

CA No. 08-16338

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NIKKI POOSHS,
Plaintiff/Appellant,

v.

PHILIP MORRIS USA INC., *et al.*,
Defendants/Appellees,

**On Appeal from the United States District Court
for the Northern District of California
(No. C-04-1221-PJH, Honorable Phyllis J. Hamilton)**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES,
URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company.

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**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES,
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INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set forth in more detail in the accompanying motion for leave to file this brief. WLF is a public interest law and policy center with supporters in all 50 States, including many in California. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared before this Court and numerous other federal and State courts in cases raising tort reform issues, and has regularly urged courts to protect defendants against excessive tort liability by fully enforcing the terms of statutes of limitations. *See, e.g., Rotella v. Wood*, 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *Grisham v. Philip Morris USA, Inc.*, 40 Cal. 4th 623 (2007).

WLF is concerned that the theory being pressed by Appellant would constitute a dramatic change in the law and would undermine the many salutary purposes served by statutes of limitations. Such statutes are intended to give defendants reasonable repose, thereby protecting them from being forced to defend stale claims.

The “separate injury” approach urged by Appellant would repeatedly restart the limitations period in personal injury cases as further injury comes to light. Because the full extent of personal injury flowing from an alleged wrong generally will not be apparent until years after the injury has initially been discovered, WLF is concerned that Appellant’s approach would create an open-ended time frame at odds with the statutory aims of affording defendants reasonable repose and protecting them and the litigation process from inefficiency inherent in permitting pursuit of stale claims.

WLF does not believe that such a dramatic contraction of statute of limitations defenses is warranted. Such a contraction would reverberate far beyond the tobacco industry and would undermine the numerous interests served by statutes of limitations.

WLF has no direct interest, financial or otherwise, in the outcome of this case and thus brings to the case a perspective that is distinct from that of any of the parties. It is filing its brief for the sole purpose of sharing with the Court its views on important legal issues.

STATEMENT OF THE CASE

Appellant Nikki Pooshs smoked cigarettes from 1953 to 1991. Over the course of the last two decades, she has been diagnosed with a series of diseases

that she recognizes as smoking-related. In 1989 and again in 1999, she was diagnosed with chronic obstructive pulmonary disease (“COPD”), and in 1990 she was diagnosed with “very, very painful” periodontal disease. In 2003, she was diagnosed with lung cancer.

Pooshs filed this suit in 2004, within one year of her lung cancer diagnosis. She alleges that from 1953 through at least the end of 1987, Appellees engaged in a conspiracy to mislead the public concerning the health effects of tobacco and the addictiveness of nicotine. She alleges that as a result of Appellees’ wrongful conduct, she continued smoking until 1991– by which time she was aware that she was suffering from smoking-related illness. She alleges that her smoking caused her to develop lung cancer.

Following a remand from this Court, the district court granted Appellees’ motion for summary judgment on May 27, 2008. E.R. 5-28. Appellees contended that the limitations period began to run on Pooshs’s personal injury claims no later than 1989 (when she was diagnosed with COPD, a severe, smoking-related illness).¹ The district court agreed, citing the California

¹ There has been some disagreement regarding whether, under California law, the appropriate limitations period for Pooshs’s personal injury claims is one year or two years. In light of the issues raised in this appeal, however, that disagreement is not relevant to whether Pooshs’s complaint was timely filed. Nor is it relevant whether Appellees conspired to mislead the public in more

Supreme Court’s recent decision in *Grisham v. Philip Morris USA, Inc.*, 40 Cal. 4th 623 (2007), for the proposition that Pooshs’s “physical injury claims are barred under the ‘first-injury’ rule.” E.R. 27. The court explained that “nothing in *Grisham* suggests that different personal injuries involve different primary rights, and [Pooshs] is not correct when she suggests that there is a ‘right’ to be free of lung cancer that is distinct and separate from the ‘right’ to be free of other types of physical injury.” *Id.* It held that Pooshs’s “awareness by the early 1990s that she suffered from serious smoking-related illnesses started the statute of limitations running as to her personal injury claim.” *Id.* The court held that the California Supreme Court in *Grisham* “did not reject the ‘first injury’ rule, and it remains the law unless the Legislature amends it by statute.” E.R. 28.

Pooshs has appealed from the district court’s judgment. She urges the Court to abandon the first-injury rule (referred to by Pooshs as the “single-injury rule”) in all personal injury actions involving latent diseases, arguing that application of the rule in such actions is “illogical, discriminatory, and unfair.” Appellant’s Br. 22.

recent years – because Pooshs quit smoking in 1991 and thus did not rely to her detriment on any post-1991 statements regarding the health effects of smoking.

SUMMARY OF ARGUMENT

As this Court recently recognized, California law adheres to the first-injury rule. California law has long provided that the discovery of personal injury arising from a defendant's wrongdoing starts the limitations period running with respect to *all* personal injuries arising from the same wrongdoing, regardless when discovered:

“If the statute of limitations bars an action based upon harm immediately caused by defendant's wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing is normally barred.”

Soliman v. Philip Morris Inc., 311 F.3d 966, 972 (9th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (quoting *Miller v. Lakeside Vill. Condo. Ass'n*, 1 Cal. App. 4th 1611, 1622 (1991)). The Court explained that when a California tort plaintiff has “suffered a number of significant injuries from the cigarettes he smoked,” “[t]he injury he should have known about first is the one that starts the statute of limitations.” *Id.* Because Pooshs knew by 1989-1990 that she had suffered serious physical injury as a result of smoking cigarettes and that Appellees might have been to blame, *Soliman* compels a finding that the statute of limitations on a personal-injury action against Appellees began to run at that time – and has long since expired.

Pooshs asks this Court to ignore established Ninth Circuit and California

case law and to abandon the first-injury rule, because (she asserts) its application to her case would be “illogical, discriminatory, and unfair.” WLF agrees with Appellees that it would be inappropriate for the panel to disregard well-established California law out of sympathy for Pooshs’s plight. WLF writes separately to emphasize its belief that there is nothing illogical, discriminatory, or unfair in requiring those in Pooshs’s position to file suit within a finite period of time after discovering that they have suffered substantial personal injury and have reason to suspect that someone else is to blame.

Cases raising statute of limitations issues pose a conflict between two strong public policies – one favors granting repose for events that occurred in the distant past, the other favors merits-based disposition of legal claims. Statutes of limitations represent a pervasive legislative judgment that the right to be free of stale claims *in time* comes to prevail over the right to prosecute them. *United States v. Kubrick*, 444 U.S. 109, 117 (1979). In general, a cause of action accrues – and starts the clock running on any applicable limitations period – when a wrongful act has been committed and causes injury; that is, the clock begins running when the cause of action is complete with all of its elements.

By the twentieth century, courts and legislatures came to recognize that the general rule could be unfair to plaintiffs who did not discover – and had no

reasonable means of discovering – that they had been injured until after the generally applicable limitations period had expired. Thus was born the “discovery rule” exception to the general rule: it postpones accrual of a cause of action (at least in many instances) until the plaintiff discovers, or has reason to discover, the cause of action. But California courts have steadfastly recognized the fairness of requiring the plaintiff to file suit once he has reason to recognize that he has suffered significant personal injury, even when (as almost always will be the case) he is not yet aware of the full extent of his injuries.

Indeed, precisely because discovering the full extent of one’s injuries often takes many years, a rule that resets the clock every time a new injury is discovered would effectively eviscerate the protections afforded by statutes of limitations. As currently administered, the first-injury rule maintains a rough balance between the conflicting public policies at play in statute of limitations cases. At least as important, the first-injury rule is a “bright line” rule; it is relatively easy to determine (by reference to the plaintiff’s medical records) when the plaintiff first discovered (or ought to have discovered) that he or she had suffered an injury. In contrast, under Poosh’s proposed “separate and distinct” injury rule, there will be endless disputes regarding what constitutes a separate and distinct injury. Any imaginative plaintiffs’ lawyer will have no

difficulty constructing an argument that later-discovered injuries are sufficiently distinct from earlier physical injuries to re-start the clock under Poosh's proposed rule. To the extent that notions of fairness require that exceptions to the first-injury rule be created with respect to certain types of latent diseases, it is preferable that such determinations be made by the California legislature, which in the past has demonstrated its willingness to create exceptions to statutes of limitations in order to promote subject-matter-specific notions of fairness. It would certainly be highly inappropriate for the federal courts to create their own exceptions, which would of necessity apply across-the-board – to the detriment of all citizens' interests in repose.

Moreover, Poosh's "fairness" argument applies equally strongly to the individual who is physically injured by allegedly wrongful conduct, and then (as not infrequently occurs) years later incurs new physical injuries of precisely the same type – *e.g.*, the cancer that had been in remission for years suddenly and fatally recurs. Such a plaintiff can share in Poosh's complaint that application of the first-injury rule denies some individuals the opportunity to seek full compensation for injuries allegedly caused by another's wrongdoing. But even Poosh does not assert that the interests of such a plaintiff ought to trump the defendants' interests in repose; it is well recognized that countervailing public

policy considerations require that such a plaintiff be limited to one opportunity to seek recovery of damages, even if that limitation means that the plaintiff will have an opportunity to recover only a portion of his damages.

Pooshs's "fairness" claim should be rejected for identical reasons. In statute of limitations cases, fairness requires that some balance be maintained between the conflicting public policies at play. The first-injury rule maintains that balance. It ensures that plaintiffs such as Pooshs have an opportunity to seek recovery of some meaningful portion of the physical injuries they suffered (in this case, damages related to her COPD and her periodontal disease) while at the same time ensuring that defendants such as Appellees are not denied all opportunity for repose by leaving them subject to suit for a limitless time period for virtually any physical injury for which they are arguably responsible.

ARGUMENT

I. CALIFORNIA ADHERES TO THE FIRST-INJURY RULE

A. Under Existing Precedent, the Limitations Period on Pooshs's Claims Began to Run When She Discovered That She Had Suffered Serious Injury Due to Smoking

Generally speaking, a cause of action accrues (thereby causing the applicable limitations period to begin to run) at the time when the wrongful act is done; *i.e.*, the cause of action is complete with all its elements. *Norgart v.*

Upjohn Co., 21 Cal. 4th 383, 397 (1999). An important exception to the general rule of accrual is the “discovery rule,” which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. *Fox v. Ethicon Endo-Surgery, Inc.*, 27 Cal. 4th 797, 807 (2005). The plaintiff has reason to discover a cause of action when he or she has reason at least to suspect a factual basis for its elements – namely, wrongdoing, causation, and injury. *Id.*

Under that standard, Pooshs’s product liability cause of action against Appellees accrued in 1989-90. She does not contest that, by 1989-1990, she had discovered that she was suffering from serious smoking-related illnesses: COPD and periodontal disease. She also does not contest that, by 1989-1990, she had reason to suspect that her personal injuries were caused by Appellees’ wrongdoing. Pooshs’s product liability suit is thus time-barred.

Pooshs disputes that analysis, asserting that the only relevant personal injury for purposes of this suit is her lung cancer, which was not diagnosed until January 2003, less than a year before she filed suit. But California law is clear: the State adheres to the first-injury rule in personal injury cases. The discovery of personal injury arising from a defendant’s wrongdoing starts the limitations period running with respect to *all* personal injuries arising from the same

wrongdoing, regardless when discovered:

“If the statute of limitations bars an action based upon harm immediately caused by defendant’s wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing is normally barred.”

Soliman v. Philip Morris Inc., 311 F.3d at 972 (quoting *Miller*, 1 Cal. App. 4th at 1622). The Court explained that when a California tort plaintiff has “suffered a number of significant injuries from the cigarettes he smoked,” “[t]he injury he should have known about first is the one that starts the statute of limitations.” *Id.* See also *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 1024 n.5 (1987) (“The longstanding rule in California . . . is that ‘[a] single tort can be the foundation for but one claim for damages.’”) (quoting *Panos v. Great Western Packing Co.*, 21 Cal. 2d 636, 638 (1942)). Because Pooshs knew by 1989-1990 that she had suffered serious physical injury as a result of smoking cigarettes and that Appellees might have been to blame, *Soliman* compels a finding that the statute of limitations on a personal-injury action against Appellees began to run at that time – and has long since expired.

California does not apply the first-injury rule to trivial personal injuries. Such application has been deemed unduly harsh to plaintiffs who reasonably elect not to sue to recover insignificant damages and later, after the limitations period has expired, discover more serious injuries. *DeRose*, 196 Cal. App. 3d at

1022. But although a right to recover nominal damages will not trigger the running of the period of limitations, “the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period.”

Davies v. Krasna, 14 Cal. 3d 502, 514 (1975).² *Davies* provides no solace for Pooshs, however: she was diagnosed with serious smoking-related diseases in 1989-1990 (COPD and periodontal disease), physical injuries that unquestionably qualify as “appreciable and actual harm.” The discovery of those serious injuries commenced the running of the limitations period 15 years before she filed suit in 2004.

B. *Grisham* Did Not Change That Law, and Certainly Did Not Empower the Panel to Ignore Circuit Precedent

Pooshs asserts that California has abandoned its longstanding first-injury

² *Davies* is in accord with traditional legal principles:

Generally, there is but one single, indivisible cause of action for all injuries arising from the same tortious conduct, even though the ultimate damage or injury is unknown or unpredictable. This general principle is intended to promote finality and efficiency in litigation by requiring plaintiffs to recover all potential damages in one suit. Thus, subsequently discovered injuries do not cause the limitations period to recommence when these injuries are attributed to the same source.

63 Am. Jur. 2d *Products Liability* § 1581 (2008). The reference to “unknown or unpredictable” personal injuries clearly contemplates that at least some injuries not yet incurred may never be recoverable, regardless whether they are similar in nature to injuries already incurred.

rule, citing the California Supreme Court's recent decision in *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623 (2007). Nothing in that decision supports Poosh's argument.

The principal plaintiff in *Grisham* was a smoker who asserted two distinct types of tort claims against several cigarette manufacturers: (1) the defendants' wrongdoing had caused her to become addicted to cigarettes and to expend money to purchase cigarettes that she would not have purchased but for the defendants' wrongdoing; and (2) the defendants' wrongdoing caused her to smoke cigarettes and caused her eventually to develop serious smoking-related diseases, which were first diagnosed in 2001 (less than a year before she filed suit). The court held the first category of claims (which the court described as "her unfair competition and related causes of action") was time-barred because it depended on an assertion that she did not become aware of her addiction until many years after the fact, yet she failed to "plead facts showing an inability to have discovered that addiction, such as reasonable reliance on tobacco company misrepresentations." *Grisham*, 40 Cal. 4th at 638.

The court held that the second category of claims (her personal injury claims) was not time-barred because there was no indication that Grisham had reason to believe that she had suffered any physical injuries prior to her 2001

medical diagnoses. *Id.* at 641-44. The court said that the earlier discovery of the economic harm encompassed by the first category of claims (*i.e.*, the cost of purchasing cigarettes) did not start the clock running on Grisham’s personal injury claims because the economic harm constituted an entirely “different type” of injury, and “the two different types of injuries . . . g[ave] rise to two different types of action.” *Id.* at 642-43.

Nothing in *Grisham* indicates that the California Supreme Court disapproved the California and federal decisions cited above that have adhered to the first-injury rule in personal injury cases. Indeed, *Grisham* explicitly stated that it was *not* addressing that issue (*i.e.*, “whether and under what circumstances two different physical injuries arising out of the same wrongdoing can give rise to two separate lawsuits”) because the issue was not presented. *Id.* at 643.³

The district court correctly analyzed *Grisham* and other relevant case law. As it explained, California law does not recognize “a ‘right’ to be free of lung cancer that is distinct and separate from the ‘right’ to be free from other types of

³ *Grisham* disapproved of *Soliman* with respect to one issue not at issue here: *Soliman*’s holding that “there is a special presumption under California law based on common knowledge that a plaintiff is aware that smoking is addictive or harmful.” 40 Cal. 4th at 638. Rather, *Grisham* explained, while there is a general presumption that plaintiffs have knowledge of the wrongful cause of action, that presumption is rebuttable. *Id.*

physical injury.” E.R. 27. In the absence of subsequent California case law to the contrary, *Soliman* sets forth this Court’s understanding of relevant California law; that understanding includes adherence to the first-injury rule.

II. ADHERENCE TO THE FIRST-INJURY RULE ENSURES THE PROPER BALANCE BETWEEN COMPETING POLICY CONSIDERATIONS

Pooshs asks this Court to ignore established Ninth Circuit and California case law and to abandon the first-injury rule, because (she asserts) its application to her case would be “illogical, discriminatory, and unfair.” WLF agrees with Appellees that it would be inappropriate for the panel to disregard well-established California law out of sympathy for Pooshs’s plight. Appellees’ brief explains in detail how its position is fully supported by California case law; WLF will not repeat that analysis here. Rather, WLF writes separately to emphasize its belief that there is nothing illogical, discriminatory, or unfair in requiring those in Pooshs’s position to file suit within a finite period of time after discovering that they have suffered substantial personal injury and have reason to suspect that someone else is to blame.

A. Statute of Limitations Issues Require Courts to Balance Defendants’ Interests in Repose and Plaintiffs’ Interests in Merits-Based Determinations

Cases raising statute of limitations issues pose a conflict between two

strong public policies – one favors granting repose for events that occurred in the distant past, the other favors merits-based disposition of legal claims. Those two public policies – “the one being for repose and the other for disposition on the merits – are equally strong, the one being no less important or substantial than the other. . . . To establish any particular limitations period under any particular statute of limitations entails the striking of a balance between the two.” *Norgart*, 21 Cal. 4th at 396.

Statutes of limitations represent a pervasive legislative judgment that the right to be free of stale claims *in time* comes to prevail over the right to prosecute them. *United States v. Kubrick*, 444 U.S. 109, 117 (1979). “[T]he fundamental purpose” of statutes of limitations is “to give defendants reasonable repose, that is, to protect parties from defending stale claims.” *Jolly v. Eli Lilly and Co.*, 44 Cal. 3d 1103, 1112 (1988). Pooshs insists that *any* application of the statute of limitations that denies her an opportunity to have *all* of her personal injury claims decided on the merits is fundamentally unfair. But what Pooshs is asking is that the courts abandon all efforts to balance the competing public policy. If the “rule” to be adopted is that *all* personal injury claims are to be decided on the merits – regardless whether many years have elapsed following the defendant’s alleged wrongdoing and regardless whether the plaintiff has already had an

opportunity to recover substantial personal injury damages based on that same wrongdoing – then the underlying rationale must be that a diligent plaintiff *always prevails* on statute of limitations issues. Such a rule does not comport with the California Supreme Court’s understanding of the balance to be struck.

Statutes of limitations have been recognized by legal systems for thousands of years. Ancient Hebrew law, Roman law, and early German and English law all recognized the importance of calling a halt to legal responsibility for most wrongs after some period of time. *See* David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 Mo. L. Rev. 1, 25 (2005).

Statutes of limitations “are found and approved in all systems of enlightened jurisprudence.” *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). In particular, there is simply too great a possibility that the passage of a large amount of time following alleged wrongdoing will prejudice a defendant’s ability to present a meritorious defense.⁴ Indeed, California does not require defendants to demonstrate actual prejudice in order to assert a statute-of-limitations defense;

⁴ That possibility is certainly very real in this case. If forced to defend the case on the merits, Appellees undoubtedly would attempt to show, among other things, that any allegedly misleading statements they made from 1953 to 1987 were never heard by Poosh; and if they were heard, Poosh never relied on them. Gathering such evidence so many decades after the fact would be extremely challenging.

rather, when a statute of limitations is applicable, it “operates conclusively across-the-board” to bar an action without regard to actual prejudice or the facts of the case before the court. *Norgart*, 21 Cal. 4th at 410. It operates conclusively:

[W]ith respect to *all* causes of action, both those that do not have merit and also those that do. That it may bar meritorious causes of action as well as unmeritorious ones is the price of the orderly and timely processing of litigation – a price that may be high, but one that must nonetheless be paid.

Id. (citations omitted).

The line initially drawn by both California law and the common law was somewhat harsh on plaintiffs. The clock started running on any applicable limitations period as soon a potential plaintiff was injured by a wrongful act, regardless whether the plaintiff was aware of the injury. *Id.* at 397; 43 Cal. Jur. 3d *Limitations of Actions* § 81 (2008). By the twentieth century, courts and legislatures came to recognize that the general rule could be unfair to plaintiffs who did not discover – and had no reasonable means of discovering – that they had been injured until after the generally applicable limitations period had expired. Thus was born the “discovery rule” exception to the general rule: it postpones accrual of a cause of action (at least in many instances) until the

plaintiff discovers, or has reason to discover, the cause of action.⁵ But while California courts have adopted the discovery rule, they have steadfastly recognized the fairness of requiring the plaintiff to file suit once he has reason to recognize that he has suffered significant personal injury, even when (as almost always will be the case) he is not yet aware of the full extent of his injuries. It is enough to start the limitations period running if “the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.” *Fox*, 35 Cal. 4th at 807. If, as Poosh contends, each new injury restarts the statute of limitations, then the fundamental premise of the discovery rule – that even the suspicion that a potential plaintiff has been injured by wrongdoing irrevocably starts the clock running – will have been abandoned.

B. The First-Injury Rule Both Ensures Balance and Provides an Easy-to-Administer Bright-Line Test

Precisely because discovering the full extent of one’s injuries often takes many years, a rule that resets the clock every time a new injury is discovered would effectively eviscerate the protections afforded by the statute of limitations.

⁵ The move toward adoption of the discovery rule began in the 1930s in connection with medical malpractice cases, in which the delay in discovering injuries is often considerable. 3 *Modern Tort Law: Liability and Litigation* § 25:104 (2d ed. 2008). Courts extended the discovery rule to products liability claims beginning in the 1960s with the advent of asbestos litigation. *Id.*

So long as the plaintiff remains alive, the very real possibility would exist that he would suffer a new injury that is traceable to the long-ago wrongdoing, and thus the alleged wrongdoer would lose all possibility of repose.

The first-injury rule does, in some instances, prevent a plaintiff from having a potentially meritorious claim heard on the merits. But such a plaintiff can be assured that he will have an opportunity to have at least a substantial portion of his claims heard on the merits – because the limitations period will never begin to run until the plaintiff has incurred a substantial injury. In this manner, the first-injury rule maintains a rough balance between the conflicting public policies at play in statute of limitations cases.

At least as important, the first-injury rule is a “bright line” rule; it is relatively easy to determine (by reference to the plaintiff’s medical records) when the plaintiff first discovered (or ought to have discovered) that he or she had suffered an injury. In contrast, under Poosh’s proposed “separate and distinct” injury rule, there will be endless disputes regarding what constitutes a separate and distinct injury. Any imaginative plaintiffs’ lawyer will have no difficulty constructing an argument that later-discovered injuries are sufficiently distinct from earlier physical injuries to re-start the clock under Poosh’s proposed rule.

DeRose well illustrates the difficulties. The plaintiff in that suit was a woman in her 20s who alleged that she had been sexually abused by her step-grandfather while she was child. Although she had always been aware of the abuse, she did not file suit within the normal limitations period (which ended one year after she reached age 21). The plaintiff claimed that emotional injuries she suffered in her 20s were different in kind from the physical injuries she suffered in her childhood in connection with the assaults, and thus that her discovery of those emotional injuries should restart the limitations period. The court of appeal ruled that the plaintiff's childhood injuries were sufficient to trigger the statute of limitations under the first-injury rule, and thus her suit was time-barred. *DeRose*, 196 Cal. App. 3d at 1025-26. Accordingly, the court of appeal had no need to determine whether the emotional injuries the plaintiff suffered in her 20s were different in kind from the injuries she suffered as a child. But under Poosh's proposed "separate and distinct injury" rule, the need to engage in such line-drawing would become routine. Given the virtually limitless ways in which injuries can be characterized, it can be extremely difficult for a court to determine whether an injury the plaintiff contends only recently manifested itself is categorically distinct from personal injuries the plaintiff suffered in the past. *See Appellees Br.* at 42.

As the California Supreme Court has emphasized, rules adopted by courts governing limitations periods operate “across-the-board” to all types of personal injury actions. *Norgart*, 21 Cal. 4th at 410. Any rules adopted in this case will apply to the broad range of product liability actions. Accordingly, it would be inappropriate for the Court to fashion special rules designed to meet conditions arguably unique to tobacco liability cases. If there is a need to fashion such special rules, the California legislature is far better positioned than the courts – and certainly far better positioned than the federal courts, which possess no mandate to create California law – to accomplish the task. As Appellees have explained at length, the California legislature has acted in several recent instances to fashion special rules governing accrual of actions in asbestos and sexual abuse cases, in order to eliminate perceived unfairness to specific classes of plaintiffs. Appellees Br. 34-38. When the legislature modified the first-injury rule in those instances, it could have adopted – but did not – an across-the-board modification but instead adopted limited modifications that are inapplicable here. The limited nature of those modifications is a strong indication that the legislature did not intend – as urged by Poosh – a wholesale abandonment of the first-injury rule. Moreover, should it choose to act, the legislature would be far better positioned than is this Court to engage in the detailed line drawing that

would be necessary to avoid confusion regarding when a personal injury should be deemed “separate and distinct” from personal injuries that arose earlier and were a product of the same alleged wrongdoing.

C. Pooshs’s “Fairness” Argument Proves Too Much: It Would Eviscerate Statutes of Limitations by Requiring That Plaintiffs Be Permitted to Seek Recovery of *Any* Later-Discovered Injury

Pooshs argues that application of the first-injury rule in personal injury litigation is “unfair” and “works an injustice” because “the plaintiff may be left with no remedy for the later, serious illness” even though he diligently pursued all claims as soon as he became aware of them. Appellant Br. at 21. She argues that adoption of her “separate and distinct injury” rule is the only way to ensure that an injured person can be “fairly compensated for a latent disease.” *Id.* at 22.

Pooshs’s “fairness” argument proves too much. It applies equally strongly to the individual who is physically injured by allegedly wrongful conduct, and then (as not infrequently occurs) years later incurs new physical injuries of precisely the same type – *e.g.*, the cancer that had been in remission for years suddenly and fatally recurs. Such a plaintiff can share in Pooshs’s complaint that application of the first-injury rule denies some individuals the opportunity to seek full compensation for injuries allegedly caused by another’s

wrongdoing. But even Poosh's does not assert that the interests of such a plaintiff ought to trump the defendants' interests in repose; it is well recognized that countervailing public policy considerations require that such a plaintiff be limited to one opportunity to seek recovery of damages, even if that limitation means that the plaintiff will have an opportunity to recover only a portion of his damages.

As one court has observed, in defending application of the first injury rule:

Tolling the statute of limitations until the totality of [the plaintiff's] injury is manifested is the means by which he suggests that the possibility of his recovery be preserved. In contrast, the defendants' interest is in putting to rest any claim the plaintiff may have within a finite period of time. Taken to its logical extreme, the proposed extension of the discovery rule could lead to accrual of a cause of action fifty years after the precipitating event. Such a delay, in cases such as this, would be far more burdensome than in normal situations in which the discovery rule is applied. We believe that the potential burden on defendants outweighs the interest of plaintiffs in full recovery for their injuries.

Rowe v. John Deere, 130 N.H. 18, 23 (1987).

Poosh's "fairness" claim should be rejected for the same reason that it is routinely rejected in cases involving plaintiffs whose initial injury is aggravated many years after the alleged wrongdoing. In statute of limitations cases, fairness requires that some balance be maintained between the conflicting public policies at play. The first-injury rule maintains that balance. It ensures that plaintiffs

such as Pooshs have an opportunity to seek recovery of some meaningful portion of the physical injuries they suffered (in this case, damages related to her COPD and her periodontal disease) while at the same time ensuring that defendants such as Appellees are not denied all opportunity for repose by leaving them subject to suit for a limitless time period for virtually any physical injury for which they are arguably responsible.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court affirm the district court's decision.

Respectfully submitted,

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Counsel wish to thank Courtney Stevens, a student at George Mason University Law School, for her assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.*. Pursuant to Fed.R.App.P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the brief contains less than 7,000 words (the actual word count is 5,661) not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2008, I electronically filed the foregoing with the Clerk of the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I have mailed the foregoing document by First-Class mail, postage prepaid, to the following individuals who may not be CM/ECF participants:

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