CASE NO. S172023

IN THE COURT SUPREME COURT

OF THE STATE OF CALIFORNIA

NIKKI POOSHS,

Plaintiff and Petitioner,

vs.

PHILIP MORRIS USA, et al.,

Defendants and Respondents.

On Review From the Ninth Circuit Court of Appeals
Certified Questions of California Law

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITY

I.

INTRODUCTION

By Order filed May 20, 2009, this Court granted the Ninth Circuit Court of Appeals' request for decision of dispositive questions of California law related to a smoker's claims for tobacco-induced injury. California Rules of Court, Rule 8.548

A. Question Presented

The Question, as restated by this court, is:

When multiple distinct personal injuries allegedly arise from smoking tobacco, does the earliest injury trigger the statute of limitations for all claims, including those based on a later injury?

B. Answer

The answer to the stated question is: No. When a person is injured by a toxic substance and at first suffers only relatively mild symptoms, a new limitations period will begin to run when the person is later diagnosed with a serious, separate and distinct latent injury arising from the same exposure. This separate and distinct injury rule, already applied by California courts in a variety of cases, has been adopted by the majority of the jurisdictions which have

considered the question. The failure to apply it in tobacco personal injury cases in California would violate the public policy of this state.

Petitioner Nikki Pooshs is dying from tobacco-induced lung cancer. Less than one year after her cancer diagnosis she filed suit against the defendants in this matter alleging their liability for her lung cancer — only lung cancer — nothing else. The trial court granted summary judgment for the defendants on the ground that Pooshs' claims were barred by the statute of limitations. This finding was based on the conclusion that Pooshs' diagnosis with tobacco-induced chronic obstructive pulmonary disease (COPD) in 1989 triggered the statute of limitations for all tobacco related illnesses. Applying that court's rationale, Ms. Pooshs should have filed her claims for this lung cancer no later than 1990, more than a decade before she was diagnosed with the disease. Petitioner seeks a decision from this Court making it clear that the law of California does not demand such an absurd and impossible result.

II.

STATEMENT OF FACTS

Petitioner Nikki Pooshs is a 68 year old woman who began smoking in 1953. [Excerpts of Record (E.R.) 91] In 1989 she was

diagnosed by her personal physician with chronic obstructive pulmonary disease (COPD). [Supplemental Excerpts of Record (S.E.R.) 45] In 1991 she successfully quit smoking. [S.E.R. 48] That same year she was also diagnosed with periodontal disease. [S.E.R. 48] Both her COPD and periodontal disease diagnoses were attributed to her smoking. [S.E.R. 48] A dozen years later, on January 31, 2003, she was diagnosed with lung cancer caused by her smoking. [E.R. 92] On January 13, 2004, less than one year after her cancer diagnosis, she filed suit against the defendants in this action asserting their liability for her lung cancer. [E.R. 81] She did not seek damages for any other manifestation of smoking related injury. [E.R. 92]

III.

PROCEDURAL HISTORY

A. *Pooshs I*[1]

Petitioner Nikki Pooshs filed suit in the San Francisco Superior Court on January 13, 2004. [E.R. 67] The defendants in that action

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[1]The procedural history of the present appeal is complicated. For the sake of clarity, the proceedings in the district court and the Ninth Circuit Court of Appeals occurring before this Court's decision in *Grisham v. Philip Morris* (2007) 40 Cal.4th 623 are referred to herein as *Pooshs I.* The proceedings in the district court after *Grisham* and the present appeal are referred to as *Pooshs II.*

removed the case to the Federal District Court and contemporaneously filed several motions to dismiss. [E.R. 122-123] The moving defendants' argument emphasized one claim: that *Soliman v. Philip Morris Inc.*, 311 F.2d 966 (9th Cir. 2002) controlled and compelled dismissal of the action on statute of limitations grounds. [E.R. 69] Plaintiff in *Pooshs I* argued in response that *Soliman* was not controlling because unlike the plaintiff in that case, she had not pled addiction as an injury, was not seeking damages for addiction and thus could not be deemed to have conceded that addiction alone was somehow independently actionable. [E.R. 71-72]

Plaintiff argued that under California law there is, in fact, no cause of action for mere addiction to tobacco. [E.R. 71-72] She also argued that, even if she had a claim for addiction, her claim for lung cancer was timely because it was governed by its own statute of limitations under the "separate and distinct injury" rule, which the *Soliman* court did not address. [E.R. 72]

The district court, finding that *Soliman* controlled, granted defendants' motion to dismiss and judgment was entered in favor of defendants. [E.R. 80]

Petitioner timely filed a Notice of Appeal. [E.R. 129] While that appeal was pending, the Ninth Circuit Court of Appeals filed an order certifying questions of state law to this Court in *Grisham v. Philip Morris*. *See Grisham v. Philip Morris U.S.A., Inc.*, 403 F.3d 631 (9th Cir. 2005). In *Pooshs I*, pursuant to the joint request of the parties, the Ninth Circuit held the matter in abeyance pending the decision of this Court. That decision was issued on February 15, 2007 and the Ninth Circuit subsequently vacated the stay and remanded the case for further proceedings consistent with the decision in *Grisham*.

B. *Pooshs II*

Following remand to the District Court, defendants filed a Motion for Summary Judgment virtually identical to their Motion to Dismiss in *Pooshs I*. The district court granted defendants' motion. [E.R. 5] The district court found first, with regard to any claims of injury or damage caused by addiction, the complaint is time-barred, as stated under *Grisham*. [E.R. 26] The district court specifically found that while the complaint did not specifically claim addiction as an injury, and plaintiff contended that it was never her intention to seek compensation for addiction, plaintiff did allege throughout the

complaint that defendants created and sold a product that caused addiction and was harmful to health. [E.R. 26]

Despite defendants' failure to even argue the issue, the district court also found that plaintiff cannot proceed with the claims of fraud, conspiracy, and failure to warn. The district court reasoned that since plaintiff cannot claim any damages or injury resulting from the "addiction" claim, and since she was plainly aware that smoking caused health hazards at least by the time she was diagnosed with COPD in 1989 her claims of fraud and conspiracy are time-barred. [E.R. 27]

Finally, the district court found that the physical-injury claims were barred. The district court held that in latent disease cases, upon manifestation of any harm, an injured party must sue for all harms that may (or may not) result from the same exposure sometime in the future. [E.R. 27-28] The present appeal followed. After briefing and oral argument in the Ninth Circuit Court of Appeals, that court certified dispositive questions of California law to this court which issued an order granting the request and restating the question. The parties are now before this court to address that question:

When multiple distinct personal injuries allegedly arise from smoking tobacco, does the earliest injury trigger the statute of limitations for all claims, including those based on a later injury?

IV.

ARGUMENT

In this brief we will address the question presented from two perspectives. First, we point out that the position petitioner took in the trial court is consistent with long standing California law. Through a review of the history of the "single injury" rule, and a survey of cases applying the "two injury" rule, we demonstrate that California courts have applied the latter rule in a wide variety of circumstances for over half a century. We also demonstrate that those courts are in accord with the vast majority of courts in other jurisdictions which have considered the question. Second, we demonstrate that the application of the two injury rule in cases of latent disease due to exposure to toxic substances is in accord with the public policy of this state.

A. The Origins of the Single Injury Rule

The single injury rule, also known as the rule against splitting claims, provides a plaintiff one indivisible cause of action for all damages arising from a defendant's single breach of a legal duty. *See Gideon v. Johns-Manville Sales Corp.,* 761 F.2d 1129, 1136-37 (5th Cir.1985). The historical reason for the rule was the necessity for preventing vexatious and oppressive litigation, and its purpose was accomplished by forbidding the division of a single cause of action so as to maintain several suits when a single suit will suffice. *See Pustejovsky v. Rapid-American Corp.,* 35 S.W.3d. 643 (Tex. 2000).

As this Court observed in *Grisham v. Philip Morris, U.S.A., Inc.,* 40 Cal.4th 623 (2007) , "[t]he long standing rule in California. . . is that '[a] single tort can be a foundation for but one claim for damages.'" *Id.* at 641 *citing DeRose v. Carswell*, 196 Cal.App.3d 1011, 1024 (1987). This rule is a corollary of the primary right theory found in California law.[2] *Id.* The rule has its origins not in cases

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[2]The rule provides that a cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant, constituting a breach of that duty. *Id.* "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." *Crowley v. Katleman*, 8 Cal.4th

involving injury to the person, but rather, from a doctrine that developed from injury to chattel. *Marble v. Keys*, 9 Gray 221 (Mass. 1857). In *Marble*, decided by the Massachusetts Supreme Court, defendant contended that plaintiff could not maintain more than one action for different articles of property taken by the same trespass, and converted at the same time. *Id.* at 222. The court ruled that:

> [t]he plaintiff having put in his evidence to show a particular conversion, and having rested his case upon proof thus offered, would not now, upon this objection being made and ruled upon, be allowed to put in evidence offered to make out a different conversion.

Id.

The California Supreme Court in *Beronio v. The Southern Pacific Railroad Company* (1890) 86 Cal. 415 cited *Marble* for establishing the rule that:

> [i]n cases of tort, the question as to the number of causes of action which the same person may have turns upon the number of the torts, not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one.

Id. at 421.

In *Panos v. Great Western Packing* (1943) 21 Cal.2d 636, plaintiff was injured on defendant's property when struck by a large

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666, 681 (1994).

chunk of meat on a trolley. *Id.* The court found that plaintiff suffered but one injury and had but one cause of action. *Id.* Therefore, under the doctrine of res judicata plaintiff, after an adverse judgment in the first action, was barred from bringing a second action against defendant to recover for the same injury on allegations charging negligence which differed from the negligence charged in the first action. *Id.* at 638.

The equitable doctrine applied in *Marble, Beronio* and later in *Panos* is a species of res judicata that prohibits splitting a single cause of action and subsequently asserting claims that could have been litigated in the first instance. It certainly had logical application in tort cases involving injury to property wherein the injury in question had finite, definable parameters. However, the traditional "single-injury" rule works an injustice in toxic substance cases where an exposure can lead to two or more separate and distinct injuries, one or more of which does not arise for years or decades. The injustice stems from the fact that the plaintiff may be left with no remedy for the later, serious illness, no matter what she does.[3] If she

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[3]"The first injury rule seems to be skewed in favor of defendants because they are able to raise a statute of limitations defense whenever a tobacco-related injury to the plaintiff can be identified that falls outside of the limitations period. This rule

immediately brings a claim for the mild injury and also alleges there is a possibility she may suffer other serious injuries in the future, she will be unsuccessful, because a plaintiff generally must show it is "more likely than not" she will contract the disease.[4] *See Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 974. If the plaintiff instead waits until she actually suffers from the latent disease (such as smoking-related lung cancer), under the traditional rule it will be too late to sue.

In short, under the single injury rule, an injured person can never be fairly compensated for a latent disease. Initially the claim for the latent disease is speculative, and when it is no longer speculative, it is untimely. Such a result is illogical, discriminatory, and unfair.

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punishes plaintiffs who do not run to the courts at the first sign of harm." *See*, Eubanks, *When Should Statute of Limitations Begin to Run in Tobacco Litigation*, 56 Ala.L.Rev. 311, 321-322 (2004).

[4]The impossibility of such a showing is apparent from the fact that only 1-2 of every 10 heavy smokers will ever develop lung cancer. *See* Cagle, "Tumors of the Lung," in Thurlbeck and Churg, *Pathology of The Lung* ch. 23 p.439 (2d ed., Thieme Medical Publishers, Inc.) ("... only 10% of smokers develop lung cancer"); The Health Consequences of Smoking – A Report of the Surgeon General ch. 2 pp. 42-61 (U.S. Dept. Health and Human Services 2004) (discussing epidemiological studies that assess the cumulative risk of death from lung cancer for male smokers at 10-16%, depending on the length of time of their smoking).

B. Under California Law, When a Person Is Injured by a Toxic Substance and at First Suffers Only Relatively Mild Symptoms, a New Limitations Period Will Begin to Run If the Person Is Later Diagnosed with a Serious, Separate and Distinct Latent Injury Arising from the Same Exposure.

The courts of California have long held that when a plaintiff suffers two illnesses arising from the same cause, and the second illness is of a different, more serious and debilitating nature and arises much later, the statute of limitations is calculated separately for each injury.

That "separate and distinct injury" rule was recognized by this Court over half a century ago in *Coots v. Southern Pacific Co.,* (1958) 49 Cal.2d 805, a case brought under the Federal Employers' Liability Act (FELA).[5] Mr. Coots worked with a plating solution that contained silver cyanide. In 1949, he noticed blisters and pimples on his hands, which he correctly attributed to the silver cyanide solution. He sought medical care and was given a lotion, but he took no legal action.

In 1953 Coots' condition became "real worse" and spread to other parts of his body. He filed suit in 1954, within three years of

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[5] As the Court noted, the standard for employer liability under FELA is, as in most personal injury actions, negligence. 49 Cal.2d at 811-12.

the onset of his disease and resulting disability, but outside the applicable statute of limitations if computed from 1949. The Court held the action was timely:

> We have concluded that plaintiff was 'blamelessly ignorant' that the 'moderately severe' dermatitis suffered by him in 1949 would lead to disability and that under no view of the evidence can it be said that the statute begins to run at any earlier time than in the year 1953 when the condition became 'real worse.' It is not necessary, however, for us to determine whether the statute began to run in 1953 or in 1954 when, according to the allegations of plaintiff's complaint, his employment-connected disease prevented him from performing his usual work 'from time to time' inasmuch as either time is well within the statute of limitations.

49 Cal.2d at 810.

In a concurring opinion, Justice Spence wrote:

> I am of the opinion that it should be held that plaintiff's cause of action accrued and the statute of limitations commenced to run in 1953, when there was the first manifestation of *substantial* harm to plaintiff, and that therefore his cause of action was not barred by the three-year statute when the suit was commenced in 1954. * * *
>
> This theory offers a practical approach to the problem, and it achieves a just result. The minor manifestation of skin trouble on plaintiff's hands prior to 1953 was of such nature that it may be treated as *de minimis*. It was so treated by the parties and it is a maxim of our jurisprudence that "The law disregards trifles." (Civ. Code, § 3533.) Human experience indicates that comparable conditions ordinarily terminate with the passage of a brief period of time; and it does not

> comport with sound public policy to require an employee, at his peril, to engage in litigation with his employer when an apparently minor and temporary manifestation of skin trouble occurs.

49 Cal.2d at 813, 814.

The next California decision to apply the separate and distinct injury rule was *Martinez-Ferrer v. Richardson-Merrell, Inc.,* (1980) 105 Cal.App.3d 316. The plaintiff, a doctor, began taking the defendant's anti-cholesterol drug "MER/29" in 1960, and soon suffered from a variety of ailments including blurred vision, macular edema and dermatitis. He and his doctors "assumed" that these problems were related to his use of the drug, 105 Cal.App.3d at 319, so he stopped taking it and the problems cleared up over time. However, in 1976 he developed cataracts and tunnel vision which ultimately led to permanent blindness. His doctors told him that the cataracts were caused by the cholesterol drug, but apart from that similar cause there was no evidence that they were related to the retinal swelling he had experienced earlier. 105 Cal.App.3d at 319.

The trial court dismissed plaintiff's claims against the drug manufacturer on limitations grounds, but the Court of Appeal reversed. After finding it was a question of fact whether plaintiff's 1960 problems were causally related to MER/29, and thus whether a

cause of action even for those injuries had accrued at the time, 105 Cal.App.3d at 321-22, the court went on to address the "real question" before it: "whether [plaintiff] can proceed against defendants on the theory that his cataracts were caused by MER/29, even though his action was filed years after he knew or should have known that he had suffered some bodily injuries from that product." *Id.* at 322.

The defendant predictably argued that:

> [plaintiff's] ingestion of MER/29 triggered but one cause of action for personal injuries, known or unknown, latent or patent, temporary or permanent: [plaintiff's] cataracts are just a part of that cause of action which outlawed one year after his discovery that MER/29 had caused substantial bodily harm. Any other holding would permit [plaintiff] to split his cause of action.

105 Cal.App.3d at 322.

Although that position was supported by hornbook law, the court was rightfully disturbed by it. It described the injustice of applying a legal fiction that the plaintiff should have sued in 1960, not only for the relatively mild side effects from which he then suffered, but also for the far more serious cataracts that he did not yet have and which he could not have proven to be a probable result of his use of defendant's drug. The court declared:

> The sad fact is that [plaintiff] would have been laughed out of court had he sued for his dermatitis and macular edema when defendants say he should have – say in 1962 – and had he then attempted to be compensated for the speculative possibility that his 1960 ingestion of MER/29 might cause cataracts before that chance became a fact in 1976.

After noting that the California Supreme Court had just applied the same reasoning in adopting the theory of market share liability for DES cases,[6] the Court of Appeal condensed reason and fairness into a short and compelling sentence: "*If the manufacturer of ... a drug is liable for the long-delayed effects of his product, it advances no coherent public policy to absolve him of that liability simply because right after the ingestion of the drug the user suffered other, different, independent and relatively innocuous side effects for which he did not bother to sue.*" 105 Cal.App.3d at 324. That opinion was later cited by this Court, without any suggestion of disapproval. *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 n.5.

The separate and distinct injury rule was similarly endorsed in *Chevron U.S.A., Inc. v. Workers' Compensation Appeal Board* (1990) 219 Cal.App.3d 1265, wherein the court held "that where two separate and distinct occupational disease processes resulting from

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[6] *See Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588.

a single period of exposure to asbestos manifest themselves at different times, each is entitled to a different date of injury...." 219 Cal.App.3d at 1267.

The claimant in *Chevron* was diagnosed with asbestosis in 1976 and was awarded permanent disability benefits. Eleven years later, he was diagnosed with mesothelioma, a cancer of the lining of the lung with an associated long latency, from the same asbestos exposure, and he died within three months. The employer opposed the widow's calculation of death benefits on the theory that the "date of injury" was the date of the asbestosis diagnosis. The compensation judge disagreed, looking instead to the date of decedent's mesothelioma diagnosis because it implicated a separate and distinct injury. 219 Cal.App.3d at 1269. The Appeals Board upheld the judge, and an unanimous Court of Appeal affirmed, noting that the evidence showed that "mesothelioma was not an extension or outgrowth of his earlier pulmonary asbestosis." *Id.* at 1271.[7]

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[7] Similarly, lung cancer is not an "extension or outgrowth" of addition to nicotine or chronic obstructive pulmonary disease. (See, e.g., Lung Cancer and Smoking Statistics—risk and life expectancy Cancer Research UK <http://info.cancerresearchuk.org/cancerstats /types/lung/smoking/>, [as of Feb. 15, 2007] [the cumulative risk of dying of lung cancer by age 75 for a male lifelong smoker is 15.9 percent].) Cited in *Grisham v. Philip Morris USA, Inc.,* 40 Cal.4th 623, 645.

Nine years ago, in *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, this Court likewise unanimously endorsed the factual and legal predicates for the separate and distinct injury rule, if not the rule itself, in the context of a tort claim for asbestos injury. The plaintiff, Mr. Mitchell, was diagnosed with asbestosis in 1979, but the disease was not yet disabling and he retired later for other reasons. In 1993 his shortness of breath worsened and he filed an action. There was no question that suit was timely under Code of Civil Procedure section 340.2.

Before the case went to trial, Mitchell was diagnosed with malignant mesothelioma. He promptly filed a second action for those injuries in February, 1996. The defendants moved to dismiss on limitations grounds, arguing that the mesothelioma claim was untimely because it was brought more than one year after plaintiff "conceded" he suffered a disability by bringing the first action. The Court of Appeal agreed, apparently "assum[ing] that Mitchell had only a single cause of action for both his asbestosis and his mesothelioma." 22 Cal.4th at 1145-46. On review, this Court squarely rejected that application of the "primary right" rule. The

Court reiterated that "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from **the particular injury suffered,**" *id.* at 1145, and found that the rule was inapplicable because, although they resulted from the same exposures, the two cases brought by plaintiff were for "separate and distinct" injuries:

> [T]he asbestosis found in Mitchell's lungs in 1979 and the malignant mesothelioma found in his abdomen in 1996 were two separate and distinct diseases. Except for the likelihood that both were initially triggered by Mitchell's occupational exposure to asbestos, the two were unrelated in all respects: one did not cause or evolve into the other, they developed by means of wholly different mechanisms and at widely different rates, affected different tissue and organs, manifested themselves at different times and by different symptoms, and carried very different outcomes.

22 Cal.4th at 1136.

Although the majority opinion rested its decision on Code of Civil Procedure section 340.2 (which it construed in plaintiff's favor) rather than on that holding, the concurring opinion of Justice Brown advocated the explicit adoption of the "separate and distinct" injury rule as a better rule of decision:

> [P]laintiff in this case did not allege the same causes of action in his two lawsuits. Plaintiff's first action sought recovery for asbestosis. In contrast, his second action sought recovery for mesothelioma, a different and unrelated disease caused by asbestos exposure. Thus, the causes of action in the second complaint were

> separate and distinct from those in the first complaint, and the filing of the first action did not trigger the one-year statute of limitations for the causes of action in the second action. [footnote] As such, plaintiff's second lawsuit would not be time-barred....

22 Cal.4th at 1150. In a footnote, Justice Brown noted that "Most other jurisdictions have reached the same conclusion," citing decisions from state and federal courts in the District of Columbia, Florida, Illinois, Maryland, Michigan, New York, Pennsylvania, Tennessee and Wisconsin.

This Court adopted a similar rationale in concluding that, for purposes of applying the "delayed discovery rule," a cause of action does not accrue until the time that a reasonable investigation would "reveal[] a factual basis *for that particular cause of action*." *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 803 (emphasis added). Plaintiff in *Fox* was the victim of gastro-intestinal surgery gone wrong. Plaintiff sued her surgeon and hospital for medical malpractice, and then sought to amend her complaint to add a strict products liability claim against the manufacturer of the surgical stapler used in her procedure. Plaintiff asserted that she had no notice of that potential claim until defendant surgeon testified, at deposition, that he had found on previous occasions that such

staplers had caused postsurgery leaks. The manufacturer demurred on the ground that any cause of action plaintiff might have had against it was time-barred by former Civil Procedure Code § 340 (3).

This Court refused to so strictly apply the discovery rule, holding instead that a plaintiff can only be charged with knowledge of those causes of action which a reasonable factual investigation could have revealed. *Fox, supra*, 35 Cal.4th at 803. The opinion explains:

> As the allegations in this case illustrate, a diligent plaintiff's investigation may disclose an action for one type of tort (e.g., medical malpractice) and facts supporting an entirely different type of tort action (e.g., products liability) may, through no fault of the plaintiff, only come to light at a later date. Although both claims seek to redress the same physical injury to the plaintiff, they are based on two distinct types of wrongdoing and should be treated separately in that regard.

35 Cal.4th at 814-15.

This case requires precisely the same type of analysis. No amount of investigation by individuals like Pooshs can ever discover latent diseases like lung cancer – diseases which, in fact, they probably will not develop – unless and until they have some clinical, symptomatic manifestation of injury. If plaintiffs like Fox, who are disabled from *discovering* their causes of action, are thereby excused from filing an action, how much stronger is the case for

individuals like Pooshs, who do not in fact *have* any cause of action until their latent diseases become manifest?

While this precise issue has not previously been addressed by this Court, the California Court of Appeal did have occasion directly to address the similar question "whether the first sign of an asbestos-related disease triggers the running of the statute of limitations on all separate and distinct asbestos-related diseases caused by the same asbestos exposure." *Wagner v. Apex Marine Ship Mgmt. Corp.* (2001) 83 Cal.App.4th 1444, 1449. In *Wagner*, a case arising under the Jones Act, plaintiff alleged he was diagnosed with asbestos-related pleural disease in 1993, and with asbestosis in 1998. Defendant argued that the 1998 action was time-barred because all claims for asbestos-related injury accrued in 1993. The Superior Court granted a demurrer on that basis, but the Court of Appeal reversed.

Finding that "few Jones Act cases have addressed a question even somewhat similar to the one before us," and critical of the reasoning of those that had,[8] the Court looked to federal maritime

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[8] As the Court held, "While decisions of the United States Supreme Court are binding on state courts on federal questions, 'the decisions of the lower federal courts, while persuasive, are not binding on us.' [Citation.] Thus, in the absence of a controlling United

law, including the decision in *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (discussed *infra*), and held that "each disease resulting from asbestos exposure triggers anew the running of the statute of limitations." *Id.* at 1453. The opinion explains:

> [W]e find that appellant has stated a timely claim for his asbestosis, which, according to the complaint, was diagnosed in 1998 and is a separate disease from his previously diagnosed pleural disease. *To hold otherwise would leave plaintiffs in Jones Act cases, such as appellant, with the untenable choice of either suing and attempting to prove damages for mild, asymptomatic asbestos-related diseases or being forever barred from obtaining any relief for the often devastating effects of prolonged asbestos exposure.* Accordingly, we conclude that the trial court erred in sustaining respondents' demurrer without leave to amend.

Id. at 1454 (emphasis added, citation and footnote omitted).

As the above cases show, the need for flexibility in the application of statutes of limitation in response to the realities of our chemical-laden society has long been recognized by the California courts. As this Court said in *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 610 (quoted in *Martinez-Ferrer*, 105 Cal.App.3d at 324), "The response of the courts [to advances in science and technology]

States Supreme Court opinion, we make an independent determination of federal law. [Citations]" 83 Cal.App.4th at 1451.

can be either to adhere rigidly to prior doctrines, denying recovery to those injured by such products, or to fashion remedies to meet those changing needs." *See also Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 247 ("Statutes of limitations are not so rigid that under certain circumstances principles of equity and justice will not allow them to be extended or tolled. This may happen by the occurrence of events or causes not mentioned in the statute itself."); *Martinez-Ferrer,* 105 Cal.App.3d at 324 ("The simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long-delayed side effects.") Like lawsuits for exposure to asbestos and other hazardous substances whose long-term injurious effects were at first unknown and later, concealed and misrepresented, tobacco personal injury actions require such flexible handling.

Individuals such as Pooshs, like the plaintiffs in the above-cited drug and asbestos cases, have no way of knowing, detecting, or even predicting the latent diseases which they may develop years – often decades – after their exposure to the defendants' products.

There is no rational basis for applying a different rule of decision in such actions than in cases such as *Coots, Martinez-Ferrer, Hamilton,* and *Wagner,* each of which concluded that it would be patently unfair – and certainly not legally required –to bar a plaintiff who develops a serious illness from suing for those injuries just because he previously suffered some minor harm from the same products but deemed those injuries unworthy of litigation. All of those considerations militate in favor of a holding that the accrual of a smoker's separate cause of action, if any, for an early diagnosis of a smoking-related injury does not trigger the running of the statute of limitations for later-diagnosed, separate and distinct diseases caused by the consumption of tobacco products.

C. The Separate and Distinct Injury Rule Has Been Adopted by the Overwhelming Majority of Federal and State Courts That Have Faced the Issue.

The rule advocated by petitioner Pooshs, and endorsed by the cases discussed above, is not an aberration of "liberal" California. Although their decisions are not binding on this Court, the majority of the courts across the country that have considered the issue have adopted the separate and distinct injury rule in cases analogous to this one.

Among those, the seminal decision is the above-referenced opinion of the District of Columbia Circuit in *Wilson*. *Wilson* was an asbestos cancer case in which the defendant mounted a limitations defense on evidence that the plaintiff had been diagnosed with asbestosis many years before his cancer arose. The court recognized the unjust predicament in which plaintiffs would be placed if that theory were accepted, and it refused to countenance that injustice:

> [W]e take into account the interests generally involved in personal injury and death cases: plaintiff's in obtaining at least adequate compensation, defendant's in paying no more than that. Integrating these two, the community seeks to advance, through the system of adjudication, relief that will sufficiently, but not excessively, compensate persons for injuries occasioned by the tortious acts of others. In latent disease cases, this community interest would be significantly undermined by a judge-made rule that upon manifestation of any harm, the injured party must then, *if ever*, sue for *all* harms the same exposure may (*or may not*) occasion some time in the future.
>
> The traditional American rule, adopted in the District of Columbia, is that recovery of damages based on future consequences may be had only if such consequences are "reasonably certain."
> * * *
> In view of the "reasonably certain" standard, it appears that Johns-Manville is urging for cases of this sort (in which cancer is diagnosed years after asbestosis becomes manifest) more than a time-bar; it is urging, in essence, that there can *never* be a recovery for cancer

> unless (1) a lawsuit is filed within three years of the asbestosis diagnosis, and (2) cancer becomes manifest during the course of that lawsuit. For it is altogether likely that had Wilson, upon receiving the "mild asbestosis" diagnosis, sought to recover for a cancer which might (or might not) develop, Johns-Manville would have argued forcibly that the probability of such a development was far less than 50%, and was therefore too speculative, conjectural, uncertain to support a damage award.

684 F.2d at 119-20 (emphasis added, footnotes omitted). Those are the precise policy interests at stake here.

Wilson is far from alone among federal decisions that have adopted or approved the "separate and distinct injury" rule for a variety of both federal and state law causes of action. Those decisions include: *Mix v. Delaware & Hudson Ry. Co.,* 345 F.3d 82, 90-91 (2d Cir. 2003) (FELA action, tinnitus and hearing loss); *Fonseca v. Consolidated Rail Corporation,* 246 F.3d 585, 589-90 (6th Cir. 2001) (FELA action, wrist injury and carpal tunnel syndrome); *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 320-21 (5th Cir. 1986) (Jones Act case; court found that seaman who was accidentally soaked with toxic chemicals had a ripe claim for medical monitoring, and would have a separate claim in the future should he be unfortunate enough to contract cancer); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 519-21 (5th Cir. 1984)

cert. denied, 478 U.S. 1022 (1986) (Mississippi law, asbestosis and cancer);[9] *Golod v. Hoffman La Roche*, 964 F.Supp. 841, 850-52 (S.D.N.Y. 1997) (New York's "two-injury" rule[10] applied to a claim for injuries caused by defendant's psoriasis medication, where the plaintiff suffered a long series of eye problems that were represented in product inserts to be temporary side-effects, but later went permanently blind in one eye); *Braune v. Abbott Labs*, 895 F.Supp. 530, 555, 567 (E.D.N.Y. 1995) (New York and Colorado two injury rules applied in "DES daughter" cases); *Colby v. E.R. Squibb & Sons, Inc.*, 589 F.Supp. 714, 716-717 (D. Kan. 1984) (Kansas law, DES daughter case; plaintiff who underwent a hysterectomy for non-malignant complications of her exposure permitted, several years later, to sue for a carcinoma that was also tied to DES).

Worthy of special discussion are two Circuit Court cases which applied the "separate and distinct injury" rule to tobacco personal

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[9] *Jackson's* application of the "separate and distinct" injury rule was cited approvingly by the Mississippi Supreme Court in *Gentry v. Wallace*, 606 So.2d 1117, 1122 (Miss. 1992).

[10] The rule in New York is that, "diseases that share a common cause may nonetheless be held separate and distinct where their biological manifestations are different and where the presence of one is not necessarily a predicate for the other's development." *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856, 858 (N.Y.Sup.Ct. 1989), *aff'd.* 565 N.Y.S.2d 357 (1st Dept. 1991).

injury cases essentially identical to this one. In *Nicolo v. Philip Morris,* Inc., 201 F.3d 29 (1st Cir. 2000), the plaintiff, an "addicted cigarette smoker for most of her adult life, had contracted, by 1988, a series of smoking-related illnesses, including asthma, emphysema, and chronic obstructive pulmonary disease (COPD)." 201 F.3d at 30. Plaintiff lived with those afflictions and did not sue. Five years later, she was diagnosed with cancer. As always, the tobacco defendants asserted that her claims were time-barred, in that case by Rhode Island's three year statute of limitations.[11] Plaintiff countered with

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[11]The tobacco defendants are particularly motivated to defeat cases on any procedural basis, even the most absurd interpretation of the statute of limitations, given the fact that any defense on the case merits is particularly problematic for them. *See, United States v. Philip Morris USA, Inc.,* 2009 U.S. App. LEXIS 11008 (D.C. Cir., May 22, 2009) in which a unanimous panel of the U.S. Court of Appeals for the District of Columbia upheld the ruling of the D.C. District Court that nine cigarette manufacturers, including Philip Morris USA, Inc. and R.J. Reynolds Tobacco Company, violated federal racketeering laws by joining in a 50-year conspiracy to deceive the American public about the health effects and addictiveness of cigarettes. (United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006)) The violations found and affirmed included: "(1) falsely denying the adverse health effects of smoking, (citation omitted); (2) falsely denying that nicotine and smoking are addictive, (citation omitted); (3) falsely denying that they manipulated cigarette design and composition so as to assure nicotine delivery levels that create and sustain addiction, (citation omitted); (4) falsely representing that light and low tar cigarettes deliver less nicotine and tar and therefore present fewer health risks than full flavor cigarettes, (citation omitted); (5) falsely denying that they market to youth, (citation omitted); (6) falsely denying that secondhand smoke causes

authority for the "separate and distinct injury" rule. Finding no governing precedent, the Court of Appeals set out to find a "fair standard," and adopted a version of the plaintiff's proposed rule which requires a smoker to sue, not when she "becomes addicted" or suffers early mild symptoms, but when her physical ailments become such that she knows or should know she is likely to contract cancer:

> We ... are confident that a Rhode Island court would not deem cancer to be so foreseeably related to the very beginning of plaintiff's respiratory difficulties as to identify that as the time of accrual of her cause of action for cancer. Plaintiff argues for setting the time of medical diagnosis of cancer as the time of accrual. While there may be cases where such a time would be appropriate, it is also possible in the case of a long-time addictive smoker that the progression of illnesses, the presence of symptoms indicative of cancer, the nature of materials read, or discussions with doctors, etc., so point to the likelihood of cancer that it is fair to expect a plaintiff to bring suit and where further delays would impose an untoward burden on a defendant.
>
> It seems to us, as it did to the district court, that a fair balancing of the legitimate interests of the parties lies in a middle position that would not allow a plaintiff to sleep on her rights but would not, in the interests of repose and evidence preservation, severely jeopardize a plaintiff's opportunity to obtain compensation for contracting cancer. The district court's framing of its

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disease, (citation omitted); and (7) suppressing documents, information, and research to prevent the public from learning the truth about these subjects and to avoid or limit liability in litigation, (citation omitted)." (*United States v. Philip Morris USA, Inc.*, 2009 U.S. App. LEXIS 11008, 16-17)

[12] The Court is referring to *Wilkinson v. Harrington*, 243 A.2d 745 (R.I. 1968) and *Lee v. Morin*, 469 A.2d 358 (R.I. 1983). In *Wilkinson*, a medical malpractice action, the court discussed its deep concern about "the manifest unfairness of barring 'the enforcement of injury claims brought by a plaintiff who was not, nor could not have known that he was, the victim of tortious conduct because the consequent harm was unknowable within two years of the negligent act.'" *Nicolo,* 201 F.3d at 35, *Wilkinson*, 243 A.2d at 752. In *Lee*, a construction defect case, "the court set forth its rationale for a manifestation of injury rule of accrual saying that 'a person [should] have a reasonable opportunity to become cognizant of an injury'" before being required to sue. *Nicolo*, 201 F.3d at 35, *Lee*, 469 A.2d at 361. These cases illustrate the broad acceptance of the "separate and distinct" injury rationale in a variety of applications, even outside the personal injury context.

plaintiff's claims for smoking–related lung cancer were time-barred because she had long ago been diagnosed with and treated for smoking-related laryngeal cancer. The court ruled for plaintiff, squarely applying and refusing to reconsider the New York "two–injury" rule. 167 F.R.D. at 12-15.

There is, likewise, as this court noted in *Grisham*, a long line of state court authority from around the country adopting and applying the "separate and distinct" or "two injury" rules in asbestos and other cases involving toxic substances that have both short term and long term effects. These include: *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 644 (Tex. 2000) (framing the question as "whether the single action rule or the statute of limitations bars Henry Pustejovsky, who settled an asbestosis suit with one defendant in 1982, from bringing suit against different defendants twelve years later for asbestos-related cancer," and answering that question in the negative); *Sopha v. Owens- Corning Fiberglas Corp.*, 601 N.W.2d 627, 630 (Wis. 1999) ("We conclude that a diagnosis of a non-malignant asbestos-related lung pathology does not trigger the statute of limitations with respect to a claim for a later diagnosed, distinct malignant asbestos-related condition."); *Giffear v. Johns-*

Manville Corp., 632 A.2d 880, 885-86 (Pa. Super. 1993) (since Pennsylvania has adopted the "separate disease rule," plaintiffs need no longer sue for asymptomatic pleural thickening in order to bring a later claim for mesothelioma if and when it is diagnosed); *Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111, 113 (Colo. 1991) (plaintiff's initial diagnosis of asbestos-related pleural thickening did not start the limitations period for his claim for later-developing asbestosis); *Wilber v. Owens-Corning Fiberglas Corp.*, 476 N.W.2d 74 (Iowa 1991) (manifestation of asbestosis does not trigger the statute of limitations on all separate, distinct and later-manifested diseases which may have stemmed from the same asbestos exposure, *see* Iowa Code Ann. § 614.1(2A)(b); *Fusaro v. Porter-Hayden Co., supra*, 548 N.Y.S.2d at 858-60 (holding that an "injury" for statute of limitations purposes "should be equated with physical manifestation of the particular disease for which compensation is sought," and finding that "it would be unfair to prohibit claims for increased risk of cancer for asbestosis sufferers and at the same time, hold that failure to bring a suit against any or all defendants when plaintiff is suffering from asbestosis acts as a time bar to a future cancer claim."); *Sheppard v. A.C. & S. Co.*, 498

A.2d 1126, 1134 (Del. Super. 1985) ("latent disease cases justify a change in our perception and application of the statute of limitations to the end that a plaintiff with the misfortune of contracting more than one asbestos-related ailment over a long period of time not be without a remedy for the later and generally more serious and inherently unknowable claims."); *Anderson v. Sybron Corp.*, 353 S.E.2d 816, 817-18 (Ga.App. 1983) *aff'd sub nom. Sybron Corp. v. Anderson*, 310 S.E.2d 232 (Ga. 1983) (reciting the rule that "the occurrence of an injury" means the discovery of the particular injury for which the action is brought, and upholding claim for eye cataracts allegedly suffered from same exposure to ethylene oxide which had previously caused plaintiffs various other physical ailments). *See also* Indiana Code § 34-20-3-2(a)(2) ("The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action."). *Compare Green v. A.P.C.*, 960 P.2d 912, 917 (Wash. 1998) (refusing to adopt "two injury" rule in DES case, in absence of record evidence that the condition for which plaintiff was suing was medically separate and distinct from other DES-related conditions

that plaintiff knew she suffered from several years before she brought suit).

In a number of those decisions, the courts observed that they were adopting the clear majority rule. *See, e.g., Wilber, supra*, 476 N.W.2d at 75 (citing cases from Delaware, Illinois, Maryland, Michigan, New York and Tennessee). All of them – including the analogous decisions from California – followed a consistent line of reasoning that can be summarized as follows:

(1) The traditional "single-injury" rule works an injustice in toxic substance cases where an exposure can lead to two or more separate and distinct injuries, one or more of which does not arise for years or decades. The injustice stems from the fact that the plaintiff may be left with *no remedy* for the later, serious illness, *no matter what she does*. If she immediately brings a claim for the mild injury and also alleges there is a *possibility* she may suffer other serious injuries in the future, she will be unsuccessful, because a plaintiff generally must show it is "more likely than not" she will contract the disease. *See Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 974. If the plaintiff instead waits until she actually suffers from the latent disease (such as smoking-related lung cancer), under the

traditional rule it will be too late to sue for it. As the First Circuit explained in *Nicolo*:

> [W]ere [the single injury] rule applied to a latent, long-delayed cancer case, it would place ... a victim in an impossible position. If he did not sue at the earliest onset of breathing difficulty or emphysema, he would risk being barred from pursuing a remedy for a cancer condition discovered much later. If, on the other hand, he brought suit at such an early stage he would not be able to come forward with the proof of sufficient likelihood of damage from cancer to sustain his cause of action.

201 F.3d at 35.

In short, under the single injury rule, an injured person can *never* be fairly compensated for a latent disease. Initially the claim for the latent disease is speculative, and when it is no longer speculative, it is untimely. Such a result is illogical, discriminatory, and unfair.

(2) Application of the two injury rule serves to *promote* rather than to undermine judicial economy and certainty, by removing any incentive to bring a premature action in order to protect against the possibility or fear of contracting a latent, serious disease. Until they contract a serious illness, plaintiffs need not file a case. As a unanimous Texas Supreme Court has explained:

> An additional policy reason for the single action rule is the need to protect defendants from vexatious, piecemeal litigation and provide judicial economy. But having to defend against the *potential* for cancer in every asbestosis case, if we were to allow such a claim, is arguably more vexatious and judicially inefficient than allowing a separate action for *actual* cancer cases.

Pustejovsky, *supra*, 35 S.W.3d at 653. *See also Sopha*, *supra,* 601 N.W.2d at 635 ("As the plaintiffs argue, and as other jurisdictions have recognized, a holding that bars the plaintiffs' cause of action for an asbestos-related malignancy creates incentives for claimants to rush to the courthouse to initiate anticipatory litigation.")

(3) By fostering a system whereby plaintiffs have the time to file actions for an actual disease, rather than for the fear or possibility of contracting that disease, the courts will have better medical evidence relating to damages and causation:

> Allowing claims to proceed when claimants file within three years of discovering an asbestos-related malignancy, as opposed to trying damages for the risk or fear of cancer when the first effects of exposure to asbestos appear, promotes the development of more accurate factual records for deciding damages. Moreover, there is almost no chance that the allegation of the existence of mesothelioma or any other malignancy would be fraudulent.

Sopha, 601 N.W.2d at 635. The same policies are equally applicable to tobacco claims.

This court recognized that fact in its *Grisham* decision when it discussed the tobacco defendants' arguments:

> In the present case the rule proposed by Philip Morris, like the Bristol-Myers Squibb rule we rejected in *Fox*, would compel cigarette smokers either to file groundless tort causes of action based on physical injury against tobacco companies as soon as they discovered they were addicted to cigarettes and had an unfair competition cause of action (again, assuming such a cause of action exists), or risk losing their right to sue in tort for such physical injury. This rule would violate the essence of the discovery rule that a plaintiff need not file a cause of action before he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.] (Fox, supra, 35 Cal.4th at p. 807.) It would directly contravene the interest of the courts and of litigants against the filing of potentially meritless claims.

40 Cal.4th 623, 645. Yet that is what the tobacco defendants here, and the district court by its ruling, would have plaintiffs do. They seek to invoke a system in which a person diagnosed with any smoking related illness must file (to paraphrase the court) a "probably meritless claim" for tobacco related lung cancer. Since less than two in ten lifelong smokers will develop lung cancer[13], over eighty percent of such claims would be meritless.

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[13]See, e.g., Lung Cancer and Smoking Statistics—risk and life expectancy Cancer Research UK <http://info.cancerresearchuk.org /cancerstats/types/lung/smoking/>, [as of Feb. 15, 2007] [the cumulative risk of dying of lung cancer by age 75 for a male lifelong smoker is 15.9 percent].) Cited in *Grisham v. Philip Morris USA, Inc.*, 40 Cal.4th 623, 645. *See also*, footnote 4, *supra*.

D. Failure To Recognize The "Separate And Distinct Injury" Rule In Tobacco Personal Injury Cases Would Result In A Violation Of This State's Established Public Policy.

This Court's formal recognition of the separate and distinct injury rule in tobacco personal injury cases is essential to promote the established public policy of ensuring that there is no "statutory bar" to recovery for tobacco-related personal injuries by California smokers. In *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, this Court reviewed the history of the tobacco "immunity statute," former Civil Code § 1714.45, and the similarly codified "repeal statute" enacted effective January 1, 1998, and summarized the legislative findings as follows:

> In 1995, the California Legislature found that "[t]obacco related disease places a tremendous financial burden upon the persons with the disease, their families, the health care delivery system, and society as a whole," and that "California spends five billion six hundred million dollars ($5,600,000,000) a year in direct and indirect costs on smoking-related illnesses." (Health & Saf. Code, § 104350, subd. (a)(7).) To obtain compensation for the physical and mental suffering and staggering expenses inflicted by tobacco-related illness, users of tobacco products and their families have sought relief in our courts through product liability lawsuits against manufacturers and sellers of tobacco products.

Myers, 28 Cal.4th at 831. The Court found that the repeal statute was passed in order to reverse the prior impediment to plaintiffs'

ability to recover for those injuries. *Id.* at 837. The statute now provides:

> (b) This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions....
>
> (f) It is the intention of the Legislature in enacting the amendments ... to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the Legislature to clarify that *such claims ... shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense.* [emphasis added]

Cf. Coots, supra, 49 Cal.2d at 807-808 (rejecting a "mechanical analysis" of the timeliness of plaintiff's claims lest the statute of limitations be used to "thwart the congressional purpose" of FELA, to provide compensation for occupational diseases.)

The District Court's interpretation of California's personal injury statute of limitations as triggering the requirement to sue for latent, unknown diseases at the time of the plaintiff's knowledge of any tobacco related injury inexorably operates as precisely such a statutory bar. The test operates to preclude virtually all plaintiffs

whose latent diseases did not manifest until years after their first symptoms of tobacco related injury (and often, as in the case of Pooshs, years after they ceased smoking entirely) from bringing suit to recover for those personal injuries. In fact, the district court's standard appears to go *farther* than the former immunity statute, because it applies to all tobacco injury claims regardless of plaintiff's claims. In contrast, in *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, this Court held that even during the decade when it was in effect, the immunity statute did not bar claims that the tobacco industry manipulated the addictive qualities of cigarettes through additives, such as ammonia, because the law extended only to dangers "inherent in cigarette products" themselves.

The District Court's ruling, and the position advocated by the tobacco industry, violates the very public policy – avoidance of unnecessary litigation – which this Court said it is necessary to advance. *Grisham, supra,* 40 Cal.4th at 645 That is, all individuals who realize they have a tobacco-related disease, no matter how slight, and are concerned about the risk of later contracting a serious smoking-related disease now face not only an incentive, but in effect a requirement, to file suit immediately. Such suits, even if not

dismissed out of hand, will not result in meaningful compensation to those individuals who have no present symptoms of serious disease, but develop those diseases in the future. Because smoking elevates the risk of getting cancer but does not, fortunately, make it *probable* that the smoker will get cancer, in most cases nothing more than nominal damages would be recoverable. As this Court stated in *Fox*, statutes of limitation are designed to serve two major public policies: to give defendants reasonable repose and protection from "stale" claims, and to stimulate plaintiffs to pursue their claims diligently. 35 Cal.4th at 806. Neither of those policies is served by a rule which would require plaintiffs prematurely to sue for potential future injuries which no amount of earlier investigation could reveal. To the contrary, as *Fox* holds:

> It would be contrary to public policy to require plaintiffs to file a lawsuit "at a time when the evidence available to them failed to indicate a cause of action." [citations] Were plaintiffs required to file all causes of action when one cause of action accrued, ..., they would run the risk of sanctions for filing a cause of action without any factual support. [citations] Indeed, it would be difficult to describe a cause of action filed by a plaintiff, before that plaintiff reasonably suspects that the cause of action is a meritorious one, as anything but frivolous. At best, the plaintiff's cause of action would be subject to demurrer for failure to specify supporting facts.

Id. at 816.

In contrast to the vital goal of providing Californians with a meaningful forum in which to have their smoking-related claims determined on the merits – a policy which has, so far, been duly protected by the appellate courts of California in cases such as *Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640 and *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, the tobacco companies present *no* competing policy justifications for adopting a rule which would categorically preclude such suits in the future. This court noted that fact in its decision in *Grisham:*

> Philip Morris cites no authority, and we have found none, for the proposition that the rule that the statute of limitations commences with the infliction of appreciable injury bars suits based on a later manifesting injury of a different type.

40 Cal. 4th at 644.

Grisham also placed great weight on public policy. *Grisham* explained its rejection of the holding in *Bristol-Myers Squibb Co. v. Superior Court*, 32 Cal.App.4th 959 (1995) that "when a plaintiff has a cause to sue based on knowledge or suspicion of negligence the statute starts to run as to all potential defendants." The opinion quoting *Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal. 4th at 815 states:

> One of the reasons for our rejection was that '[i]t would be contrary to public policy to require plaintiffs to file a lawsuit 'at a time when the evidence available to them failed to indicate a cause of action'. (citation omitted) Were plaintiffs required to file all causes of action when one cause of action accrued, as they would be under the *Bristol-Myers Squibb* rule, they would run the risk of sanctions for filing a cause of action without any factual support. (citation omitted) Indeed, it would be difficult to describe a cause of action filed by a plaintiff, before that plaintiff reasonably suspects that the cause of action is a meritorious one, as anything but frivolous. At best, the plaintiff's cause of action wold be subject to demurrer for failure to specify supporting facts. (citation omitted) In sum, the interest of the courts and of litigants against the filing of potentially meritless claims is a public policy concern that weighs heavily against the *Bristol-Meyers Squibb* formulation of the discovery rule.

40 Cal.4th 644-45.

Grisham determined that an injured party's economic claims could be protected separately from their physical injuries. The tobacco defendants would have this court apply that holding to decide that Nikki Pooshs' physical injury, her fatal, tobacco-induced lung cancer is somehow less worthy of a cause of action than any claim for money damages due to the defendants marketing activities - claims not made here. How unsupportable would such a result be? The grievous personal injury suffered by a plaintiff should be subject to far more protection than an economic injury. *See, e.g. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 [the first

consideration for a court in determining the reprehensibility of a defendant's conduct in considering punitive damages should be whether the harm caused was physical as opposed to economic] Petitioner's physical injury should be entitled to more, not less protection than any economic injury.

Grisham left "for another day the question of whether and under what circumstance two physical injuries with different manifestation periods arising out of the same wrongdoing can be the legitimate bases for two different lawsuits." *Grisham v. Philip Morris U.S.A., Inc., supra*, 40 Cal.4th at 646. That day has now arrived. Public policy would certainly be undermined by a rule that an injured party must, upon manifestation of any harm, sue for all harms the same exposure may (or may not) occasion some time in the future. Such a policy would promote frivolous litigation, frustrate judicial economy, and deprive truly deserving plaintiffs, like Pooshs, of their day in court. As in *Martinez-Ferrer,* it would be "a miscarriage of justice not to permit plaintiff to go to trial." 105 Cal.App.3d at 327.

CONCLUSION

In *Grisham* this Court put off for another day the question it now faces. But the court does not address the question in a

vacuum. California courts have applied the two disease rule in a variety of circumstances for over fifty years. And, as the Court has already noted, there is no case law which supports the tobacco defendants' proposition, or the District Court's holding on the statute of limitations. There is simply no support for the conclusion that the statute of limitations which commences with the infliction of appreciable injury bars suits based on a later manifesting injury of a different type. Nikki Pooshs timely sued for her tobacco-related lung cancer. To hold otherwise would produce the Kafkaesque result that healthy plaintiffs would be required to file speculative lawsuits for cancer and other injuries that they did not have, and probably will not get, while terminally ill and suffering plaintiffs would be barred from reasonable compensation on the ground they sued too late. This Court can, and should prevent such an unfair result.

Respectfully submitted,

Dated: June 18, 2009

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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)(1)]

The text of this brief consists of 10,424 words as counted by the word-processing program used to generate the brief.

Dated: June ____, 2009 BRAYTON ❖PURCELL LP

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PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 222 Rush Landing Road, Novato, California 94948-6169.

On June 19, 2009, I served the attached:

NIKKI POOSHS v. PHILIP MORRIS, USA, et al.
Supreme Court Case No. S172023

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XXX BY OFFICE MAILING: I am readily familiar with this office's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service on that same day with postage thereon fully prepaid at Novato, California in the ordinary course of business. I placed in the outgoing office mail, the above-described document(s), in a sealed envelope, addressed to the party(ies) as stated above, for collection and processing for mailing the same day in accordance with ordinary office practices.

Executed this **June 19, 2009** at Novato, California.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

JANE EHNI