

NO. A08-2124

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State of Minnesota  
**In Supreme Court**

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RACHEL FLEEGER,

*Plaintiff,*

vs.

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

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**BRIEF AND APPENDIX OF PHARMACEUTICAL RESEARCH  
AND MANUFACTURERS OF AMERICA AS AMICUS CURIAE  
IN SUPPORT OF DEFENDANTS**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTRODUCTION

Amicus curiae, the Pharmaceutical Research and Manufacturers of America, respectfully submits this brief in support of appellants.<sup>1</sup>

Resolution of the certified question is of immense importance to the litigation of mass torts and, by extension, to the well-being of research-based pharmaceutical manufacturers in the United States. Over the past several years, the unsettled nature of Minnesota's choice-of-law rules has encouraged *thousands* of out-of-state plaintiffs to file suits in Minnesota state and federal courts, asserting product liability claims against manufacturers of innovative pharmaceutical products. These plaintiffs trek to Minnesota for the sole purpose of reviving claims that would be stale if filed in their home states.

The filing of untimely out-of-state claims in Minnesota raises significant practical concerns. Particularly in the mass-tort context, extraterritorial filings have exerted an enormous strain on PhRMA's members, the courts, and other plaintiffs who observed the limitations rules of their home states. The practice of some courts to allow every plaintiff in the nation six years to file a personal injury

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, counsel for amicus state that they authored this brief in whole, and that no person or entity other than amicus, its members, or its counsel made monetary contributions to the preparation or submission of the brief. PhRMA member companies GlaxoSmithKline, Novartis Pharmaceutical Corporation and Novo Nordisk, all of whom are parties to the  
*(footnote continued next page)*

claim – so long as it is filed in Minnesota – considerably delays the date by which parties can reliably gauge the scope of a mass tort litigation proceeding. Such delay imposes a burden on courts, on PhRMA’s members, and on the plaintiffs who timely filed claims in their own states.

Allowing non-Minnesota citizens to file claims in Minnesota that would be stale under their own states’ laws also contravenes important federalism and interstate comity principles. This is so because Minnesota’s rule effectively overrules the policy judgments of other states regarding limitations periods and interferes with federal proceedings. At the same time, the rule brings no discernible benefit to Minnesota or its citizens. This lopsided policy calculus merits rejection of the rule.

Given these significant policy concerns, which compound the concerns raised by the appellants and their other *amici*, the Court should answer “no” to the certified question.

### ARGUMENT

The Court should answer “no” to the certified question. *First*, the application of Minnesota’s six-year limitations period to out-of-state claims filed in Minnesota courts substantially burdens the litigation of mass torts, to the detriment

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underlying multidistrict litigation, *In re Prempro Prods. Liab. Litig.*, MDL 1507, have not financially contributed to the preparation of this *amicus* brief.

of plaintiffs and defendants alike. *Second*, applying Minnesota's limitations period to out-of-state claims undermines important principles of federalism and interstate comity, raising serious policy concerns that counsel strongly in favor of rejecting such a rule.

**I. APPLICATION OF MINNESOTA'S SIX-YEAR LIMITATIONS PERIOD TO CASES WITH NO CONNECTION TO THE STATE DISRUPTS AND DELAYS RESOLUTION OF MULTI-BILLION-DOLLAR MASS TORT PROCEEDINGS.**

The willingness of some courts to apply Minnesota's six-year limitations rule to all claims filed in Minnesota has placed substantial burdens on mass tort proceedings by delaying the resolution of mass torts – often by several years. Ultimate resolution of mass torts is difficult unless the parties and the courts are able to gauge the nature and overall value of the dispute. The extraterritorial application of Minnesota's unusually long limitations period for personal injury claims complicates this task because it channels a significant and unpredictable number of stale claims from other states into mass tort proceedings for as long as Minnesota's limitations period allows.<sup>2</sup> The inevitable result of this channeling

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<sup>2</sup> Minnesota's limitations period for negligence-based personal injury claims is six years. As discussed in greater detail in the appellants' brief, the vast majority of states apply two- or three-year limitations periods to such claims, and those that apply longer periods do not apply them to parties without any connection to the forum. (See Brief of Appellants Wyeth et al. ("Wyeth Br.") at 35-36.)

effect is to delay mass tort resolutions – to the detriment of the courts, the plaintiffs and the defendants.

It is widely recognized that resolution of mass torts is unattainable without a reliable mechanism to determine the number and value of legitimate claims. “The importance of accurate valuation of mass tort claims cannot be overestimated; without it, the system would quickly break down under the pressure of unresolved claims.” Peter H. Schuck, *Symposium: Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995); Kenneth R. Feinberg, *Symposium on Mass Torts: Reporting from the Front Line – One Mediator’s Experience with Mass Torts*, 31 Loy. L.A. L. Rev. 359, 366 (1998) (“If the parties are to resolve their mass tort litigation, they need to know what their claims are worth in order to negotiate settlement dollars.”). Accurate valuation takes time because it depends upon the maturity of a tort. “A course of litigation and a pattern of settlements determines the legal consequences of individual torts; this greater determinacy in turn makes it easier to exploit aggregative procedures to refine and establish claim values.” Shuck, *supra*, at 951. And even when valuation of particular kinds of claims is feasible, global resolution cannot be achieved until the defendant believes that the litigation has been narrowed down to a legitimate core of claims. That legitimate core cannot be identified until the defendant is reasonably certain about

its shape and size – that is, it must know what a legitimate claim looks like and how many plaintiffs are asserting such a claim.

Uncertainty regarding the reach of Minnesota’s limitations period has made it difficult to “close the doors” in mass torts. As detailed in the appellants’ brief and in other *amicus* briefs, the willingness of some courts to apply Minnesota’s generous limitations period to anyone who files in the State has helped promote filings by hundreds or even *thousands* of out-of-state plaintiffs in each of several multidistrict proceedings. In the Prempro litigation giving rise to the *Fleeger* case, for example, over 5,000 claims have been filed in Minnesota by plaintiffs having no connection with the state. (Wyeth Br. at 4 & n.4; Brief of Amici Novartis Pharms. Corp. et al. (“Novartis Br.”) at 9.) Similarly, in the Vioxx litigation, about 3,000 claims were filed in Minnesota by out-of-state residents. (See Novartis Br. at 10.)

The reason for Minnesota’s popularity is no secret among the plaintiffs’ bar. In 2003, Gale Diane Pearson, a personal injury plaintiffs’ lawyer practicing in Minneapolis, invited plaintiffs’ lawyers around the country to file their claims in Minnesota and went so far as to suggest it would be malpractice not to do so. According to Pearson, “A good attorney should not give up” on a claim simply because it is untimely in the prospective client’s home state; instead, Pearson explained, just file it in Minnesota. Gale Diane Pearson, *Statutes of Limitations*

*and Choice of Law Issues in Multi-District Practice*, 2 ATLA Annual Convention Reference Materials 2541 (July 2003) (App-1, with entire article appended as App-1–App-10).

The late influx of out-of-state claims to Minnesota delays resolution not simply because of how many such claims there are, but also because it is impossible to know how many there will be in advance. For example, a defendant in a mass tort may be able to predict with some accuracy how many total claims will be filed in Utah in the fourth year of its four-year limitations period, Utah Code Ann. § 78B-2-307, based on sales data and its experience in the litigation up to that point. It might thus be able to model its likely total exposure to Utah claims before the door closes on such claims, thereby allowing it to move toward resolution earlier. The same prediction regarding total claims filed in Minnesota is not possible, however, because national sales data and prior filing patterns in the litigation provide no model for predicting how many plaintiffs whose claims are stale in their home states will file in Minnesota. Such unpredictability impedes efforts to resolve mass torts for the reasons described above – without a way to measure the size and shape of the final claims pool, the parties will find it harder to settle or otherwise dispose of cases. The result is simple and inevitable: delay.

The victims of this practice include courts, defendants, and plaintiffs. The numbers strain defendants, as well as courts, by forcing them to bear the burden of

resolving a greater number of claims. Nearly every other state has a limitations period shorter than six years for personal injury claims, and the vast majority of those have periods of three years or shorter. Manufacturers of innovative drugs (and other products) expect to receive the protection from protracted liability that those laws were intended to afford, and that protection is denied when courts applying Minnesota law effectively overrule the decisions of other state legislatures and apply the six-year limitations period to cases with no connection to the State.

But perhaps those who are most affected are legitimately injured plaintiffs who filed their suits on time. These plaintiffs, who may have minimal resources, must often wait until the door closes on all claims to determine whether they will receive compensation. Even Minnesota residents are adversely affected by this practice. Although they have six years to file their claims, most residents (like plaintiffs from other states) will not idly delay filing their claims – they will file very soon after they realize they may have a claim. But because ultimate resolution of mass torts is delayed by the out-of-state filers who take advantage of the longer limitations period in Minnesota, that delay works to the prejudice of Minnesota plaintiffs as well.

The winners, meanwhile, are the delinquent non-Minnesota plaintiffs and, to a much greater extent, their lawyers. In a very real sense, these lawyers are able to

“cash in” on delinquent claims at the expense of substantial numbers of diligent claims.

This case presents the Court with an opportunity to put an end to these abuses of Minnesota’s generous limitations law. By answering “no” to the certified question, the Court would promote the timely and efficient resolution of mass tort proceedings and thereby protect the interests of its citizens (and citizens of other states).

## **II. THE APPLICATION OF MINNESOTA’S LIMITATIONS RULE TO OUT-OF-STATE DISPUTES UNDERMINES INTERSTATE COMITY AND FEDERALISM.**

Application of Minnesota’s limitations period to out-of-state disputes also raises significant concerns regarding interstate comity and federalism because it effectively overrules the policy judgments of every other state in the country and interferes with federal proceedings. Moreover, these intrusions are difficult to justify in light of the minimal state interests advanced by applying Minnesota’s limitations period to out-of-state disputes.

Extraterritorial application of Minnesota’s limitations rule undermines interstate comity and federalism in a number of ways. The adverse effects on interstate comity are severe. As already discussed, the current practice substantially delays resolution of mass tort proceedings at great cost to parties in other states. And as the appellants and their other *amici* capably demonstrate, this

practice has encouraged rampant forum shopping by delinquent litigants hoping to escape the policy judgments of their home legislatures. (*See* Wyeth Br. at 39-41; Novartis Br. at 7-14.) Minnesota is particularly attractive for these purposes because it is the only state with a limitations period longer than the national average of two or three years to entertain out-of-state claims with no connection to the state. (*See* Novartis Br. at 7-8.) The result is that some Minnesota courts have been able to nullify the limitations periods of virtually every other state, at least in cases involving defendants over which a Minnesota court has personal jurisdiction.

The rule has also had an adverse impact on federalism by interfering with the business of federal courts. In addition to hindering federal multidistrict litigation in the mass tort setting, the rule also places a significant filing burden on federal courts in Minnesota. (*See* Wyeth Br. at 42; Novartis Br. at 10-11, 16.)

These extraterritorial effects are difficult to justify in light of the fact that few if any benefits are secured to this State by application of its limitations period to out-of-state disputes. It is clear, for example, that such application does not benefit Minnesota's citizens. They, like other participants in mass tort proceedings, are prejudiced by Minnesota's rule, and they fare no better outside the mass tort context. Minnesotans must wait longer in line for resolution of all disputes as the State's courts sort through the flood of out-of-state claims. And

Minnesotans must pay the taxes and sit on the juries that support these out-of-state filings.

In theory, it might be contended that Minnesota has an altruistic interest in providing a haven for out-of-state plaintiffs who, for whatever reason, have not timely asserted their claims in their home states. But a state's legislature owes its allegiance to the people who elected its members – *i.e.*, the state's citizens. *See, e.g., Hughes v. Wal-Mart Stores, Inc.*, 220 F.3d 618, 621 (8th Cir. 2001) (applying Leflar factors) (“Absent some relevant connection between a state and the facts underlying the litigation, we fail to see how any important Arkansas governmental interest is significantly furthered by ensuring that nonresidents are compensated for injuries that occur in *another state.*”); *cf. Casanova Beverage Co., Inc. v. Comm’r of Pub. Safety*, 486 N.W.2d 448, 451 (Minn. Ct. App. 1992) (agreeing that “a state has no legitimate interest in regulating transactions outside its borders”) (citing *Cent. Liquor v. Okla. Alcoholic Beverage Control Bd.*, 640 P.2d 1351, 1355 (Okla. 1982)). Thus, little weight could be assigned to such an interest, and no other conceivable state interest is apparent.<sup>3</sup> And in any event, out-of-state litigants are

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<sup>3</sup> For this reason, little weight, if any, should be accorded to any “reliance” interest by out-of-state citizens on Minnesota’s limitations period. As a political matter, the State’s Legislature is not beholden to the interests of those citizens. Furthermore, as a practical matter, it is highly doubtful that thousands of consumers are consciously allowing shorter home-state limitations periods to lapse, comforted by the knowledge that Minnesota’s longer six-year period will  
(footnote continued next page)

on balance also disserved by such a rule, at least in the mass tort setting. While some may benefit from the *de facto* extension of the limitations periods governing their claims, a substantial number of out-of-state litigants who timely pursued their claims are forced to endure delayed resolution of their claims. Thus, even if the State has a valid interest in serving out-of-state residents, that interest is actually undermined by extraterritorial application of Minnesota's statute of limitations.

When so little can be said in defense of a rule that places such profound burdens on federalism and interstate comity, it should be rejected as a matter of basic policy.<sup>4</sup> There is simply no good reason to sanction a rule that places Minnesota so directly at odds with the interests of the other states and the federal

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always be available. Any such reliance would in any event be misplaced in light of the fact that this Court has not previously ruled on the certified question.

<sup>4</sup> Indeed, a law that inflicts such substantial extraterritorial burdens in the furtherance of no identifiable state interest is a candidate for invalidation under the commerce clause of the U.S. Constitution. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (state law unconstitutional if burdens on interstate commerce are "clearly excessive in relation to the putative local benefits" it serves); *Bendix Autolife Corp. v. Midwesco Enters.*, 486 U.S. 888, 890 (1988) (applying the undue-burden rule in the statute-of-limitations context and striking down Ohio law that provided for indefinite tolling of statute of limitations against companies that refused to register agent for service of process). That is particularly true where, as here, the law is "out of line with the requirements of almost all the other States." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (state law requiring mud flaps on Illinois highways unconstitutional where requirement caused great burden and delay for interstate motor carriers and did not conclusively serve state interests).

judicial system. For this reason too, the Court should answer “no” to the certified question.

**CONCLUSION**

For the foregoing reasons, the Court should rule that out-of-state plaintiffs cannot avail themselves of Minnesota’s limitations period to save stale claims with no Minnesota connection, simply by filing suit in this State.

Respectfully submitted,

Dated: February 18, 2009

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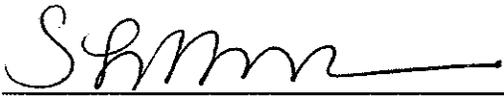
**CERTIFICATION OF BRIEF LENGTH**

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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 2,718 words. The Brief was prepared using Microsoft Office Word 2007.

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