



Reading Between The Lines: *Pooshs V. Philip Morris*

by

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(A version of this article was published by Law360.com on May 19, 2011.)

On May 5, the California Supreme Court issued its decision in *Pooshs v. Philip Morris USA Inc.*, the latest in a line of cases addressing how statutes of limitations should apply in cases where a plaintiff alleges delayed discovery of only one of multiple claims or injuries.

The latest battle again involved Philip Morris, a named defendant in the three most recent Supreme Court cases implicating this issue, including *Boeken v. Philip Morris USA Inc.* and *Grisham v. Philip Morris USA Inc.* What might seem lost in this stream of tobacco-related litigation is the ongoing genesis of an important rule with possible widespread implications, well beyond the mundane statute of limitations issues that draw the ire of first-year law students.

While many may be unhappy with the Supreme Court's failure to set forth a bright line and consistent rule, a close reading of the opinions reveals the court's careful effort to reach an arguably fair result while avoiding issues that could have a larger and devastating effect on tort litigation.

Although not discussed in detail in the recent opinion, the background issue that appears to be guiding the Supreme Court's decisions is the little used doctrine of "primary rights."

For those who don't deal with torts on a daily basis, California subscribes to what is known as the primary rights theory. It states that each harm an individual suffers involves an invasion of a single primary right, which in turn gives rise to a single "cause of action," or right, to obtain redress for the harm suffered, regardless of the specific remedy sought or the legal theory advanced.

Say for example, a plaintiff is injured in a car accident. Every "claim" or "legal theory" the plaintiff could assert against the tortfeasor, whether it be negligence, battery, assault and so on, all arise out of a single "cause of action" or "primary right." This is significant because, as a general rule, primary rights are indivisible.

Therefore, the statute of limitations for all "claims" or "legal theories" arising out of a single "cause of action" or "primary right" run concurrently, and a legal resolution of a lawsuit based upon any single legal theory should bar any future actions based on the same primary right under principles of res judicata.



Summary of the Case

With that backdrop in mind, we turn the developments of May 5. In *Pooshs v. Philip Morris USA Inc.*, the California Supreme Court held that when a later-developed injury arising from the same wrongful conduct is “separate and distinct” from an earlier injury, the statute of limitations runs independently for the later injury.

But perhaps the most significant part of the opinion was the holding that the court avoided. Despite being directly asked by the Ninth Circuit whether, under California law, two separate physical injuries arising out of the same wrongdoing can be conceived of as invading two different primary rights, the court declined to address the issue. Instead, by relying upon its earlier holding in *Grisham*, the court was able to avoid this thorny issue and still provide the Ninth Circuit with guidance.

The underlying dispute involved a former smoker who brought suit against several cigarette manufacturers for injuries pertaining to the lung cancer the smoker had developed in 2003. The manufacturers alleged that the plaintiff’s earlier injuries, including chronic obstructive pulmonary disease (COPD), and periodontal disease, which had been diagnosed more than 10 years earlier, triggered the statute of limitations for all of plaintiff’s injury claims.

After the district court granted the defendants summary judgment on statute of limitations grounds, the plaintiff appealed and the Ninth Circuit certified two questions to the California Supreme Court. It asked whether: 1) two separate physical injuries arising out of the same wrongdoing can be conceived of as invading two different primary rights; 2) two separate physical injuries — both caused by a plaintiff’s use of tobacco — can be considered qualitatively different for purposes of determining when the statute of limitations begins to run.

The California Supreme Court rephrased the two questions as a single 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 the later injury?” The court concluded it did not, and that plaintiff’s discovery of the later injury would trigger a new limitations period.

In so doing, the court relied upon its earlier opinion in *Grisham*, which held that a plaintiff’s knowledge of an earlier economic injury did not serve to trigger the statute of limitations on the plaintiff’s later physical injury that was based upon the same wrongful conduct.

The *Grisham* court specifically avoided deciding the issue on primary rights grounds; rather, it carved out an exception to the general rule that a single tort can be the foundation of but one claim for damages. The exception was based on the policy of the discovery rule, which is to prevent the limitations period from expiring before a plaintiff has or should have learned of the latent injury.



Therefore, even though a case may only involve one primary right, the *Grisham* court held that the statute of limitations can apply separately to a claim for economic damages and a claim for latent physical injury.

Applying the reasoning of *Grisham* to the plaintiff's claim in *Pooshs*, the court extended the holding to include multiple claims for physical injury if the later-discovery injury is latent. Specifically, the court concluded that when a later-discovered latent disease is "separate and distinct" from an earlier-discovered disease, discovery of the earlier disease does not trigger the statute of limitations for the later disease.

Why the Supreme Court Avoided the Primary Rights Issue

Upon first reading, one may wonder why the court did not simply find that a separate and distinct injury involved a separate primary right. Such a holding would have yielded the same result in this case and would not have required an exception to the general rule that a single tort supports only a single claim.

In addition, the current holding potentially leads to inconsistent results where a plaintiff who fails to sue on an earlier injury (e.g., COPD) can bring a suit for a later and more severe injury (e.g., lung cancer), but a plaintiff who diligently files suit on the first injury will likely be barred from suing when the later injury develops because of the doctrine of *res judicata*.

To understand why the *Pooshs* court chose this route, it is necessary to assess the implications of deciding the case on primary rights grounds.

A year prior to the court's decision in *Pooshs*, the court decided another products liability case, *Boeken v. Philip Morris USA Inc.* That case involved a woman who sued the cigarette manufacturer for the wrongful death of her husband. Philip Morris argued that the suit was barred by the woman's earlier suit for loss of consortium, which had been brought prior to her husband's death but dismissed with prejudice, because the two distinct causes of action implicated the same primary right.

The court agreed and concluded that the subsequent suit was barred because the two causes of action overlapped, as they both implicated the woman's right not to be deprived of spousal companionship and affection (the same primary right). This holding was particularly significant because, as the court recognized, concluding two separate primary rights were involved "would often lead ... to multiple proceedings and the possibility of a double recovery or an inadequate recovery."

With *Boeken* in mind, the *Pooshs* case appears even more meticulously crafted. By avoiding the primary right issue the Supreme Court managed to avoid a major landmine. If the court would have concluded that a later-arising physical injury constituted a separate "primary right" that



holding could have opened a Pandora's box of potential issues that could have turned the torts world on its head.

In *Boeken*, the court suggested that a separate primary right gives a right to a subsequent suit, even where the subsequent suit could end up being duplicative of the first. What this would potentially mean is that anytime an injured plaintiff sues, recovers damages, then subsequently develops an unrelated injury, the plaintiff would have the right to bring a new suit based upon the new "primary right."

This result would have had far-reaching consequences as it would potentially open the door for new lawsuits by every plaintiff who had previously won a case and subsequently suffered an additional injury. Such a result would run afoul of traditional notions of finality and would have created law well beyond the narrow statute of limitations issue the *Pooshs* case presented.

"Separate and Distinct"?

Perhaps the most obvious implication of the recent ruling is that it carves out an exception to the general rule that a cause of action begins to run when a plaintiff is aware of "appreciable and actual harm" insofar as the latent injury is "separate and distinct" from the earlier injury. Of course, this begs the question of how to define and determine whether injuries are truly separate and distinct.

In *Pooshs*, the plaintiff asserted in opposition to summary judgment that "COPD is a separate illness, which does not predispose or lead to lung cancer and that it has nothing medically, biologically or pathologically to do with lung cancer."

The court declined to speculate on whether the plaintiff would ultimately prevail on this assertion because the Ninth Circuit had only asked whether plaintiff's assertion, if true, would have had any implication on the statute of limitations for her claims under California law.

Although it held in the affirmative, the court's opinion offers little guidance on how to draw this distinction. This will undoubtedly evolve over the years through extensive analysis of expert opinions on similar issues. But the court's reliance on the discovery rule for its holding does provide some insight on how courts may resolve unclear distinctions.

At heart, the discovery rule is based upon the principle that the statute of limitations is triggered as of the date plaintiff knew or should have known about the injury and its wrongful cause. In *Grisham*, the court concluded that knowledge of economic injury does not trigger the statute of limitations for physical harm because plaintiff did not know, or have reason to know, that the physical injury existed.



In *Pooshs*, the court extended *Grisham*'s holding to injuries involving two separate physical harms. Considering that the cases are based upon consideration of the plaintiffs' knowledge of the condition, it appears that will be a key issue in future cases.

However, this may overlap with the determination of whether two injuries are truly separate and distinct. For example, if a plaintiff's knowledge of one injury gives reason to know about the other injury, it will be difficult for plaintiffs to apply the policies underling the rule. On the other hand, plaintiffs counsel will surely attempt to broaden the rule to include any later discovered injury even if not medically distinct based on the policies of the discovery rule. Courts will have to continue the careful analysis employed by the Supreme Court to walk the fine line established by the decision.

Conclusion

As the *Pooshs* court noted, barring a suit on statute of limitations grounds inevitably reflects a value judgment concerning the point at which the interests in favor of or protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.

Although some may not be happy with the court's decision in *Pooshs*, the court's judgment in this case clearly fell on the side of allowing the plaintiff to proceed with the case. In carving out an exception to the general rule that a single tort supports only a single claim, the court at least avoided the larger implications of deciding the case on primary rights grounds, in essence choosing the lesser of two evils.

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