



## Alerts

### Starting The Statute Of Limitations Clock In California Becomes More Difficult In Certain Toxic Tort Cases

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*Hinshaw Alert*

The California Supreme Court recently decided that claims arising from separate injuries caused by the same wrongdoing may accrue on different dates according to when the plaintiff discovered each injury. *Pooshs v. Philip Morris USA, INC.*, 51 Cal.4th 788 (Cal. 2011).

Plaintiff in *Pooshs* suffered from COPD, periodontal disease, and lung cancer as a result of smoking cigarettes. Plaintiff became aware of her COPD in 1989, her periodontal disease in the early 1990s, and her lung cancer in 2003. In 2004, Plaintiff filed suit against Philip Morris for the injuries sustained due to lung cancer. Defendant argued that the case was barred by the statute of limitations, because Plaintiff knew that smoking had harmed her health when she was diagnosed with periodontal disease and COPD. Plaintiff argued that her three physical injuries from smoking were separate diseases and each was therefore the basis of a distinct right under the law with each claim accruing at the time each disease was discovered. The case was certified to the California Supreme Court by the U.S. Court of Appeals for the Ninth Circuit and was limited to the issue of the statute of limitations under California law. The Court did not consider the merits of the Plaintiff's case pending in federal court.

The court held that "two physical injuries—both caused by the same tobacco use over the same period of time—can in some circumstances be considered 'qualitatively different' for purposes of determining when the applicable statute of limitations period begins to run." Essentially, "when a later-discovered latent disease is separate and distinct from an earlier-discovered latent disease then the earlier disease does not trigger the statute of limitations for the later discovered disease." Thus, Plaintiff's discovery of periodontal disease or COPD did not start the clock on her lung cancer claim, even though all three diseases were caused by tobacco use. Instead, the claim based on lung cancer accrued at the time she discovered the lung cancer.

The Court considered two major precedents, *Soliman* and *Grisham*, in reaching its conclusion. In *Soliman*, the Ninth Circuit held that a long-time smoker could not claim delayed discovery of his disease where the plaintiff alleged the disease of "addiction" as his injury. *Soliman v. Philip Morris Inc.*, 311 F.3d 966 (9th Cir. 2002). According to the Court, California law presumes that the public knows that smoking causes addiction and that the plaintiff therefore had constructive knowledge of the injury throughout his 40-year smoking habit.

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In *Grisham*, the plaintiff brought suit against a cigarette manufacturer and alleged economic injury caused by money spent on cigarettes and personal injury caused by emphysema. *Grisham v. Philip Morris Inc.*, 151 P.3d 1151. In order to evaluate whether plaintiff had constructive knowledge of the injury, the Court in *Grisham* considered the Ninth Court's ruling in *Soliman* that the general public knows the dangers of smoking. The Court held that while there is no special presumption that smokers are aware of the danger of smoking, there is a general rebuttable presumption that a plaintiff knows the wrongful causes of an injury. Following this logic, the Court in *Grisham* reasoned that plaintiff was aware for many years of the economic harm caused by cigarettes, but that the plaintiff was not aware of her physical injury claim until she discovered she had emphysema. In making this distinction, the Court declined to create one statute of limitations for both claims because it would require that a smoker file suit for both economic and physical injuries as soon as he discovers he is addicted to smoking, even though he has no proof of harm beyond addiction. Thus, the Court concluded that the plaintiff's claims had separate accrual dates. Because plaintiff had knowledge of her economic injury for many years, that claim was time-barred. However, the claim for physical injury could proceed.

The *Pooshs* Court applied the reasoning from *Grisham* and concluded that it would make little sense to require a plaintiff "who years ago suffered a smoking related disease that is not lung cancer to sue at that time for lung cancer damages based on the possibility that lung cancer might later arise." The Court did not extend this holding to non-latent diseases, but held that in the case of latent diseases this rule is necessary in order to prevent the limitations period from expiring before a plaintiff has even discovered the latent injury and its cause. Because COPD was considered a separate disease from lung cancer in the underlying federal case, the court ruled that claims arising from the later-discovered lung disease have a different statutory period.

The *Pooshs* decision, unfortunately, has difficult implications for defendants in toxic tort because, in effect, it allows tort cases to lie dormant for as long as the alleged disease lies dormant. Thus, even plaintiffs who are aware of the health risks associated with certain products are not charged with knowledge of the health injuries resulting from those products until an actual diagnosis is made.

For more information, please contact [Craig T. Liljestrand](#) or your regular [Hinshaw](#) attorney.

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