Minnesota (through February 9, 2009) [DA-I-168-278]. This spreadsheet simply compiles the non-resident plaintiffs whose complaints are a matter of public record. Minnesota courts may take judicial notice of statistical evidence not a part of the record when "[they] could refer to such" evidence "in the course of [their] own research." *In re Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986). The references in Defendants' brief to 5,700 non-residents who filed suit in Minnesota and 4,700 whose claims remain pending have been rounded off for ease of reference. The same is true for other numbers regarding non-resident plaintiffs. See also Certification Order, *Fleeger v. Wyeth*, Case No. 4:07-CV-00506 at 3 (Dec. 1, 2008) [DA-I-1].

approximately 4,700 such plaintiffs remain pending and, at the completion of the MDL proceedings, subject to remand for trial in Minnesota federal court. *See* 28 U.S.C. § 1407(a).

These numbers, when translated into percentages, are striking in two ways. First, the non-resident plaintiffs who filed suit in Minnesota courts represent just shy of half of all plaintiffs whose cases have been transferred to MDL-1507. Second, the non-resident plaintiffs represent 94 percent of all plaintiffs who filed cases in Minnesota; Minnesota residents represent a mere 6 percent of all filers in this state.

The Event That Triggered Ms. Fleeger's Lawsuit

The hormone therapy litigation began in 2002, after the National Institutes of Health on July 9, 2002, terminated the estrogen-plus-progestin arm of the Women's Health Initiative ("WHI") study,⁵ and the study investigators published preliminary findings in the *Journal of the American Medical Association* on July 17.⁶ The WHI was a randomized clinical trial involving more than 26,000 women in the hormone therapy arms, making it the largest study of women's health ever conducted. In the July 9 announcement and July 17 publication, the WHI investigators reported that the preliminary data (i) did not show a cardiovascular benefit (as hypothesized), but instead an increased risk of cardiovascular disease, and (ii) also confirmed a predicted, small

The Judicial Panel on Multidistrict Litigation transferred approximately 4,950 of these 5,707 plaintiffs to MDL-1507. The cases of the remaining 757 plaintiffs are pending in Minnesota federal or state courts, or have been dismissed.

⁵ [DA-I-279].

⁶ [DA-I-284].

increase in breast cancer risk.⁷ Enormous and sustained publicity followed the announcement. The Harvard Health Newsletter surveyed the media coverage and called the termination of the WHI study the “No. 1” health story of 2002.⁸

There is no reason Ms. Fleeger could not have filed her lawsuit in time to meet her home state’s two-year statute of limitations. The first hormone therapy lawsuit was filed in Philadelphia on July 11, 2002.⁹ Within 90 days of the NIH announcement and WHI publication, additional lawsuits were filed across the country, and plaintiffs in October 2002 requested multidistrict consolidation of the federal cases. In March 2003, the Judicial Panel on Multidistrict Litigation began transferring cases to the MDL court.¹⁰ By July 2003, one year after the announcement of WHI’s termination, personal injury actions involving more than 500 plaintiffs had been filed against Wyeth and other manufacturers alleging that hormone therapy caused breast cancer and other injuries. By July 2004, that total had increased to 4,400 plaintiffs. Also by July 2004, approximately 1,450 plaintiffs had filed lawsuits in Ms. Fleeger’s home state. In October 2003, the Philadelphia Court of Common Pleas began coordination of the cases pursuant to its mass tort procedures. Plaintiffs’ Liaison Counsel in those proceedings (who is also a member

⁷ [DA-I-279; 284].

⁸ [DA-I-297].

⁹ Class Action Complaint, *Bloch v. Wyeth, et al.*, Case No. 02-4948 (Phila. Ct of Com. Pl. July 11, 2002) [DA-I-300].

¹⁰ *In re Prempro Prods. Liab. Litig.*, 254 F. Supp. 2d 1366 (J.P.M.L. 2003).

of the MDL Plaintiffs' Steering Committee) has called Philadelphia the "proverbial center of the hormone therapy universe."¹¹

Ms. Fleeger's Complaint adopts the position taken by plaintiffs generally -- that announcement of WHI's termination on July 9, 2002, triggered the running of the statute of limitations. The alleged absence of public knowledge about the breast cancer risk of hormone therapy "tolled the commencement of the statute of limitations," the complaint contends, only "until July, 2002."¹² Plaintiffs' Lead Counsel in the MDL proceedings and her deputies have consistently taken the same position. At the time the MDL court selected "bellwether" plaintiffs for trial, again in opposition to motions for summary judgment concerning those "bellwether" plaintiffs, and then in jury argument concerning the same plaintiffs, counsel have argued emphatically that the WHI publication on July 9, 2002, was a watershed moment that put plaintiffs like Ms. Fleeger on notice of their potential claims:

¹¹ Pl's. Resp. to Defs.' Mot. to Dismiss on Grounds of Forum Non Conveniens at 23, *Chavira, et al. v. Wyeth Pharm., et al.*, No. 3013 at 23 (Phila. Ct. Com. Pl. Aug. 30, 2004) [DA-I-348].

¹² [DA-I-32]. Wyeth and Greenstone dispute that there was a lack of "publicly disseminated information" about the breast cancer risk before July 2002. Defendants contend that, before then, the possible connection between hormone therapy and breast cancer was known in the medical community, published in the medical literature, and specifically warned about in the physician labeling and patient warning information. The Pennsylvania court has so held. See DA-II-379-381 (Findings and Order at 24-26, *Coleman v. Wyeth Pharm., et al.*, No. 3179 (Phila. Ct. Com. Pl. Sept. 24, 2007) (holding hormone therapy plaintiff's claims time-barred). Whether the statute of limitations began to run for Ms. Fleeger and other plaintiffs even before July 2002 is an issue distinct from the Certified Question.

January 26, 2006¹³

THE COURT: . . . I need to have some idea on how serious the statute of limitations issue is, because I do not want to have to get up to trial and have to throw one out on the statute of limitations. So I'd like to hear from them on it.

MS. LITTLEPAGE: Judge, the WHI study was published in July of 2002. *That without any doubt changed everything in the hormone therapy world. It changed the patients' perceptions, the physicians' perceptions, it told the world these drugs cause breast cancer.* No, none of the bellwether cases are filed more than three years from July of 2002.

May 8, 2006¹⁴

[U]ntil *the landmark, paradigm-shifting release of the WHI study*, Helene Rush had no reason to know that her Premarin, Provera and Prempro use caused her breast cancer.

The WHI results were described as *the "biggest bombshell in the history of hormone replacement therapy" that "shocked women around the world."* The "widespread media coverage" caused "millions of women to question their hormone treatment." "Physicians [we]re scrambling" to keep up, for "[t]he bubble ha[d] burst."

The WHI announcement was *the equivalent of the Loch Ness monster surfacing during daylight.*

February 14, 2007¹⁵

Question No. 18 talks about when should Ms. Rush have known about the cause of her breast cancer. . . . *Nobody*

¹³ *In re Prempro Prods. Liab. Litig.*, MDL Doc. No. 4:03-CV-1507-WRW, Jan. 26, 2006 Hearing Tr. at 19:6-15 [DA-II-384]. (Unless otherwise indicated, all emphases in this brief are added.)

¹⁴ Plaintiff's Opposition to Defendants' Motion for Summary Judgment, *Rush v. Wyeth*, Case No. 4:05-CV-497-WRW (May 8, 2006) at 1, 17-19 [DA-II-385, 401-03].

¹⁵ *Rush v. Wyeth*, Case No. 4:05-CV-497-WRW, Trial Tr. at 3210:10-11, 18-19 (Feb. 14, 2007) [DA-II-413].

knew until July of 2002 when the WHI was studied – was published.

February 21, 2008¹⁶

[W]hen was the first time you had a legitimate reason to believe that your breast cancer was caused by these hormones? I would suggest to you that the date for Donna Scroggin is the same date it was for her doctor, Dr. Kuperman, *when the Women's Health Initiative study came out in July 2002*.

May 19, 2008¹⁷

In fewer than two months, virtually all hormone therapy cases will be filed. *July 9, 2008 will mark the six-year anniversary of the announcement of the termination of the WHI study* and no state has a longer negligence or product liability statute of limitations than six years.

Although Ms. Fleeger concedes she had notice of her claim no later than July 2002, she did not file her lawsuit for nearly five years, until 2007.

The overwhelming majority of the 5,700-plus non-resident plaintiffs who filed lawsuits in Minnesota (more than 5,200 out of 5,700) did so more than three years after the announcement of the termination of the WHI study. Approximately half (2,800) did so in the 60-75 days before the six-year anniversary of the WHI announcement in July 2008. Also like Ms. Fleeger, the great majority are not women recently diagnosed with breast cancer (or other injuries). She received a breast cancer diagnosis in 2001; among

¹⁶ *Scroggin v. Wyeth, et al.*, Case no. 4:04-CV-1169-WRW, Trial Tr. at 2538:23-2539:02 (Feb. 21, 2008) [DA-II-415-16].

¹⁷ Plaintiffs' Proposal for MDL 1507 Resolution, *In re Prempro Prods. Liab. Litig.*, MDL Doc. No. 4:03-CV-1507-WRW (May 19, 2008) at 1 [DA-II-417].

the plaintiffs who have served their MDL Fact Sheets, more than two-thirds were diagnosed with breast cancer before July 2002.

SUMMARY OF ARGUMENT

The answer to the Certified Question is “No.” If it were “Yes” – if a non-Minnesota plaintiff can sue a non-Minnesota defendant in this state for conduct not occurring in Minnesota – then Minnesota would be creating, in effect, a *national* (indeed, *global*) six-year statute of limitations. That is, Minnesota would be overruling the consensus of forty-nine states and the District of Columbia that Ms. Fleeger’s claims should be time-barred, and would be recognizing a rule that would permit plaintiffs from every state (and, logically, every country) to bring their personal injury claims in Minnesota for a period of six years, so long as the Minnesota courts have personal jurisdiction over the defendant.

This Court has never so held. It should not do so now. Ms. Fleeger argues that statutes of limitation are “procedural” and that the law of the forum should always apply to matters of procedure. This arbitrary and inflexible choice-of-law rule – advocated by Ms. Fleeger, for herself and on behalf of thousands of other non-Minnesota hormone therapy plaintiffs who filed complaints in the courts of this state on the eve of the six-year statute’s expiration for their non-Minnesota claims – is: (1) contrary to Minnesota limitations law and policy, as it has stood for the past 160 years; (2) out of step with the most recent decisions of this Court, which have rejected both the mechanical application of *lex fori* to issues traditionally labeled “procedural” and recognized that statutes of limitation are both substantive and procedural in character; (3) contrary to the

overwhelming weight of authority, as expressed in legal treatises and commentary, the Restatement (Second) of Conflict of Laws, the Uniform Conflict of Laws-Limitations Act, statutes, and decisional authority; and (4) conducive to rampant forum shopping that burdens the Minnesota courts and both delays and complicates the resolution of nationwide products liability litigation.

The Certified Question should be answered “No” for three reasons:

First, answering “No” is true to the state’s longstanding policy toward non-residents, as reflected in its borrowing statutes. For 132 of the past 159 years, Minnesota has had a statute that would “borrow” the statute of limitations of a plaintiff, like Ms. Fleeger, who is not a Minnesota resident and whose claims arose in, and have their most significant relationship with, another state. When the Minnesota legislature repealed the borrowing statute in 1977, its clear intent (as reflected in the legislative history) was to enable the Minnesota courts to employ the same modern choice-of-law analysis for statutes of limitation as for substantive law. The issue never came before this Court, however, and the lower courts (and Minnesota federal courts) acted inconsistently and uncertainly. The legislature then formalized this policy choice in 2004 by enacting the Uniform Conflict of Laws-Limitations Act. It is certain that the 1977 legislature did not repeal the borrowing statute in order to “turn back the clock” and adopt the already almost universally faulted traditional *lex fori* rule for limitations.

Second, an answer of “No” is true to the Court’s common law embrace of the modern and more rational choice-of-law methodologies that have been advocated by a chorus of commentators and adopted now by the vast majority of states. The Court

embraced modern choice-of-law analysis in 1973. *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973); see *Schneider v. Nichols*, 158 N.W.2d 254 (Minn. 1968). Although a 5-4 majority of the Court held in 1983 that it would not apply the “*Milkovich* test” to conflicts-of-law matters that are “procedural,” *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983), the Court did not purport to catalogue what is “procedural” and did not refer to statutes of limitation at all. The Court has never been presented with the question whether the “*Milkovich* test” (or other modern choice-of-law test) should be applied to conflicting limitations periods when a non-resident files claims in Minnesota that have no factual connection to the state. In its most recent decisions, the Court has rejected the simplistic view that statutes of limitation can be considered purely procedural. The Court has instead recognized that statutes of limitation have features that are substantive and procedural. And because they are always outcome-determinative, the Court has indicated that they are more substantive than procedural.

The voices of authority speak with rare unanimity and conviction on this issue of law. For thirty years or more, commentators, courts, and legislatures have rejected the traditional *lex fori* rule for conflicting statutes of limitation as illogical and an encouragement of forum shopping. This Court, in turn, has been attuned to the better rule, as represented by the weight of authority. Here, the clear guidance provided by the weight of authority meshes seamlessly with (i) the state’s historic and current rule, as embodied in borrowing statutes and (ii) the Court’s treatment of the statute of limitations as both substantive and procedural in nature, to answer the Certified Question with a “No.”

Third, the same “No” answer furthers Minnesota’s stated policy against forum shopping, which, in 2009, imposes a particular burden on the Minnesota court system. Even in the abstract, public policy supports rejecting a choice-of-law rule for limitations that would have the effect of making the Minnesota six-year statute applicable to the product liability claims of all plaintiffs, whether Minnesota residents or not, and whether arising in Minnesota or not, so long as the defendant company has jurisdictional “minimum contacts” with the state and can be sued here. But the prospect of plaintiffs from every state treating the Minnesota statute of limitations as nationwide in application is real. More than 5,700 non-resident plaintiffs have filed Minnesota lawsuits in the hormone therapy litigation alone and, of that number, more than 4,700 still have pending cases. Thousands more have filed Minnesota lawsuits in other nationwide products liability litigation. The added burden on the already-burdened Minnesota courts is self-evident. Less evident is the effect that the late-filing of these lawsuits has on the efficient resolution of nationwide litigation. Global resolution of such litigation requires knowing the number of plaintiffs. But if non-Minnesota plaintiffs can sue here and secure the benefit of Minnesota’s statute of limitations, then resolution becomes almost impossible before the six-year mark, with consequent costs to the parties and the courts, here and everywhere else.

ARGUMENT

For 159 years, Minnesota statutory and case law reflect two clear and consistent policies regarding choice of law as applied to conflicting state statutes of limitation. First, Minnesota favors providing access to the Minnesota courts for Minnesota residents.

Second, Minnesota disfavors providing access to its courts for non-residents whose claims have no connection with Minnesota.

Ms. Fleeger attaches conclusive significance to the fact that, outside a choice-of-law context, the Court has sometimes referred to statutes of limitation as “procedural.” But that *dicta* will not support the weight she places on it. Her argument asks the Court to be guided by labels rather than logic and to adopt the antithesis of the modern approach when, first, the legislature repealed the borrowing statute in 1977 to clear the way for the Court’s adoption of that very approach; and, second, the Court has demonstrated that Minnesota employs modern choice-of-law rules for matters that have traditionally been considered procedural.

I. THE HISTORIC RULE AND COMMON LAW ANALYSIS ANSWER THE CERTIFIED QUESTION “NO.”

A. The Minnesota Borrowing Statutes and Case Law Do Not Afford Non-Residents the Benefit of the Six-Year Statute of Limitations.

1. The borrowing statutes.

For 132 of the past 159 years, Minnesota had a “borrowing” statute that would have answered the Certified Question. The “borrowing” statute, enacted in 1850 prior to Statehood and not repealed until 1977, provided:

When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of [Minnesota] who has owned the cause of action ever since it accrued.¹⁸

¹⁸ See 2 Mason Minn. St. 1927, § 9201, later numbered Minn. Stat. § 541.14 (1976) [DA-II-431].

Thus, had Ms. Fleeger filed her lawsuit in Minnesota at any time between 1850 and 1977, the “borrowing” statute would have barred her claim. Her cause of action arose outside of this state (in Pennsylvania); the Pennsylvania statute of limitations bars the cause of action (as stipulated); and she is not a citizen of Minnesota.

Likewise, for claims “arising from incidents occurring on or after August 1, 2004,” the current borrowing statute provides that, “if a claim is substantively based . . . upon the law of one other state, the limitation of that state applies.” Minn. Stat. Ann. §§ 541.31(a), 541.34. Thus, had Ms. Fleeger been diagnosed with breast cancer after August 1, 2004, the current borrowing statute would “borrow” both the substantive law and the statute of limitations of Pennsylvania.

The Minnesota Legislature intended the same general policy that governed before 1977 and after 2004 to govern the intervening years, but with a greater sensitivity to the facts of the particular case allowed by modern choice-of-law rules. The Legislature did not repeal the former borrowing statute in 1977 in order to enable the courts to apply the state’s statutes of limitation to the claims of non-residents, like Ms. Fleeger. Only four years before, in *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973), the Court had expressed a determination to adopt “a more rational choice-of-law methodology” based on the multi-factor analysis of Professor Robert Leflar, the author of the treatise, *American Conflicts Law*. *Id.* at 412. Against the backdrop of *Milkovich*, referring to “a change in the law that swept across the country,” the sponsor of repeal explained in the Senate Judiciary Committee that “what this bill does is just free the Minnesota court . . .

*to apply that modern theory of choice of law*¹⁹ The “modern theory,” as the sponsor explained, had to do with “current principles of choice of law” based on the “contacts” of a case with two or more jurisdictions. *Id.* One thing is certain: the purpose of repeal was not to repudiate modern choice-of-law theory, as announced by this Court in *Milkovich*, in favor of a mechanistic rule that would automatically apply Minnesota’s statute of limitations as a “procedural” rule of the forum, without regard for whether Minnesota has any contacts with the parties or the facts of the case. The legislative intent in 1977 was to facilitate adoption of the modern approach, and that intent remained the prevailing legislative intent until the legislature acted again in 2004.

It is no answer to say that, in 2004, the legislature did not make the new borrowing statute retroactive. The fact is that the Legislature, whether for reasons of constitutional restraint or political compromise, acted prospectively, leaving it to this Court to determine the common law rule for the period not covered by the borrowing statutes. The 2004 Legislature did not, and could not, announce what the law had been since 1977. It is the sole province of the judiciary to determine the common law, and in doing so the judiciary is not bound by the legislature’s characterization of a statute as either changing or simply clarifying the law. *Ubel v. State*, 547 N.W.2d 366, 370 (Minn. 1996); *Honeywell v. Minnesota Life & Health Ins. Guaranty Assoc.*, 518 N.W.2d 557, 562

¹⁹ Remarks of Senator Jack Davies (later judge, Minnesota Court of Appeals), Senate Judiciary Committee (Mar. 9, 1977) in Willard Converse & Pamela Converse Zerlin, *Minnesota’s Choice-of-Law Dinosaur: Still in the Jurassic Period When it Comes to Statutes of Limitation*, Minnesota Defense (Summer 1996) at 3 [DA-II-433]; Michael Lindsay & Alexandra B. Klass, *Setting Appropriate Limits: Choice of Law and Statutes of Limitation*, The Hennepin Lawyer (Nov.-Dec. 1994), at 31 [DA-II-439].

(1994). It is the “duty” of the courts “to strive continually to develop the common law in accordance with our own changing society.” *Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982).

2. The case law.

Like the former and current borrowing statutes, this Court’s decisions reflect that Minnesota’s “governmental interest” is in providing access to the state’s courts for citizens of *this* state. One year after *Milkovich*, in *Myers v. Government Employees Insurance Co.*, 225 N.W.2d 238 (Minn. 1974), the Court applied “the *Milkovich* standards” to determine whether to apply Louisiana law, which permitted a direct action against defendant insurance companies, or Minnesota law, which did not permit direct actions. *Id.* at 241. Louisiana’s general one-year statute of limitations would have barred the claim, if brought in that state. *Id.* at 240 n.1. “Applying these [*Milkovich*] considerations,” the Court held that “the predominant consideration of Minnesota as the forum state is the availability of *our* courts to *our* citizens to enforce their vested rights” and permitted the plaintiffs to proceed under the Louisiana direct action statute and the Minnesota six-year statute of limitations. *Id.* at 244.

A number of courts,²⁰ as well as the drafters of the Restatement (Second) of Conflict of Laws,²¹ cite *Myers* as an example of the Court’s use of “the *Milkovich* test” to

²⁰ See *Danielson v. Nat’l Supply Co.*, 670 N.W.2d 1, 5 (Minn. Ct. App. 2004) (“In 1974, the Minnesota Supreme Court applied the modern approach in deciding whether to apply Minnesota’s statute of limitations.”) (*citing Myers*, 225 N.W.2d at 241); *Hernandez v. Crown Equip Corp.*, File No. PI 03-15846, 2004 WL 5326627 at Part III.A.2, ¶ 1 (Henn. Co. Dist. Ct. May 5, 2004) (“[I]n 1974, following *Milkovich*, the Minnesota Supreme Court elected to apply the modern, choice-influencing

analyze the statute of limitations as well as the choice of substantive law. If that reading is correct, *Myers* is direct authority that the answer to the Certified Question is “No.”²²

consideration approach to a statute of limitations issue [in] *Myers v. Gov't Employees Ins. Co.* . . .”) [DA-II-444]; *Zandi v. Wyeth, et al.*, No. 27-C-V06-6744, 2006 WL 5962871 at Part 2.a, ¶ 5 (Minn. Dist. Ct. Dec. 18, 2006) (“In *Myers*, decided ten years before *Davis*, the court applied the choice-influencing factors and held that the plaintiffs’ action could proceed, applying a Minnesota statute of limitations to Louisiana substantive law.”) [DA-II-458]; *Grewe v. Southwestern Co.*, No. Civ. 04-3818JRTFLN, 2005 WL 1593048, at *2 (D. Minn. July 5, 2005) (“In 1974, however, the Minnesota Supreme Court applied a multi-factor choice of law analysis in determining whether a Louisiana direct action statute and a Louisiana state of limitations applied.” (citing *Myers*)) [DA-II-462]; *Glover v. Merck & Co., Inc.*, 345 F. Supp. 2d 994, 998 (D. Minn. 2004) (“The *Myers* court analyzed the direct action statute, as well as a statute of limitations issue, under the five choice-influencing considerations.”); *Fee v. Great Bear Lodge of Wisconsin Dells, LLC*, No. Civ. 03-3502 (PAM/RLE), 2004 WL 898916, at *2 (D. Minn. Apr. 9, 2004) (“The [*Myers*] court therefore applied the five-factor *Milkovich* test in its choice-of-law analysis.”) [DA-II-467].

- ²¹ Restatement (Second) of Conflict of Laws § 142 cmt. e (1971) (citing “cases espousing the modern view” with respect to statutes of limitation, and including *Myers* among those cases).
- ²² That reading finds strong support in the Court’s discussion of the *Milkovich* “governmental interests” consideration. The *Myers* Court deemed that consideration determinative and introduced discussion of it by reference to the respective statutes of limitation:

With respect to residents of Louisiana, there is an express legislative determination that an action must be commenced within 1 year. However, with respect to nonresidents, we can discern only a minimal interest, if any, of Louisiana as to the application of another state’s statute of limitations in that state’s courts.

225 N.W.2d at 242-43.

But even if *Myers* did not use a *Milkovich* analysis to select the statute of limitations,²³ the Court made clear that Minnesota’s governmental interest is not one of applying its longer statute of limitations generally, but of providing access to its courts for Minnesota citizens specifically. Thus, the Court said:

Minnesota . . . advances its governmental interest by providing access to its courts for *its citizens*

Minnesota’s interest [is] in permitting *its citizens* access to our courts

[P]laintiff owns something. He asks us to help him get it. *He is a citizen and resident of this State*. Defendant is also domiciled within our borders. . . . *Plaintiff should be entitled to come into the courts of his own state* for redress of legal wrongs when jurisdiction may be acquired.

225 N.W.2d at 243-44.

B. Minnesota Has Adopted Modern Choice-of-Law Analysis.

Since repeal of the borrowing statute in 1977, this Court has not addressed the question whether Minnesota would employ modern choice-of-law analysis or resort to an automatic *lex fori* rule to select the appropriate statute of limitations. For that entire period, however, the Court has held that modern choice-of-law analysis – specifically, the “*Milkovich* test” – applies to the selection of “substantive” law. The Court has also held that a mode of modern choice-of-law analysis applies to matters that are both “substantive” and “procedural.” For such matters, the Court has twice adopted the modern Restatement (Second) of Conflicts approach. Because the Court’s recent cases

²³ See *Davis*, 328 N.W.2d at 152 n.2 (“Because we concluded [in *Myers*] that the rights were substantive, we did not have reason to extend the *Milkovich* analysis into the realm of procedural rules.”).

recognize that statutes of limitation are also both substantive and procedural in character, it follows that Minnesota would resolve conflicting limitations periods by applying either the *Milkovich* test or the Restatement test. Regarding Ms. Fleeger, both tests give the same answer of “No” to the Certified Question.²⁴

In *Milkovich*, this Court noted that “[t]he field of ‘conflict of laws’ in tort matters ha[d] undergone dramatic change in the last decade,” and that Minnesota law had changed along with it. 203 N.W.2d at 410. The change began, the Court explained, with two decisions in 1966 that marked a “determination to replace *lex loci* with a more rational choice-of-law methodology,”²⁵ followed by the 1972 decision in *Schneider v. Nichols*, which adopted “[t]he choice-influencing considerations” proposed by Professor Leflar. *Id.* at 413 (citing *Schneider v. Nichols*, 158 N.W.2d 254 (1968)). Those considerations, re-affirmed in *Milkovich*, were: (a) predictability of results; (b) maintenance of interstate and international order; (c) simplification of the judicial task; (d) advancement of the forum’s governmental interests; and (e) application of the better rule of law. *Id.* at 412.

A decade later, in *Davis v. Furlong*, 328 N.W.2d 150 (Minn. 1983), the Court confronted “a choice-of-law issue concerning the applicability of Wisconsin’s direct action statute or Minnesota’s common law prohibition of direct actions against an insured’s liability carrier.” *Id.* at 151. Because the Court viewed the Wisconsin direct

²⁴ See p. 27, *infra*.

²⁵ *Milkovich*, 203 N.W.2d at 412 (citing *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966); *Kopp v. Rechtzigel*, 141 N.W.2d 526 (Minn. 1966)).

action statute “as a procedural rule for joinder of parties,” not a matter of substantive law, that case presented the first opportunity to address whether the *Milkovich* methodology should apply to “questions involving arguably procedural rules.”²⁶ The Court held that “the *Milkovich* analysis should not be extended to conflicts of procedure,” but “only to conflicts of substantive law.” *Id.* at 153.

The Court in *Davis* did not, however, inventory those matters that should be deemed “substantive,” on the one hand, and “procedural,” on the other, for choice-of-law purposes. Nor did it address or attempt to categorize statutes of limitation. In support of its holding, the Court did refer to “the almost universal rule that matters of procedure and remedies were governed by the law of the forum state.” *Id.* at 153. And, as further support, the Court cited Professor Leflar for the proposition that “[i]t is traditional that a forum court always applies its own procedural rules and practices.” *Id.* (quoting Robert A. Leflar, *American Conflicts Law* § 121 at 239 (3d ed. 1977)). But as we explain below, where statutes of limitation are concerned, the “almost universal rule” is that they should not be treated as matters of procedure governed by the law of the forum state. And Professor Leflar, in the same treatise quoted by the *Davis* court, states that classifying statutes of limitation as procedural for purposes of applying forum law “does not make

²⁶ *Davis*, 328 N.W.2d at 152-53 (“In *Milkovich* . . . we abandoned the mechanical *lex loci* rule for selecting the applicable substantive rule in a conflict-of-law situation. . . . We had no occasion in *Milkovich* nor in subsequent cases to comment on whether the methodology adopted there would also displace the common law rules of *lex fori* where procedural rules are in conflict.” (citations omitted)).

very good sense.”²⁷ Thus, had the choice-of-law question in *Davis* concerned the statute of limitations, there is sound reason to believe that the Court would have cited the “almost universal rule” and Professor Leflar to *reject* an automatic *lex fori* rule.

C. Minnesota Common Law Treats Statutes of Limitation as Both Substantive and Procedural.

It is true for the period since *Davis*, as it was for the period before *Milkovich*, that “[t]he field of ‘conflict of laws’ in tort matters has undergone dramatic change.” *Milkovich*, 203 N.W.2d at 410. The law continues to recognize that for matters that are truly procedural – e.g., Leflar lists (i) the method of selecting jurors, (ii) the form of action, (iii) the sufficiency of pleadings, (iv) what motions may be made and when, (v) the method of trial, whether by court or jury, (vi) procedures for appeal, and more – the choice of forum law is appropriate.²⁸ But the reasons *Davis* gave for applying the forum’s procedural law do not apply to statutes of limitation.

The 5-4 decision in *Davis* left open the question whether the statute of limitations should be considered “procedural” for choice-of-law purposes. Ms. Fleeger looks back to the Court’s statement in 1940 that the “limitation of time within which an action may be brought relates to the remedy and is governed by the law of the forum,” and deems that

²⁷ Robert A. Leflar, *American Conflicts Law* § 127 at 253 (3d ed. 1977) [DA-II-580].

²⁸ *Id.* at 241 [DA-II-488]. Leflar identified those issues because they “are so much a part of the forum’s system of judicial administration that it would be unreasonable to ask that they be laid aside in favor of another state’s system.” *Id.* § 127 at 252-56 [DA-II-579-83]. He did not include the statute of limitations among those issues, noting that the practical and unacceptable consequence of its inclusion would be “that plaintiffs whose claims are barred by the governing substantive law are allowed to shop around for a jurisdiction in which the statute is longer.” *Id.* at 253 [DA-II-580].

statement dispositive.²⁹ *In re Daniel's Estate*, 294 N.W. 465, 469 (Minn. 1940); *American Mutual Liability Insurance Company v. Reed Cleaners*, 122 N.W.2d 178, 181 n.1 (Minn. 1963). But her argument places more weight on that nearly 70-year old adage than it can bear.

First, the argument disregards the fact that the plaintiff in *Daniel's Estate*, unlike Ms. Fleeger, was a Minnesota resident. *Id.* The borrowing statute did not apply for that reason – “the cause of action has been owned by a *citizen of this state* ever since it accrued.” *Id.* Thus, *In re Daniel's Estate* did not present, and does not answer, the Certified Question.

Second, as we explain below, the development of Minnesota common law did not stop in 1940. Ms. Fleeger's argument is contrary to the Court's more nuanced view of statutes of limitation, as expressed in its most recent decisions. Those four decisions have recognized that statutes of limitation are *sui generis*, having features that are both substantive and procedural.

In *State v. Johnson*, 514 N.W.2d 551 (Minn. 1994), the Court said that “[m]any statutes and rules have both procedural and substantive aspects,” and, by way of example, added, “[s]tatutes of limitation . . . are procedural in that they regulate when a party may file a lawsuit and are substantive in that they are outcome determinative.” *Id.* at 555.

More recently still, in *State v. Lemmer*, 736 N.W.2d 650 (Minn. 2007), the Court re-

²⁹ See Plaintiff's Opposition to Wyeth's Motion to Certify Question to Minnesota Supreme Court and Motion for Summary Judgment re Statute of Limitations, Case No. 4:07-CV-00506-WRW (Nov. 12, 2008) at 8 [DA-I-101].

affirmed what it said in *Johnson*, noting that unlike “evidentiary matters and matters of trial and appellate procedure,” statutes of limitation are not purely procedural, but have a dual nature. *Id.* at 657. Indeed, the Court in *Lemmer* emphasized the substantive nature of statutes of limitation:

[W]e 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.***³⁰

The United States Supreme Court has adopted the same view, stating that statutes of limitation cannot logically or categorically be assigned to either pigeonhole.³¹

³⁰ *Lemmer*, 736 N.W.2d at 658 (citation omitted). See also *Hernandez v. Crown Equip. Corp.*, No. PI 03-15846, 2004 WL 5326627 at Part III.A.1, ¶ 2 (Dist. Ct. Henn. Co. May 5, 2004) (recognizing that “[w]hile statutes of limitation once fell unambiguously within the purview of procedural law governed by the law of the forum, Minnesota law has evolved such that the appropriate method for resolving conflicts between statutes of limitation is now open to application of the ‘modern’ approach.”) [DA-II-444].

³¹ See *Jinks v. Richland County*, 538 U.S. 456, 465 (2003) (“the meaning of ‘substance’ and ‘procedure’ in a particular context is largely determined by the purposes for which the dichotomy is drawn.” (internal quotation marks omitted)); *Sun Oil v. Wortman*, 486 U.S. 717, 726 (1988) (“Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy.”); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313-14 (1945) (“[I]t is difficult to fit [statutes of limitation] into a completely logical and symmetrical system of law. . . . Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices”) (cited approvingly in *Johnson*, 514 N.W.2d at 555 n.7).

Because statutes of limitation are always outcome-determinative, where they apply, there is sound reason to consider them “part of the law which creates, defines *and regulates* rights”³² – in short, as part of the substantive law – for conflicts-of-law purposes. But even as to matters that traditionally have been considered procedural, this Court has increasingly resisted a mechanistic application of Minnesota law. On two recent occasions, this Court has examined “procedural” matters and found both to be hybrid questions, with aspects of the substantive and procedural. And on both occasions, the Court determined that the modern approach to choice-of-law was appropriate for that reason.

In *State v. Heaney*, 689 N.W.2d 168 (Minn. 2004), the Court considered the issue of the admissibility of blood-alcohol evidence – a quintessential matter of procedure. The issue implicated conflicts-of-law analysis because the evidence, although properly obtained under Wisconsin law, would not be admissible under Minnesota’s physician-patient privilege statute. *Id.* at 173. The court of appeals had resolved the conflict of laws by reasoning that (i) because the physician-patient privilege is an evidentiary rule, and (ii) because evidentiary rules are matters of procedure, then (iii) the law of the forum (Minnesota) governs. *Id.* But this Court reversed, stating that “[a] question of privilege is an evidentiary question, but it has a substantive component.” *Id.* at 174 (citation omitted). For that reason, the Court rejected the *lex fori* choice-of-law rule in favor of

³² *Johnson*, 514 N.W.2d at 554 (quoting *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989)).

“the most significant relationship with the communication” rule provided by the Restatement (Second) of Conflict of Laws § 139 (1971).³³

Two years later, in *State v. Schmidt*, 712 N.W.2d 530 (Minn. 2006), the Court considered another quintessentially procedural/remedial matter: the use of out-of-state convictions to enhance an offense. *Id.* at 534. A conflict of laws existed because the three South Dakota convictions, although valid under South Dakota law, arguably were secured without affording the defendant advice of counsel regarding whether to take a blood-alcohol test, as required by Minnesota law. *Id.* at 533. The trial court and court of appeals applied Minnesota law and held that the South Dakota convictions could not be used to enhance the offense. *Id.* at 532. Again, this Court reversed, and again it rejected what it called “the ‘mechanical’ approach, that determines admissibility by the law of the forum state.” *Id.* at 535. From *Heaney*, the Court took the lesson that “we need to consider various conflict of laws approaches and select the one that is most relevant to the issue presented.” *Id.* And, in *Schmidt*, it concluded “the most significant relationship approach” was best. *Id.* at 536.

The trajectory of decisions from *Johnson* to *Heaney* to *Schmidt* to *Lemmer* – against the backdrop of the *Davis* court’s attention to the “almost universal rule” and Professor Leflar’s treatise – points decisively away from the *lex fori* rule to the *Milkovich* test (in the tort context) or alternative, modern choice-of-law tests (in other contexts

³³ *Id.* at 176. The Court considered the “*Milkovich* rule,” but concluded that “[w]hile reasonable in the context of tort law, the criminal setting presents significant differences that make the *Milkovich* rule inappropriate.” *Id.*

involving questions of law with a substantive component). The only contrary, recent authority to which Ms. Fleeger has pointed is a single sentence in a footnote in *Kennecott Holdings Corp. v. Liberty Mutual Ins. Co.*, 578 N.W.2d 358, 361 n.7 (Minn. 1998).³⁴ The cases cited there for the observation that “we have consistently regarded statutes of limitation as primarily procedural laws” (i) pre-date *Johnson*, *Heaney*, *Schmidt*, and *Lemmer*, (ii) do not consider the hybrid nature of statutes of limitation at all, and (iii) certainly do not do so in a choice-of-law context.³⁵

Regarding Ms. Fleeger, there is no real controversy that, if the *Milkovich* five-factor test is applied, the test selects the Pennsylvania statute of limitations in her case. If it were otherwise – if the traditional and modern choice-of-law rules did not lead to a different choice on these facts – then any differences in the rules would, practically speaking, be meaningless.

Two Minnesota courts have applied the *Milkovich* test to similar facts and chosen the statute of limitations of the other state. Only last year, in *Schmelze v. Alza Corp.*, 561

³⁴ Plaintiff’s Opposition to Wyeth’s Motion to Certify Question to Minnesota Supreme Court and Motion for Summary Judgment re Statute of Limitations, Case No. 4:07-CV-00506-WRW (Nov. 12, 2008) at 9 [DA-I-102].

³⁵ *Kennecott*, 578 N.W.2d at 361 n.7 (citing *City of Willmar v. Short-Ellicott-Hendrickson, Inc.*, 512 N.W.2d 872, 875 (Minn. 1994) (engineer’s cross-claim against manufacturer was not time-barred even though city’s claim against manufacturer was time-barred); *Calder v. City of Crystal*, 318 N.W.2d 838, 841-42, 843-44 (Minn. 1982) (application of statute of limitations to bar plaintiff’s claim was not retroactive application of statute, and statute did not violate equal protection or due process); *Klimmek v. Independent School Dist. No. 487*, 299 N.W.2d 501, 502-03 (Minn. 1980)) (repealed statute of limitations applied to claim which had not been time-barred by repeal’s effective date)).

F. Supp. 2d 1046 (D. Minn. 2008) (Davis, J.), the court employed the *Milkovich* test to determine whether the Wyoming or Minnesota statute of limitations should be applied: “If Wyoming law applies, this action is time-barred; if Minnesota law applies, it is not time-barred.” *Id.* at 1048. In that wrongful death action, which concerned the use of a prescription patch for the treatment of chronic pain, the plaintiff resided in Wyoming during the relevant time and received all her medical treatment there. One defendant, a Delaware corporation, had a facility in Minnesota for designing and manufacturing drug delivery patch systems; another defendant, a New Jersey partnership, marketed the drug in Minnesota.³⁶ The *Milkovich* factor of “maintenance of interstate order” favored “the state that has the most significant contacts with the facts relevant to the litigation” – thus, Wyoming, because “Plaintiff is a lifelong resident of Wyoming, and facts surrounding the circumstances of the decedent using Duragesic took place in Wyoming.” *Id.* at 1049. The other major *Milkovich* factor – consideration of the forum’s governmental interests – also favored Wyoming law because “Minnesota has little interest in this matter given its lack of connection with the core facts underlying Plaintiff’s causes of action.” *Id.* at 1050. Those factors determined the selection of Wyoming law,³⁷ and the same analysis determines the selection of Pennsylvania law here.

³⁶ In *Milkovich* itself, the Court held that these factors did not have “much bearing on the case.” 203 N.W.2d at 414.

³⁷ As in *Milkovich* itself, the court held that the first and third *Milkovich* factors (predictability of results and simplification of the judicial task) were not of importance. 203 N.W.2d at 414. The fifth factor (better rule of law) does not come into play unless the previous four factors are not determinative. *Myers*, 225 N.W.2d at 244. Moreover, as Professor Leflar has remarked, “[w]ith respect to limitations, it

The court in *Hernandez*, File No. PI 03-15846, 2004 WL 5326627 at Part III.A.2, ¶ 2, applied the *Milkovich* test in the same way. In that case, a California resident who sustained injuries in California sued the Ohio corporation that sold its equipment in Minnesota, among other states. The court's analysis of the *Milkovich* factors led to the choice of the California limitations period.

The same result follows from application of the Restatement (Second) of Conflict of Laws § 142. See *Washburn v. Soper*, 319 F.3d 338, 341-42 (8th Cir. 2003) (applying the Restatement to choose Illinois's shorter statute of limitations because "the plaintiffs are Illinois residents, the defendant attorney is licensed in both Iowa and Illinois, the defendant attorney was retained to represent the plaintiffs in Illinois state court proceedings, and these proceedings concerned Illinois residents, Illinois businesses, Illinois trust agreements, and Illinois contracts"); *Held v. Manufacturers Hanover Leasing Corporation*, 912 F.2d 1197, 1203 (10th Cir. 1990) (applying Restatement to choose New York law because plaintiff's employer maintained its headquarters and principal place of business in New York, the decision not to continue plaintiff's employment was made there, and the plaintiff's personnel records were maintained there).

would be hard to say that one period of limitations is better than another" Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. at 473-74 [DA-II-568-69].

II. THE WEIGHT OF AUTHORITY ANSWERS THE CERTIFIED QUESTION “NO.”

A. Minnesota Attends to the Weight of Authority.

Regarding choice-of-law analysis, the Court has never demonstrated a “go it alone” inclination, but has obtained guidance from respected sources of authority and aligned its decisions with the greater weight of authority. Fifty years ago, the plaintiff in *Allen v. Nessler*, 76 N.W.2d 793 (Minn. 1956), sought to have the Court apply Minnesota law so as to allow the survival of a tort action after the death of the tortfeasor. *Id.* at 794. The action did not survive under Colorado law, where the negligent conduct occurred. *Id.* at 794-95. The plaintiff relied on a recent decision of the California Supreme Court and argued that “the weight of authority [was] in harmony with the decision.” *Id.* at 800. Rejecting that claim, and finding that the weight of authority was to the contrary, the Court cited the “Restatement, Conflict of Laws; all text writers of any eminence; authors of annotations; and certainly the numerical weight of decided cases” *Id.* (footnotes omitted).

In *Milkovich*, the Court again surveyed recent developments and aligned Minnesota’s choice-of-law principles with current thinking in the field, as expressed by New York’s and New Hampshire’s highest courts, and by Professor Robert Leflar, whose article in the *New York University Law Review* provided “the groundwork” for the New Hampshire court. 203 N.W.2d at 414.

The Court in *Davis* similarly relied on what it understood to be “the almost universal rule” and again cited Professor Leflar. 328 N.W.2d at 153 (quoting R. Leflar, *American Conflicts Law* § 121 at 239 (3d ed. 1977)).

Most recently, in adopting the Restatement’s “most significant relationship” choice-of-law test for matters related to the admissibility of privileged communications and the use of out-of-state convictions, the Court not only selected “a conflicts rule unique to privileges,” but one it noted had also been selected by courts in Iowa, Washington, Illinois, and other jurisdictions. *Heaney*, 689 N.W.2d at 175 & n.4.

B. The Weight of Authority Rejects a *Lex Fori* Choice-of-Law Rule for Limitations.

The great weight of modern authority rejects any analysis based on consideration of limitations as “procedural” in favor of the same kind of multi-factor analysis that applies generally to choice of law. According to Professor Laura Cooper at the University of Minnesota Law School, the “traditional substance-procedure distinction in the midst of a modern choice of law method, has been rejected by virtually every scholar, court and legal committee which has considered the issue.”³⁸

The Court has repeatedly cited Professor Leflar’s analysis as persuasive.³⁹ For the past quarter-century, he has argued that the choice of substantive law and the choice of

³⁸ Laura Cooper, *Statutes of Limitation in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L. Rev. 363, 378 (1986).

³⁹ *Milkovich*, 203 N.W.2d at 414; see also *Jepson v. Gen. Cas. Co.*, 513 N.W.2d 467, 470 (Minn. 1994) (citing Leflar, *Choice-Influencing Considerations in Conflicts Law; Conflicts Law: More on Choice-Influencing Considerations*, 41 N.Y.U. L. Rev. 267 (1966) [DA-II-495]).

limitations should go hand-in-hand. The theory that “limitations law affect[s] the remedy only and not the substantive right” he has called “unrealistic” and “illogic[al].”⁴⁰ In his treatise, *American Conflicts Law*, he says:

[I]t has usually been held that action may be maintained if the statute of limitations at the forum has not run, even though the period set by the statute of the place where the cause of action arose has already passed. The theory is that passage of the period of limitations destroys only the remedy and not the right in a cause of action. . . . ***This theory, as applied to causes of action barred where they arose, does not make very good sense.*** A right for which the legal remedy is barred is not much of a right. ***It would have made better sense, as well as logic, if the limitations rule of the state whose substantive law is chosen to govern the right were deemed substantive also,*** so that both the original and the terminal existence of the right would be related to the same body of law.⁴¹

The problem with the old rule is not just that it “does not make very good sense” as a logical rule. The practical consequence, Professor Leflar notes, is “that plaintiffs whose claims are barred by the governing substantive law are allowed to shop around for a jurisdiction in which the statute is longer”⁴² – just as happened here, by plaintiffs numbering in the thousands.

⁴⁰ Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461, 462 (1984) [DA-II-557].

⁴¹ Robert A. Leflar, Luther L. McDougal III, & Robert L. Felix, *American Conflicts Law* § 127, at 348-49 (4th ed. 1986) (footnotes omitted) [DA-II-490-91].

⁴² *Id.* at 349 [DA-II-491].

The major scholars in the field – Brainerd Currie,⁴³ Russell Weintraub,⁴⁴ Gary Milhollin,⁴⁵ and a host of others⁴⁶ – join Professor Leflar in advocating the abandonment of mechanical rules in favor of applying a modern, multi-factor choice-of-law approach to certain issues traditionally deemed “procedural,” including statutes of limitation.

⁴³ See Brainerd Currie, *Essays on the Conflict of Laws*, 285, 476-77, 580 n.2, 614, 700 (1963) [DA-II-587-92].

⁴⁴ See Russell J. Weintraub, *Commentary on the Conflict of Laws* § 3.2C2, at 59 (2d ed. 1980) [DA-II-595].

⁴⁵ See generally, Gary L. Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitations*, 27 *Hastings L.J.* 1 (1975) [DA-II-604].

⁴⁶ See William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* §§ 58, 93 (3d ed. 2002) [DA-II-657-66]; Barry Ravech, Comment, *New England Telephone & Telegraph Co. v. Gourdeau Construction Co.*, 80 *Mass. L. Rev.* 126 (1995); Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 *U. Ill. L. Rev.* 683 (1991); Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 *Akron L. Rev.* 19, 19 (1989); A. Ehrenzweig, *Conflict of Laws* § 160, at 428 (1962) [DA-II-670]; H. Goodrich, *Conflict of Laws* § 85, at 152 (4th ed. 1964) [DA-II-675]; E. Scoles & P. Hay, *Conflict of Laws* § 3.12, at 65 (1984) [DA-II-679]; Cook, “Substance” and “Procedure” in the *Conflict of Laws*, 42 *Yale L.J.* 333, 343-44 (1933) [DA-II-692-93]; Comment, *Choice of Law: Statutes of Limitation in the Multistate Products Liability Case*, 48 *Tul. L. Rev.* 1130, 1135 (1974) [DA-III-713]; Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 *U. Fla. L. Rev.* 33, 36-39 (1962) [DA-III-817-20]; Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 *Ariz. St. L.J.* 1, 15-33, 38-43, 64-65 (1980) [DA-III-880-98, 903-08, 929-30]; Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 *Yale L.J.* 492, 496-97 (1919) [DA-III-937-38]; Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 *Washburn L.J.* 405 (1980) [DA-III-940]; McDonnold, *Limitation of Actions—Conflict of Laws—Lex Fori or Lex Loci?*, 35 *Tex. L. Rev.* 95, 112 (1956) [DA-III-975]; Note: *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 *N.Y.U. L. Rev.* 299, 300-03 (1974) [DA-III-977-80]; Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 *Mercer L. Rev.* 501, 505-07 (1983) [DA-III-1004-06]; Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 *N.Y.U. L. Rev.* 813, 847 (1962) [DA-III-1054].

The Restatement (Second) of Conflict of Laws and Uniform Conflict of Laws-Limitations Act are part of this consensus. The Restatement was amended in 1988 to reflect the “emerging trend” in state and federal courts to subject conflicts in limitations statutes to choice-influencing considerations.⁴⁷ It abandons the mechanical labeling of statutes of limitation as “procedural” and seeks to align the choice of the state limitations period with the state that has the most significant relationship to the parties and the claim.

Section 142 provides:

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:

- (1) The forum will apply its own statute of limitations barring the claim.
- (2) The forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.⁴⁸

That Restatement rule bars the application of the Minnesota statute of limitations to the claim of a non-resident, like Ms. Fleeger, whose cause of action arose in another state. Explaining Sub-section 2(a) of § 142, Comment g says that a state has “no substantial” interest in the litigation “when the state of the forum has only a slight contact with the case and the parties are both domiciled in the alternative forum under whose

⁴⁷ Restatement (Second) of Conflict of Laws § 142 cmt. e (1988).

⁴⁸ *Id.*

statute of limitations the claim would be barred.”⁴⁹ The courts applying section 142 have consistently so held,⁵⁰ often where one of the parties is a resident of the forum.⁵¹

The Uniform Conflict of Laws-Limitations Act, adopted in 1982, takes a different approach, but reaches a similar result, also rejecting the mechanistic application of forum law as procedural. The Act provides:

§ 2. Conflict of Laws; Limitation Periods

- (a) Except as provided by Section 4, if a claim substantively based:

⁴⁹ *Id.* at § 142 cmt. g; *see also id.* at § 142 cmt. e (“[T]he emerging trend” “stand[s] for the proposition that a claim will not be maintained if it is barred by the statute of limitations of the state which, with respect to the issue of limitations, is the state of most significant relationship to the occurrence and the parties.”).

⁵⁰ *See, e.g., Stanley v. CF-WH Associates, Inc.*, 956 F. Supp. 55, 58 (D. Mass. 1997) (Massachusetts had no substantial interest in case where “[n]one of the parties has a residence or place of business” there and “[n]one of the acts or events that gave rise to this lawsuit took place” there); *Great Rivers Co-Op of Southeastern Iowa v. Farmland Industries, Inc.*, 934 F. Supp. 302, 306 (S.D. Iowa 1996) (Iowa had no substantial interest in a claim where none of the parties were citizens or residents of Iowa); *Held*, 912 F.2d at 1203 (Colorado had no substantial interest in case where “has no interest in this matter other than that of forum to the litigation and an arguable, but tenuous, concern as Mr. Held’s alleged domicile”).

⁵¹ *See, e.g., Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1001-02 (9th Cir. 2006) (under federal common law, which applies section 142, California had no substantial interest in plaintiffs’ contract and fraud claims even though “all but two of the proposed class representatives” resided in California); *Nierman v. Hyatt Corp.*, 808 N.E.2d 290, 293 (Mass. 2004) (Massachusetts had no substantial interest in a negligence action brought by Massachusetts plaintiffs against an out-of-state corporation for injuries incurred out-of-state, even though the corporation had a place of business in Massachusetts and regularly solicited business there); *DeLoach v. Alfred*, 960 P.2d 628, 631 (Ariz. 1998) (Arizona had no substantial interest in a claim by non-resident plaintiffs against both Arizona and non-Arizona defendants for injuries incurred outside Arizona).

- (1) upon the law of one other state, the limitation period of that state applies; or
 - (2) upon the law of more than one state, the limitation period of one of those states chosen by the conflict of laws of this State, applies.
- (b) The limitation period of this State applies to all other claims.⁵²

Under this approach, “[e]ach state is left to determine the law upon which the claim is substantively based, its own or that of another state,” based on its own choice-of-law analysis.⁵³ But the limitations law then follows automatically: “[t]hus, the forum state’s own conflicts law will always choose the limitations law that is substantively governing.”

Id.

The weight of statutory and decisional authority reflects the academic consensus and the approach taken by the Restatement and Uniform Act. The forum shopping for longer statutes of limitation engaged in by Ms. Fleeger and more than 5,700 other hormone therapy plaintiffs is impossible, except where the forum applies its own limitations period as “procedural” *lex fori*. Had Ms. Fleeger brought her lawsuit in virtually any other state, it would be time-barred – so unanimous is the weight of statutory and decisional authority regarding the answer to the Certified Question. And based on Minnesota law, properly understood, her lawsuit is barred in this state, too.

⁵² Uniform Conflict of Laws – Limitations Act § 2 (2008).

⁵³ Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461, 468 (1984) [DA-II-563].

Borrowing statutes in 32 states require courts to apply the limitations period of the state in which the cause of action arose when that other state's statute of limitations would bar the action.⁵⁴ In two more states, the borrowing statutes require application of the shorter of the two conflicting limitations periods when the claim arises in another state.⁵⁵ (In Oklahoma, the borrowing statute requires the opposite – i.e., selection of the longer of the two limitations periods – but, for Ms. Fleeger, because both Oklahoma and Pennsylvania have two-year statutes, her claim would still be time-barred.)⁵⁶ And one state bars the claim when it would be time-barred under either state's limitations period.⁵⁷

⁵⁴ Alaska Stat. § 09.10.220; Cal. Civ. Proc. Code § 361; Colo. Rev. Stat. § 13-80-110; Del. Code Ann. tit. 10, § 8121; Fla. Stat. § 95.10; Haw. Rev. Stat. § 657-9; Idaho Code Ann. § 5-239; 735 Ill. Comp. Stat. 5/13-210; Iowa Code § 614.7; Kan. Stat. Ann. § 60-516; Ky. Rev. Stat. Ann. § 413.320; La. Civ. Code Ann. Art. 3549; Me. Rev. Stat. Ann. tit. 14, § 866; Md. Code Ann., Cts. & Jud. Proc. § 5-115(b) (specifically limited to personal injury claims arising out of product liability actions); Mass. Gen. Laws ch. 260, § 9; Minn. Stat. § 541.31; Miss. Code Ann. § 15-1-65; Mo. Rev. Stat. § 516.190; Mont. Code Ann. § 27-2-503; Neb. Rev. Stat. § 25-3203; Nev. Rev. Stat. § 11.020; N.Y. C.P.L.R. 202; N.C. Gen. Stat. § 1-21; N.D. Cent. Code § 28-01.2; Ohio Rev. Code Ann. § 2305.03(B); Or. Rev. Stat. § 12.430; Tenn. Code Ann. § 28-1-112; Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a)(3); Utah Code Ann. § 78B-2-103; Wash. Rev. Code § 4.16.290; Wis. Stat. § 893.07; Wyo. Stat. Ann. § 1-3-117.

In a number of these states, the highest court has expressly rejected the traditional choice-of-law rule in favor of a rule that treats the statute of limitations as it does all other conflicts of law. *See Merkle v. Robinson*, 737 So.2d 540, 542-43 (Fla. 1999) (per curiam); *New Eng. Tel. & Tel. Co. v. Gourdeau Constr. Co.*, 647 N.E.2d 42, 45-46 (Mass. 1995); *Dillon v. Dillon*, 886 P.2d 777, 778 (Idaho 1994); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414, 418 (Wis. 1973); *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 471 (Mich. 1997).

⁵⁵ *See* 42 Pa. Cons. Stat. § 5521(b); W. Va. Code § 55-2A-2.

⁵⁶ *See* Okla. Stat. tit. 12, § 105.

⁵⁷ *See* Mich. Comp. Laws § 600.5861.

The approach taken by these 36 states represents an unusually broad consensus regarding the better, modern rule. But the consensus is broader still.

In four additional states, the decisions of state supreme courts have rejected the rigid *lex fori* rule for limitations in favor of the Leflar factors, the Restatement, or a judicial borrowing of the limitations period from the state where the claim arose.⁵⁸

The remaining ten states and the District of Columbia do not have borrowing statutes. But in all eleven jurisdictions, the relevant statutes of limitation do not exceed three years, effectively discouraging the kind of forum-shopping by non-resident plaintiffs that has occurred in Minnesota.⁵⁹

⁵⁸ See *Ganey v. Kawasaki Motors Corp.*, 234 S.W.3d 838, 846-47 (Ark. 2006) (adopting Leflar and applying Louisiana's shorter statute of limitations where plaintiff was injured while riding ATV in Arkansas, but he was a resident of Louisiana, the ATV was purchased in Louisiana, and the actions relating to his causes of action occurred there); *Jackson v. Chandler*, 61 P.3d 17, 18 (Ariz. 2003) (adopting "substantial interest" test of the Restatement (Second) of Conflict of Laws and determining that Arizona's limitations period applied to claims arising out of car accident in Arizona); *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997) (per curiam) (applying Leflar and Restatement considerations to tort claim even where parties were Rhode Island residents); *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 418 (N.J. 1973) (when cause of action arises out of state, both parties reside and are amenable to jurisdiction there, and New Jersey has no substantial interest in the claim, New Jersey courts will borrow the other state's limitations period).

⁵⁹ See Ala. Code § 6-2-38(1) (two years); Conn. Gen. Stat. § 52-584 (two years); D.C. Code § 12-301 (one year); Ga. Code Ann. § 9-3-33 (two years, four years for loss of consortium); Ind. Code § 34-11-2-4 (two years); N.H. Rev. Stat. Ann. § 508:4(I) (three years); N.M. Stat. § 37-1-8 (three years); S.C. Code Ann. § 15-3-530(5) (three years); S.D. Codified Laws § 15-2-12.2 (three years); Vt. Stat. Ann. tit.12, § 512-(4) (three years); Va. Code Ann. § 8.01-243(A) (two years).

C. The Weight of Authority Reflects the Evolving Common Law.

It is enough for *Wyeth* and *Greenstone* to say that the Court's choice-of-law decisions have created a framework of analysis that, when addressed to the Certified Question, answers with a definite "No." Minnesota would not now apply – if, after *Milkovich*, it ever would have applied – its statute of limitations to claims that arose in another state, where neither party is a citizen of Minnesota, and where it cannot be said of the plaintiff, in particular, that she is seeking access to the courts of her own state.⁶⁰

Although academic commentary has accompanied the evolution of the modern approach at every step, it would be a mistake to understand the Leflar factors, the Restatement, or the Uniform Act as simply the product of more rigorous analysis and more considered thought. The evolution also exemplifies how and why the common law develops. In the often quoted words of Justice Holmes in *The Common Law*: "The life of the law has not been logic; it has been experience." In the words of this Court, the principles of the common law "have been determined by the social needs of the community and have changed with changes in those needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require." *Miller v. Monsen*, 37 N.W.2d 543, 547 (Minn. 1949); *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 744 (Minn. 1997) ("Our common law is the result of accumulated experience. It is composed of rules carefully crafted both to reflect our traditions as a state and to address emerging societal needs.").

⁶⁰ With regard to Ms. Fleegeer, the Leflar factors the Restatement test, and the Uniform Act would all result in the choice of the Pennsylvania statute of limitations.

Sixty-eight years ago, when the Court decided *In re Daniel's Estate*, the choice-of-law issue as to limitations typically arose in a “one-off” case, involving individual parties, where the incident occurred in a neighboring state. That was still true when the Court decided *Milkovich* in 1973, and *Davis* in 1983. It is since then that courts and commentators have witnessed the advent and proliferation of mass tort cases – in particular those involving widely-used prescription drugs. There are notable differences between, on the one hand, a negligence case arising from an automobile accident in Wisconsin that involves a Minnesota driver or passenger, and the hormone therapy litigation, on the other hand, which involves (i) more than 10,000 plaintiffs, (ii) more than a dozen manufacturer defendants, (iii) additional vendor and physician defendants, (iv) multiple prescription drugs, some of them in use for more than 50 years, and (v) federal and state multidistrict proceedings for the coordination of the litigation.

Such litigation, with the nationwide advertising for clients that accompanies it, creates incentives for forum shopping on a previously unimagined scale. The prospect of “global” settlements creates an incentive to attract and enlist a huge volume of clients. The cost of filing and serving large numbers of cases, as well as the cost of gathering medical records and completing the kind of questionnaires often required in coordinated proceedings, creates a disincentive to file cases until the eleventh hour. (An early settlement, after all, renders those outlays unnecessary.) And if the settlement does not come in time, the inventory of cases can be filed in a jurisdiction with a lengthy statute of limitations – so long, of course, as that forum applies its own statute of limitations. It is this kind of experience that informs the law and has informed acceptance of modern

choice-of-law analysis which permits a fact-sensitive, context-appropriate selection of the limitations period.

III. THE MODERN CHOICE-OF-LAW APPROACH DISCOURAGES FORUM SHOPPING, AVOIDS UNDUE BURDEN ON THE MINNESOTA COURT SYSTEM, AND FACILITATES THE RESOLUTION OF MASS LITIGATION.

This Court has declared that “Minnesota does not have an interest in encouraging forum shopping.” *Jepson*, 513 N.W.2d at 471. The traditional choice-of-law rule that automatically selects the law of the forum for limitations, however, does just that. It “encourages forum shopping of the worst sort . . . ,”⁶¹ according to one commentator. “What happens,” says Professor Leflar, “is that plaintiffs whose claims are barred by the governing substantive law are allowed to shop around for a jurisdiction in which the statute is longer.”⁶² Following the repeal of Minnesota’s borrowing statute in 1977, the Minnesota state courts made conflicting predictions about which choice-of-law rule for limitations the Court would adopt, as did the Minnesota federal courts. Some courts applied an automatic *lex fori* rule,⁶³ others the “*Milkovich* test.”⁶⁴ And certain courts that

⁶¹ Robert Allen Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. Rev. 813, 850 (1962) [DA-III-1057]. See also Margaret Rosso Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, Ariz. St. L.J. 1,16 (1980): (“One of the major criticisms of the traditional rule is that it tends to encourage forum shopping.”) [DA-III-881].

⁶² Leflar et al., *American Conflicts Law* § 127, at 349 (4th ed. 1986) [DA-II-491].

⁶³ See *Commandeur LLC v. Howard Hartry, Inc.*, No. A05-2014, 2007 WL 4564186, at *5 (Minn. Ct. App. Dec. 21, 2007) [DA-II-483]; *Zandi*, No. 27-C-V06-6744, 2006 WL 5962871 at Part 2.b, ¶ 5 [DA-II-459]; *Grewe*, No. 03-CV-5166 JMR/FLN, 2005 WL 1593048, at *3 [DA-II-463]; *Glover*, 345 F. Supp. 2d at 999.

⁶⁴ See *Danielson*, 670 N.W.2d at 11; *Hernandez*, File No. PI 03-15846, 2004 WL 5326627 at Part III.A.2, ¶ 1 [DA-II-444]; *Smith v. Culver*, No. C1-94-6766, slip op. at 2-3 (Henn. Co. Dist. Ct. Aug. 18, 1995) [DA-II-471-72]; *Lutheran Ass’n of*

applied the former rule acknowledged that this Court, if squarely presented the question, might well ratify the latter rule.⁶⁵ Despite this uncertainty, non-resident plaintiffs in larger and larger numbers let the limitations period lapse in their home states and gambled that Minnesota would afford a safe harbor.

The hormone therapy litigation alone demonstrates the dimensions of the problem. 5,300 non-resident plaintiffs filed lawsuits in the Minnesota courts (state and federal) more than three years after the termination of the WHI study.⁶⁶ When non-resident plaintiffs have attempted to “take advantage of Minnesota’s greater willingness to compensate tort victims” by filing claims with minimal (or non-existent) connections to the state, the Court has signaled its disapproval. *Jepson*, 513 N.W.2d at 471. In that 1994 case, the Court refused to condone permitting *Jepson* to take advantage of the “benefits” of his North Dakota citizenship (i.e. “lower insurance rates, lower vehicle

Missionaries and Pilots, Inc. v. Lutheran Ass’n of Missionaries and Pilots, Inc., No. CIV-03-6173 PAM/RLE, 2004 WL 1212083, at *2-3 (D. Minn. May 20, 2004) [DA-II-476-77]; *Fee v. Great Bear Lodge of Wisconsin Dells, LLC*, No. Civ. 03-3502 (PAM/RLE), 2004 WL 898916, at *2-3 [DA-II-467-68].

⁶⁵ See *Commandeur*, No. A05-2014, 2007 WL 4564186, at *5 (“We recognize that, in 1988, the Restatement described an ‘emerging trend’ to analyze statutes of limitation under the choice-influencing factors.” But “[a]ny change in the method by which Minnesota courts resolve statute-of-limitations issues in cases involving conflicts of law is beyond this court’s authority.”) [DA-II-483]; *Grewe*, No. 03-CV-5166 JMR/FLN, 2005 WL 1593048, at *3 (“Although the Minnesota Court of Appeals has implied that the Minnesota Supreme Court would no longer apply the traditional rule if faced with the question today, that is not for this Court to decide.”) [DA-II-463]; *Glover*, 345 F. Supp. 2d at 999 (“Because we cannot be certain how the Minnesota Supreme Court would treat the issue in light of the revised Restatement of Conflict of Laws, we conclude that the traditional rule as stated by the Supreme Court in *Daniel’s Estate* is still the law of Minnesota.”).

⁶⁶ [DA-I-168].

registration fees and sales taxes”) while escaping the inconveniences of North Dakota law (i.e. lesser no-fault benefits). *Id.* “People who purposefully seek advantages offered by another state,” the Court said, “ought not be allowed to avoid the burdens associated with their choice.” *Id.* at 472. The same holds true for Ms. Fleeger and the thousands of non-resident hormone therapy plaintiffs like her. They selectively seek the advantage of Minnesota’s limitations law, but acknowledge that the law of their home states applies to all other questions, and, in so doing, (i) avoid the “burden” of the limitations periods in their own states, and, (ii) by their sheer numbers, obstruct the access of Minnesota’s citizens to their own court system.

Wholesale forum shopping imposes a significant burden on the Minnesota courts and Minnesota citizens. Going by current averages, the cases of 4,700 individual personal injury plaintiffs (the number of non-resident plaintiffs with cases still pending) represents the full docket of 21 judges in Hennepin County (or eleven judges in the federal court for the District of Minnesota). When the Minnesota legislature enacted the current borrowing statute in 2004, one objective was to prevent the state from becoming a “potential dumping ground” for mass tort cases by non-resident plaintiffs.⁶⁷ Legislators used the term “dumping” with reference to forum shopping that numbered only in the

⁶⁷ Minnesota House Legislative Floor Sessions, H.F. No. 2444 at 2:08:08-2:08:23 (May 5, 2004), available at: http://www.house.leg.state.mn.us/htv/archivesHFS.asp?ls_year=83 (scroll down to the House Floor Session for Wednesday, May 5, 2004 and click on “watch this program”).

dozens of cases.⁶⁸ The current burden, however, numbers in the thousands of hormone therapy cases, plus thousands more plaintiffs in other product liability litigation. That burden – whether measured in work load, delay, cost or juror time – is enormous.⁶⁹ It comes when the Minnesota state courts are confronting a budgetary and funding crisis resulting in unfilled judicial vacancies, reduced staffing, overworked judges, and clerk's offices that are closed during part of the work week.

It is also true of such wholesale forum shopping that it frustrates the timely resolution of major litigation. Suffice it to say here, personal injury litigation involving prescription drugs that were used over long periods of time by tens of thousands, or even millions, of individuals cannot be satisfactorily resolved until defendants know the number of plaintiffs. If plaintiffs from across the country, whose claims have no connection to Minnesota, can nevertheless bring their lawsuits in Minnesota and secure the benefit of its six-year statute of limitations, then nationwide litigation cannot begin to be resolved for at least six years.⁷⁰

⁶⁸ *Id.* at 2:12:10-2:13:33.

⁶⁹ The great majority of these cases has been filed in federal court, to be sure, but we think it cynical to assume that the burden on the Minnesota federal courts is beyond the scope of this Court's concern.

⁷⁰ The universe of hormone therapy plaintiffs is not known even now, after July 9, 2002. For women who developed breast cancer after that date, the statute of limitations did not begin to run until the time of their diagnosis. Thus, a six-year statute of limitations period would continue to have consequences for defining the universe of plaintiffs.

CONCLUSION

Minnesota has a longstanding governmental interest in providing access to its courts for its own citizens. It has an equally longstanding policy and practice of forbidding forum shopping by non-residents who seek to assert claims that arose outside, and have no connection with, Minnesota. The *lex fori* choice-of-law rule for limitations has been overwhelmingly rejected; the rule that aligns the choice of substantive law and limitations period has been widely adopted as the better rule and modern approach. The Court should answer the Certified Question "No."

Dated: February 11, 2009

Respectfully submitted,

BASSFORD REMELE
A Professional Association

By 

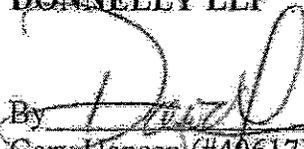
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STATE OF MINNESOTA
IN SUPREME COURT

A08-2124

RACHEL FLEEGER,

Plaintiff,

v.

WYETH and its division WYETH PHARMACEUTICALS, INC., and

GREENSTONE, LTD.

Defendants.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a), for a Brief produced with a proportional font. The length of this Brief is 13,019 words. The Brief was prepared using Microsoft Office Word 2003.

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