No. S172023

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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DEPUTY

NIKKI POOSHS,

Plaintiff-Appellant,

vs.

PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; AND HILL & KNOWLTON, INC.

Defendants-Respondents.

On Request from the U.S. Court of Appeals for the Ninth Circuit for Answers to Certified Questions of California Law

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INTRODUCTION AND SUMMARY OF ARGUMENT

Under California's well-settled "single-injury" or "first-injury" rule (E.R. 11, 14 [district court opinion][1]), "if the statute of limitations bars an action based upon harm immediately caused by [the] defendants' wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing" is generally barred. (*Miller v. Lakeside Village Condo. Assn.* (1991) 1 Cal.App.4th 1611, 1622 (*Miller*).) This settled rule has been applied for decades by California courts and by federal courts applying California law, and it was properly applied by the federal district court in this case. (*See, e.g., DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1021 (*DeRose*) [suit for later-occurring injuries from childhood sexual abuse was time-barred]; *Sonbergh v. MacQuarrie* (1952) 112 Cal.App.2d 771, 773 (*Sonbergh*) [action for assault was time-barred even though plaintiff's brain injuries only became substantial several years later]; *Nodine v. Shiley Inc.* (9th Cir. 2001) 240 F.3d 1149, 1153-1154 (*Nodine*) [claims for later-occurring injury from allegedly defective medical device were time-barred]; see also E.R. 27-28.) As the district court correctly recognized, the "'first injury' rule ... remains the law unless the Legislature amends it by statute." (E.R. 28.)

The first-injury rule promotes the core policies of the statute of limitations, which are to "stimulate[] plaintiffs to pursue their claims diligently" and to protect defendants from "'defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps.'" (*Fox v. Ethicon Endo-*

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[1] "E.R." refers to Plaintiff's Excerpts of Record in the U.S. Court of Appeals for the Ninth Circuit; "S.E.R." refers to Defendants' Supplemental Excerpts of Record in that Court; and "P.O.B." refers to Plaintiff's Opening Brief in this Court. "C.R." refers to the Clerk's Record of the proceedings in the U.S. District Court and is followed by the docket number.

Surgery, Inc. (2005) 35 Cal.4th 797, 806 (*Fox*), citation omitted.) Opening the door to separate suits for later-occurring injuries would defeat these important policies by creating opportunities for dilatory plaintiffs to argue, in nearly every case, that they are timely suing for subsequent injuries that should be considered "separate and distinct" from the first-occurring injury. Indeed, it was precisely such concerns that led this Court to adopt the rule that the statute of limitations begins to run upon the occurrence of the *first* appreciable injury. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 515 (*Davies*) [noting risk that an alternative rule could lead to arguments for indefinite tolling in all cases involving uncertainty in damages].)

In her opening brief in this Court, Plaintiff-Appellant Nikki Pooshs (Plaintiff) urges this Court to abandon California's first-injury rule in favor of an amorphous and unworkable multiple-injury rule, under which a plaintiff could bring successive causes of action for each subsequently occurring injury. While Plaintiff concedes that the "traditional 'single-injury' rule" has achieved "hornbook" status in California, she argues that the first-injury rule nonetheless should be abandoned because in her view it is "unfair" not to permit an individual to file seriatim lawsuits for *each* of potentially many "separate and distinct" injuries. (P.O.B. 15, 35-36.) In support of her proposed multiple-injury rule, Plaintiff cobbles together an unpersuasive grab-bag of authorities consisting of cases applying the law of other jurisdictions; cases involving specific statutory regimes governing only particular types of claims; and a discredited Court of Appeal case that has been sharply criticized in subsequent decisions.

This Court should decline Plaintiff's invitation to dramatically rework this long-settled principle of California law. As this Court has made clear, it "belongs to the Legislature alone" to balance the public policies inherent in establishing the appropriate contours of the statute of

limitations. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396 (*Norgart*).) And the California Legislature is plainly aware of the first-injury rule, because it has deliberately acted to modify the rule in certain selected contexts, such as asbestos and childhood sexual abuse. (Code of Civ. Proc., §§ 340.1, 340.2.) Notably, in each such instance, the Legislature has coupled its partial displacement of the first-injury rule with countervailing *statutorily defined limits* that are specifically tailored to the particular context. What the Legislature has not done is what Plaintiff asks this Court to do, namely, to jettison the rule altogether and to allow—in the absence of specific, statutorily defined limitations—multiple suits for each later-occurring injury. If there is to be any such sweeping revision of settled law, which would have significant implications for all personal-injury litigation, it must come from the Legislature, not from this Court.

The question of law certified by the Ninth Circuit (as reformulated by this Court), and Defendants' proposed answer, are as follows:

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?"

Answer: Yes. Longstanding California law establishes that where, as here, a plaintiff alleges multiple appreciable physical injuries arising from the same set of allegedly wrongful acts, the statute of limitations for all claims of physical injury is triggered by the earliest appreciable injury. It is for the Legislature, not this Court, to alter this long-established rule, and while the Legislature has explicitly altered, in a highly tailored manner, the first-injury rule in certain specific factual contexts, it has not chosen to do so here. In the absence of such legislative action, Plaintiff's policy arguments and citations of inapposite and discredited authorities do not justify the substantial shift in settled law that Plaintiff proposes.

STATEMENT OF THE CASE

I. Plaintiff's 2004 Complaint

Plaintiff filed this action in San Francisco Superior Court on January 13, 2004, and the case was subsequently removed to federal court. (E.R. 81.) According to the Complaint, Plaintiff began smoking cigarettes in 1953 and stopped smoking in 1991. (E.R. 91, 109.) The Complaint alleges that during the period from 1953 "up to and including December 31, 1987,"[2] Defendants engaged in a conspiracy to mislead the public concerning the health effects of tobacco and the addictiveness of nicotine. (E.R. 105-106; see also E.R. 94-95.)[3]

The Complaint alleges that "[a]s a direct and proximate result of said conspiracy," Plaintiff became addicted to cigarettes and continued to smoke from 1953 "up to December 31, 1987, despite numerous attempts to quit"; indeed, she "was unable to quit until 1991." (E.R. 109.) The Complaint

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[2] The Complaint's deliberate exclusion of any conduct occurring from 1988-1997 was based on this Court's holding that the immunity conferred by the prior version of Civil Code section 1714.45 "continues to shield defendant tobacco companies in product liability actions ... for conduct they engaged in *during* the 10-year period when the Immunity Statute was in effect." (*Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828, 848, original italics); see also *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 863 [holding that former section 1714.45's definition of "product liability action" includes fraud claims as well].) Because Plaintiff quit smoking before the immunity period lapsed, there is no dispute in this case that her asserted multiple injuries are all predicated on the *same* pre-1988 alleged wrongful conduct.

[3] Although the complaint originally named 22 defendants, only Philip Morris USA Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Holdings, Inc.; Lorillard Tobacco Co.; and Hill & Knowlton Inc. currently remain as defendants in the case. (See Ninth Circuit Brief for Defendants-Appellees at p. 5, fn. 2.) Accordingly, the Ninth Circuit's Request is mistaken in stating that Safeway, Inc. and DNA Plant Technology Corp. are parties to this appeal. (*Pooshs v. Philip Morris USA, Inc.* (9th Cir. 2009) 561 F.3d 964, 966 (*Pooshs*).)

further alleges that Plaintiff was diagnosed with lung cancer on or about January 31, 2003, less than one year before this suit was filed on January 13, 2004, and more than 12 years after she stopped smoking. (E.R. 92.) The Complaint, however, fails to mention a significant fact that later came out in discovery, namely that Plaintiff had been diagnosed with other significant smoking-related illnesses in 1989 and 1990. (*Post*, pp. 8-9.)

Based on these allegations, Plaintiff's Complaint asserted ten common-law causes of action, sounding in fraud, negligence, and products liability, against the four cigarette-manufacturer Defendants. (E.R. 93-111.) Defendant Hill & Knowlton, Inc. was named as a co-defendant only in the eight causes of action sounding in fraud and negligence. (*Ibid.*)

II. The District Court's 2004 Order Dismissing This Action and the Ninth Circuit's 2007 Order Remanding the Case

On August 20, 2004, the district court dismissed the Complaint with prejudice, holding that the Complaint was time-barred on its face under *Soliman v. Philip Morris Inc.* (9th Cir. 2002) 311 F.3d 966 (*Soliman*). (E.R. 66-78.) *Soliman* had held that where a plaintiff alleges "addiction as one of his distinct injuries," the "date of his actual or constructive knowledge of addiction" is the date that triggers the running of the limitations period. (*Soliman*, at pp. 972-973.) The district court held that, because the "'thread running through [Plaintiff's] complaint is that cigarettes cause addiction and other health problems, and defendants must pay for inflicting these ailments upon [plaintiff],'" the statute of limitations began to run on Plaintiff's claims at the point when she had constructive knowledge of her addiction. (E.R. 73, quoting *Soliman*, *supra*, 311 F.3d at p. 970.) The district court therefore held that because the statute of limitations had long since run on Plaintiff's addiction-based claims, application of California's first-injury rule meant that all of Plaintiff's claims were time-barred. (E.R. 73.)

While the first appeal in this action was pending, a panel of the Ninth Circuit in a different case asked this Court to decide two legal issues concerning *Soliman*'s analysis of California law. (See *Grisham v. Philip Morris USA Inc.* (9th Cir. 2005) 403 F.3d 631 [certifying questions in both *Grisham* and in a separate case, *Cannata v. Philip Morris USA Inc.*].) In August 2005, this Court agreed to decide the certified questions, albeit in a slightly restated form. (See *Grisham v. Philip Morris USA Inc.* (2007) 40 Cal.4th 623, 628 & fn. 1 (*Grisham*).) Thereafter, in August 2006, the Ninth Circuit deferred argument and submission in this case pending this Court's decision in *Grisham*. In early 2007, this Court issued its decision resolving the certified questions in that case. (*Id.* at p. 623.)

In *Grisham*, the complaint expressly alleged that "addiction" was one of the plaintiff's injuries, and the plaintiff sought monetary damages for that injury (namely, the cost of her cigarette purchases). (40 Cal.4th at pp. 630-631.) This Court held that even if this claim of economic injury was valid (an issue upon which it made no ruling), the claim was untimely "from the face of the complaint." (*Id.* at p. 634, fn. 5; *id.* at p. 639.) In reaching this conclusion, the Court agreed that "California law recognizes a *general*, rebuttable presumption, that plaintiffs 'have knowledge of the wrongful cause of an injury,'" but the Court "reject[ed] *Soliman* to the extent that it holds that there is a *special* presumption under California law based on common knowledge that a plaintiff is aware that smoking is addictive or harmful." (*Id.* at p. 638, italics added, citation omitted.)

This Court held, however, that the fact that Grisham's claims for *economic* injury from addiction were time-barred did not mean that her claims for subsequent *physical* injuries were also barred. (40 Cal.4th at pp. 639-646.) The Court acknowledged that the "longstanding rule in California ... is that [a] single tort can be the foundation for but one claim

for damages." (*Id.* at p. 641, citation and internal quotation marks omitted.) This rule, the Court explained, was "a corollary of the primary right theory found in California law," under which "the violation of a single primary right gives rise to but a single cause of action." (*Id.* at p. 641.) The Court held, however, that the "two different *types* of injury" alleged by Grisham—"an *economic* injury" and "serious *physical* injury or injuries"—gave "rise to two different types of action." (*Id.* at p. 643, italics added.) As such, these two distinct primary rights gave rise to separate statutes of limitations, so that Grisham's long-ago discovery of her "causes of action for economic injury based on smoking addiction did not start the statute of limitations running on her tort causes of action based on later discovered appreciable physical injury." (*Id.* at pp. 645-646.)

Having answered the certified questions, this Court expressly left "for another day the question of whether and under what circumstances *two physical injuries with different manifestation periods* arising out of the same wrongdoing can be the legitimate basis for two different lawsuits." (40 Cal.4th at p. 646, italics added.) Although Grisham's complaint did allege two separate physical injuries—namely, "the beginning stages of irreversible emphysema" and "chronic periodontitis and gingivitis"—the complaint alleged that the two were diagnosed only a month apart. (*Id.* at p. 630.) The Court therefore had no occasion to address the argument pressed by the "[a]micus curiae for Grisham"—who was Nikki Pooshs, the Plaintiff in this case—that two or more distinct physical injuries occurring at different times should be conceived of as invading two or more different primary rights. (*Id.* at p. 643.)

In light of *Grisham*, the parties jointly requested that the Ninth Circuit vacate the judgment and remand for further proceedings consistent

with *Grisham*. On September 4, 2007, the Ninth Circuit granted that motion.

III. Plaintiff's Deposition and Trial-Preservation Testimony

While the first appeal was pending, the district court on October 25, 2006 entered a stipulated order allowing the deposition and trial testimony of Plaintiff to be taken for preservation purposes. (C.R. 107.) That testimony and the medical records produced in discovery revealed an important fact not disclosed in the Complaint: Plaintiff had been diagnosed with serious smoking-related personal injuries well outside the limitations period.

Plaintiff's testimony and medical records confirmed that she was diagnosed with chronic obstructive pulmonary disease (COPD) in 1989 and again in 1999. (S.E.R. 44-46, 51-52, 58-59, 64-65, 67.) At the time of her COPD diagnosis in 1989, Plaintiff was aware that smoking could cause illness generally and COPD specifically. In particular, Plaintiff testified that her father, who was himself a lifelong smoker, had developed "COPD"/"emphysema" several years before his death in 1988, and she stated that she believed that this condition was "[m]ost definitely" smoking-related. (S.E.R. 78; see also S.E.R. 43-44.)

The evidence further revealed that Plaintiff was diagnosed with periodontal disease in 1990. (S.E.R. 48, 76.) Plaintiff described her periodontal disease and related treatment as "very, very painful." (S.E.R. 76.) She also testified that her periodontist told her that her periodontal disease was "directly caused from smoking," and that "he doesn't see this very often in nonsmokers." (S.E.R. 76.) Plaintiff further specifically acknowledged that she knew she had smoking-related periodontal disease when she quit smoking in 1991. (S.E.R. 48.)

IV. The District Court's 2008 Summary Judgment Order and the Ninth Circuit's Order Certifying Questions to This Court

Based on this new evidence of personal injuries sustained more than a decade before the complaint was filed, Defendants on remand moved for summary judgment. (C.R. 121.) In response, Plaintiff did not dispute that she had previously sustained, outside the limitations period, appreciable personal injuries that she believed to have been smoking-related, namely COPD and periodontal disease. (C.R. 122 at 3, 9.) Plaintiff argued, however, that she should nonetheless be permitted to sue for an additional physical injury—lung cancer—that was diagnosed in 2003. (E.R. 16.)

On May 27, 2008, the district court granted Defendants' motion. (E.R. 5-28.) The district court held that under well-settled California law, Plaintiff's "physical-injury claims are barred under the 'first-injury' rule." (E.R. 27.) In particular, the district court rejected Plaintiff's contention that her lung cancer injuries represented the invasion of a different primary right than her earlier COPD injuries, holding that "nothing in *Grisham* suggests that different *personal* injuries involve different primary rights." (*Ibid.*, italics added.) Rather, the court explained, *Grisham* merely held that "*economic-loss* claims and *personal-injury* claims involve two different primary rights." (*Ibid.*, italics added.) The court stated that beyond this distinction, *Grisham* left undisturbed the longstanding California law establishing the first-injury rule. (*Ibid.*) Accordingly, Plaintiff's undisputed "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" under California law. (*Ibid.*)

The court specifically rejected Plaintiff's reliance, in advocating for a multiple-injury rule, on "asbestos cases, which have a separate statute-of-limitations accrual rule," and "Federal Employers' Liability Act and Jones Act cases, as well as cases from other jurisdictions that are inapplicable

here." (E.R. 27.) In doing so, the court exhaustively analyzed these cases (E.R. 17-28), concluding that all of them were distinguishable and that the first-injury rule "remains the law" in California "unless the Legislature amends it by statute." (E.R. 27-28.)

Plaintiff again appealed, and after briefing and oral argument by the parties, the Ninth Circuit certified to this Court two questions of California law. (*Pooshs*, *supra*, 561 F.3d at pp. 966-967.) This Court issued an order accepting the request and reformulating the Ninth Circuit's two questions into a single question.

ARGUMENT

Plaintiff does not dispute that she was diagnosed with COPD and periodontal disease more than a dozen years before she filed suit, and that she believed these injuries to be caused by her smoking at the time of her diagnoses. (P.O.B. 2-3.) Nor does Plaintiff dispute that these were significant injuries sufficient to start the running of the statute of limitations on a claim for personal injury.[4] Nor does she dispute that both of her injuries were assertedly caused by the *same* alleged pre-1989 conduct of the Defendants. (*Ante*, p. 4, fn. 2.) Plaintiff contends, however, that this Court should reject the "traditional 'single-injury' rule" applied under California law and instead adopt an amorphous multiple-injury rule under which a

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[4] While Plaintiff now characterizes her COPD and periodontal disease as "relatively mild" and "minor" (P.O.B. 1, 25), she cannot and does not dispute that these injuries constitute "appreciable and actual harm" sufficient to trigger the running of the statute of limitations. (*Davies*, *supra*, 14 Cal.3d at p. 514.) Indeed, these physical injuries, with which Plaintiff was diagnosed in 1989 and 1990, were the principal physical injuries alleged by the plaintiff in *Grisham* (see *Grisham*, *supra*, 40 Cal.4th at 639; Plaintiff's Opening Brief in *Grisham v. Philip Morris USA Inc.*, C.A. No. 03-55780 (9th Cir.), 2003 WL 22752942 at pp. *6-*7), and Plaintiff's own doctor acknowledged that COPD is a serious disease that could be potentially debilitating and life threatening (S.E.R. 57).

new limitations period would begin for each subsequent injury arising from the very same tortious conduct. (P.O.B. 10, 45-46.) Plaintiff's argument is contrary to settled California precedent, would usurp the role of the Legislature (which has made only measured, limited changes to the first-injury rule), and would undermine the fundamental policies underlying the statute of limitations.

I. The Longstanding First-Injury Rule Should Not Be Abandoned in the Absence of Legislative Direction

The first-injury rule has long been established in California law, and as this Court has made clear, it is the role of the *Legislature*, not the courts, to modify existing statutes of limitation. While the Legislature has chosen to modify statutes of limitations in other contexts, it has *not* modified the traditional first-injury rule for personal injury claims generally, or for claims based on tobacco usage specifically.

A. California Has Long Followed the First-Injury Rule

California has long followed what even Plaintiff describes as the "traditional 'single-injury' rule." (P.O.B. 10.) This "long-standing rule" holds that a "single tort can be foundation for but one claim for damages." (*Miller*, *supra*, 1 Cal.App.4th at p. 1622; accord *Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 638; see also *Grisham*, *supra*, 40 Cal.4th at p. 641; *Davies*, *supra*, 14 Cal.3d at pp. 513-514; *DeRose*, *supra*, 196 Cal.App.3d at p. 1021; *Sonbergh*, *supra*, 112 Cal.App.2d at p. 773.) Under this "fundamental rule," the statute of limitations begins to run from the time the conduct *first* becomes actionable. (*Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, 1080 (*Spellis*).) As the *Spellis* court explained:

> Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the*

statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

(*Id.* at pp. 1080-1081, internal quotation marks omitted, italics in original.)

The intersection of the rule against splitting a single cause of action and the rule that the first injury triggers the statute of limitations means that, once a cause of action for personal injury has accrued and the statute of limitations has run, a plaintiff may *not* bring an action for later-incurred damages caused by the same wrongdoing. "[I]f the statute of limitations bars an action based upon harm immediately caused by [the] defendants' wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing would normally amount to splitting a cause of action." (*Miller*, *supra*, 1 Cal.App.4th at p. 1622; see also *Grisham*, *supra*, 40 Cal.4th at pp. 642-643 [explaining that *Miller* rests on the view that, because "the violation of a single primary right gives rise to but a single cause of action," an "earlier injury, even if less serious than the later injury, sets the statute running as to both injuries, and expiration of the statute on the earlier injury bars a suit on the later one"].)

Thus, for example, in *DeRose*, the court held that because the plaintiff's claims based on earlier injuries from childhood sexual abuse were time-barred, claims for subsequent emotional harm that arose later in life were likewise barred. (*DeRose*, *supra*, 196 Cal.App.3d at p. 1021.) Because the plaintiff "immediately suffered substantial harm as a result of the alleged sexual assaults" and knew that she had suffered such harm, the statute of limitations began to run at the time of the assaults; no separate cause of action with a distinct accrual date existed for claims based on subsequent emotional harm. (*Id.* at pp. 1021-1022.)

The Court of Appeal reached a similar conclusion in *Miller*. In that case, the plaintiff began to suffer from chronic allergies and asthma in 1983

due to mold in her condominium. (*Miller*, *supra*, 1 Cal.App.4th at p. 1619.) She filed suit in 1986, seeking recovery for immune dysregulation, an injury she allegedly discovered only that year. (*Ibid.*) The Court of Appeal held that because the one-year statute of limitations had run on a claim for asthma and allergies she experienced at the time of the exposure, the claim for the later-diagnosed immune dysregulation was also barred. (*Id.* at pp. 1621-1628; see also *Sonbergh*, 112 Cal.App.2d at pp. 772-774 [action for assault was time-barred even though plaintiff's brain injuries only became substantial several years later]; *Nodine*, *supra*, 240 F.3d at pp. 1153-1154 [holding, under California law, that plaintiffs "cannot revive the statute of limitations by claiming they incurred new [physical] damages as a result of the old fraud"].)

In addition to being grounded in long-established precedent, the first-injury rule is consistent with the "primary interest served by statutes of limitations," which is to "ensure that plaintiffs proceed diligently with their claims and mitigate the difficulties faced by defendants in defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 935.) By contrast, authorizing separate suits for later-occurring injuries would allow dilatory plaintiffs to argue, in almost every case, that they are timely suing for injuries that should be considered "separate and distinct" from the first-occurring injury. It was precisely concerns such as these that led this Court in *Davies* to adopt the rule that the statute of limitations begins to run upon the occurrence of the *first* appreciable injury. (*Davies*, *supra*, 14 Cal.3d at p. 515 [noting the risk that an alternative rule could lead to arguments for indefinite tolling in all cases that involve uncertainty in damages].)

As this Court has made clear, it "belongs to the Legislature alone" to determine the appropriate contours of the rules governing statutes of limitations. (*Norgart*, *supra*, 21 Cal.4th at p. 396-397; see also *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1145 (*Hamilton*) [stating that if the statute is "deemed inadequate," it is "for the Legislature, not the appellate courts, to rewrite it"]; *Weinberger v. Weidman* (1901) 134 Cal. 599, 602 ["[I]t is for the legislature, not the courts, to determine when the bar of the statute is a legal and proper defense."].) The Legislature is unquestionably well aware of the longstanding first-injury rule, but it has not chosen to adopt the sort of wholesale change in the law that Plaintiff urges, choosing instead to modify the application of that rule only in selected contexts and only under the specific conditions set forth by the Legislature. Thus, for example, the specific holding of *DeRose*—namely, that the first-injury rule bars an action for psychological injuries occurring later in adulthood as a result of childhood sexual abuse—was modified by the Legislature's subsequent adoption of Code of Civil Procedure section 340.1. That statute allows certain suits for "psychological injury or illness occurring after the age of majority" as a result of childhood sexual abuse, but only under the specific conditions set in the statute. (E.g., Code Civ. Proc., § 340.1, subd. (b)(1) [generally requiring such suits, when filed against persons other than the direct perpetrator, to be filed before the plaintiff's 26th birthday].)

In responding to *DeRose*, the Legislature notably did *not* establish a general multiple-injury rule, but rather statutorily altered the first-injury rule *only* in the specific context of later-occurring psychological injuries arising from childhood sexual abuse. (See Stats. 1990, ch. 1578, § 1, amending Code Civ. P. § 340.1.) The Legislature undoubtedly could have gone farther had it deemed it appropriate, but it did not. This partial and nuanced modification of the application of the first-injury rule in *DeRose*

stands in sharp contrast to the broadbrush approach Plaintiff urges in this case.

Likewise, the Legislature's enactment of Code of Civil Procedure section 340.2 substantially modifies the applicability of the single-injury rule in the asbestos context, as this Court's decision in *Hamilton* illustrates. In that case, this Court applied this special asbestos-specific statute of limitations in holding that the plaintiff's two separately filed causes of action for two asbestos-related diseases (asbestosis and mesothelioma) were *both* timely. (*Hamilton*, *supra*, 22 Cal.4th at p. 1142, citing Code Civ. Proc., § 340.2.) Under the terms of that statute, the period of limitations did not run from the date of an illness or its discovery (as is typical), but rather from the point at which the plaintiff experienced "'loss of time from work as a result of such [asbestos] exposure.'" (*Hamilton*, *supra*, 22 Cal.4th at p. 1138, quoting Code Civ. Proc., § 340.2, subd. (b).) Construing the statute in accordance with its plain language, this Court held that, because the plaintiff had retired before ever experiencing "loss of time from work," this special statute of limitations had *never* begun to run. (*Hamilton*, at p. 1142.) The resulting permissiveness of this asbestos-specific statute of limitations effectively mooted any possible issue concerning application of the single-injury rule (which the Court held the defendant had waived in any event). (*Id.* at p. 1134.)

The establishment and modification of statutes of limitations—which inherently "entail[] a striking of a balance" between two competing policies, "one for repose and the other for disposition on the merits"—"belongs to the Legislature alone." (*Norgart*, *supra*, 21 Cal.4th at p. 396; see also *Hamilton*, *supra*, 22 Cal.4th at p. 1145.) Accordingly, any modifications to the first-injury rule should come from the Legislature, whose enactment of special statutes in the specific contexts of childhood

sexual abuse and asbestos cases shows that it knows how to make such modifications when it deems it necessary. Moreover, the Legislature is best positioned to make the quintessentially legislative judgments necessary to construct an alternative system of rules to replace the first-injury rule in a specific context. Indeed, when the Legislature has acted, it has always taken care to tailor any modifications of the first-injury rule to the specific context in question rather than simply abrogate it completely. (See Code Civ. Proc., §§ 340.1, 340.2.)

Notably, the Legislature in 2002 amended the statute of limitations for personal injury actions—extending the limitations period from one year to two years—but it did so without altering the normal operation of the first-injury rule. (See Stats. 2002, ch. 448, § 1, codified at Code Civ. Proc., § 335.1.) Even though the opportunity was available to create a special rule, and, in fact, the Legislature did address particular issues regarding claims of September 11 victims (Code Civ. Proc., § 340.10), the Legislature did not create a "separate and distinct" injury rule for tobacco cases, nor did it adopt a special limitations rule analogous to those for asbestos claims (*id.*, § 340.2) or childhood sexual abuse claims (*id.*, § 340.1). Given that the Legislature has not enacted a special statute modifying the longstanding first-injury rule in tobacco cases, and in light of the Legislature's historically measured approach to enacting such modifications to the rule, Plaintiff's request for a wholesale judicial abrogation of that rule in tobacco cases should be rejected.

B. The Legislature Did Not Implicitly Amend the Statute of Limitations When It Partially Repealed the Tobacco Immunity Statute

Notwithstanding the absence of any applicable California statute abrogating the traditional first-injury rule in this context, Plaintiff argues that the Legislature's partial repeal of the prior tobacco immunity statute

(Civ. Code, § 1714.45) somehow impliedly repealed or modified the statute of limitations. (P.O.B. 39-41.) Plaintiff bases this argument on the fact that, in repealing the immunity statute, the Legislature expressed an intention that claims would proceed "without the imposition of any claim of statutory bar or categorical defense." (Civ. Code, § 1714.45, subd. (f).) This argument is demonstrably wrong: as the language and context of the statute make clear, the "statutory bar or categorical defense" referred to was simply the categorical defense provided by the prior version of section 1714.45.

An argument identical to Plaintiff's was considered and rejected by the Court of Appeal in *Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 Cal.App.4th 42, which upheld the trial court's dismissal of a smoking-related lawsuit on statute of limitations grounds. The *Barker* court explained that the reference to "any claim of statutory bar or categorical defense" was "unambiguously" directed only to the immunity defense itself:

> Barker, in arguing the Legislature intended to abrogate the statute of limitations for tobacco-related wrongful death suits, focuses on the language of section 1714.45, subdivision (f), which states such suits "shall be determined on their merits, *without the imposition of any claim of statutory bar or categorical defense*" (italics added) but he ignores the context of the language. The context of the language is a statute providing a "statutory bar" or "categorical defense," i.e., an immunity, from product liability lawsuits for certain enumerated consumer products. The context is an amendment that eliminates the previously granted immunity for tobacco-related product liability suits. When read in context, the language of the amendments unambiguously is directed at the elimination of the previously granted immunity.

(*Id.* at p. 47.) "Section 1714.45," the court observed, "contains no reference to the statute of limitations statute." (*Ibid.*) And the court held

that "eliminating statutory immunity for certain lawsuits is not inconsistent with a statute requiring that such lawsuits be brought within certain time limits." (*Id.* at pp. 47-48.)

Moreover, in addressing the effect of the partial repeal of section 1714.45 on pending suits, this Court has repeatedly stated that the effect of the repeal was to restore the normal operation of otherwise applicable tort law for conduct outside of the ten-year immunity period. (See *Naegele v. R.J. Reynolds Tobacco Co.*, *supra*, 28 Cal.4th at p. 860 ["The liability of tobacco companies based on their conduct outside the 10-year period is governed by general tort principles."]; *Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828, 847-848 ["Before January 1, 1988 [the effective date of the immunity statute], general tort principles defined the extent of any tort liability that tobacco companies might have .... When 10 years later, the California Legislature repealed the statutory immunity for tobacco manufacturers in products liability actions, it reinstated those general tort rules."].) In fact, this Court determined that the very text Plaintiff quotes did not even indicate the Legislature's clear intent to retroactively repeal the immunity statute itself, let alone to affect wholly unrelated bodies of law. (See *Myers v. Philip Morris Cos.*, *supra*, 28 Cal.4th at pp. 842-844.)

Furthermore, Plaintiff's argument on this score proves far too much. It inevitably rests on the premise that, by partially repealing the "statutory bar or categorical defense" in the former section 1714.45, the Legislature implicitly (and accidentally) abolished the statute of limitations, as well as any and all other statutory defenses, *in their entirety* in tobacco cases. Nothing in the text or legislative history of the immunity repeal statute even remotely suggests that the Legislature intended such an extraordinary (and unconstitutional) result.

II. Plaintiff Has Provided No Basis for the Wholesale Revision of California Law That She Requests

In the absence of any pertinent Legislative action vitiating the first-injury rule here, Plaintiff's policy arguments and grab-bag of inapposite and discredited authorities provide no basis for this Court to undertake such a radical shift in settled law.

A. None of the Cases Cited by Plaintiff Justifies Abrogating the First-Injury Rule

In support of her proposed multi-injury rule, Plaintiff relies on a collection of cases that are largely irrelevant to the case at hand. None of the decisions of *this* Court that Plaintiff cites provides any basis for discarding the first-injury rule. The remaining authorities cited by Plaintiff consist of cases applying the law of other jurisdictions; cases involving specific statutory regimes governing only a particular area; and a discredited pair of Court of Appeal cases that have been sharply criticized and have not been followed in any subsequent published decisions. Considered either singly or collectively, these authorities provide no warrant for the sort of wholesale change in California law Plaintiff urges.

1. The Decisions of This Court Have Carefully Avoided Questioning the Single-Injury Rule

Although Plaintiff cites a handful of decisions of this Court in support of her proposed abolition of the first-injury rule, none of these decisions even remotely supports that position. On the contrary, the Court's analysis of California law has consistently reflected a cautious avoidance of any such questioning of the rule—an exercise of restraint that befits the cross-cutting importance of this rule to the entire field of personal-injury law.

Thus, for example, in *Hamilton*, this Court expressly declined the plaintiff's invitation to discard the single-injury rule and to instead

recognize separate causes of action for each distinct injury: "We need not reach the question whether Mitchell had a separate primary right to be free from each of the two diseases resulting from his asbestos exposure." (22 Cal.4th at p. 1146.) Although Justice Brown's concurring opinion expressly advocated such a result, her opinion cited no California decisions in support of that view and not a single other Justice joined that opinion. (*Id.* at p. 1150 [conc. opn. of Brown, J.].) Instead, the Court relied solely upon the asbestos-specific statute of limitations adopted by the Legislature. (*Id.* at pp. 1144-47.)

In *Grisham*, this Court took a similarly cautious approach and declined amicus curiae Pooshs' invitation to jettison the first-injury rule. The Court concluded that it "need not resolve whether and under what circumstances two different physical injuries arising out of the same wrongdoing can give rise to two separate lawsuits...." (*Grisham*, *supra*, 40 Cal.4th at p. 643.) Instead, the Court limited its holding to the narrow conclusion that a claim for purely *economic* injuries involves a different primary right than a claim for *physical* injuries. (*Id.* at pp. 643-644.) Plaintiff contends that this holding supports a complete abrogation of the first-injury rule (P.O.B. 43-45), but that is wrong. In drawing a distinction between purely economic losses and physical injuries, the Court placed dispositive weight on the fact that these two categories represented two entirely "different *type*[*s*]" of injuries. (*Grisham*, *supra*, 40 Cal.4th at p. 644, italics added.) Indeed, this Court explicitly distinguished that situation from other cases—such as this one—where California courts have held that a "plaintiff cannot sue on later developed physical injuries when earlier physical injuries are appreciable." (*Ibid.*, italics added [describing *Miller* as such a case].) Unlike a case of successive physical injuries, a case in which "there is an earlier manifesting economic injury and a later

manifesting physical injury" involves two "qualitatively different type[s] of action." (*Id.* at pp. 644-645.) By its own terms, *Grisham*'s rationale for distinguishing between economic injuries and physical injuries does *not* extend to successive physical injuries.[5]

This Court's decision in *Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, likewise provides no support for Plaintiff's attack on the first-injury rule. *Fox* was not a "separate and distinct" injury case, but rather a case involving two acts of *separate and distinct wrongdoing*, each of a qualitatively different nature, that together gave rise to a single injury. In *Fox*, the plaintiff originally brought a medical malpractice claim against the doctor who performed her surgery; the issue was whether she was time-barred from raising a subsequent product liability claim against a surgical tool manufacturer after she learned that the manufacturer may have been at fault for her injuries. (35 Cal.4th at pp. 814-815.) The plaintiff in *Fox* did not even allege multiple or separate injuries, and the case therefore cannot possibly support the adoption of a "separate and distinct" or "multiple injury" rule.

This Court's repeated reluctance to recognize a broad exception to the first-injury rule is entirely appropriate. (Cf. also *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 214 [sex abuse plaintiff's claim against *government entity* for later-occurring injuries, which was otherwise barred by failure timely to present claim to government, was not authorized by § 340.1, as amended].) As shown by the variety of contexts in which the rule has been applied—including drug, tobacco, and other products liability cases (such as *Nodine* and this case), sexual abuse cases (*DeRose* and

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[5] Plaintiff here has explicitly abandoned any separate claim for purely economic injuries, which would be time-barred under *Grisham* in any event. (See Ninth Circuit Brief for Defendants-Appellees at pp. 43-46.)

Shirk), assault cases (*Sonbergh*), fraud cases (*Nodine* and this case), and even building defect cases (*Miller*)—the rule has broad importance to the entire range of personal-injury tort law. The Court's caution further confirms that any change in this important area of the law should be accomplished by the Legislature.

2. The Remaining California Cases Cited by Plaintiff Are Either Inapposite or Have Been Wholly Discredited

In the absence of any decision from this Court that would support Plaintiff's proposed overhaul of California law, Plaintiff has assembled a collection of inapposite and/or discredited cases—which only serves to underscore that there is no viable *California* authority supporting her position.

Several of the California-court decisions cited by Plaintiff were brought under specific *federal* statutes in state court, and the courts' construction of these federal enactments says nothing about California law. Thus, for example, *Coots v. Southern Pacific Co.* (1958) 49 Cal.2d 805 (*Coots*) involved an action brought "under the provisions of the Federal Employers' Liability Act" (FELA), which contains its own *federal* statute of limitations. (*Id.* at p. 806, citing 45 U.S.C. § 56 (1952 ed.).) The Court therefore relied on *federal* case law to determine when the plaintiff's cause of action arose. (See *id.* at pp. 806-807.) In any event, *Coots* does not even mention a multiple-injury rule, much less adopt such a rule. On the contrary, *Coots* held that the FELA limitations period did not begin to run until the plaintiff became *disabled* from work, and that the plaintiff's earlier minor skin injuries were not sufficient to trigger the running of the statute under that standard. (*Coots*, *supra*, 49 Cal.2d at p. 810.) This FELA-specific "disability" standard has no relevance here.

The *Coots* concurring opinion, on which Plaintiff heavily relies, is similarly unavailing. The concurring Justice agreed that the plaintiff's earlier minor skin injuries did not trigger the running of the FELA statute of limitations, but he disagreed with the majority's "disability" standard. (*Coots*, *supra*, 49 Cal.2d at pp. 811-815 [conc. opn. of Spence, J.].) Instead, the concurrence argued that under applicable U.S. Supreme Court precedent construing the FELA, the statute of limitations would not begin to run until the plaintiff first sustained "substantial" harm. (*Id.* at pp. 813-814.) Because the earlier rash on plaintiff's hands was "*de minimis*," the concurrence concluded that it did not trigger the statute of limitations. (*Id.* at p. 814, original italics.) Even setting aside that this is not an FELA case, Plaintiff concedes that she sustained *substantial* physical injuries from smoking—COPD and periodontal disease—more than a decade before she filed suit. (*Ante*, p. 10, fn. 4.)

Likewise misplaced is Plaintiff's reliance on *Wagner v. Apex Marine Ship Management Corp.* (2001) 83 Cal.App.4th 1444 (*Wagner*), an asbestos-related case arising under the federal Jones Act (46 U.S.C. App. § 668). The *Wagner* court noted that "*[f]ederal maritime law* governs our review of this case" (*id.* at p. 1448, italics added), and a federal statute supplied the applicable statute of limitations. (*Ibid.*, citing 46 U.S.C. App. § 763a.) In addition, the asbestos-specific context of *Wagner* renders it doubly irrelevant: because the disability for which Wagner sought recovery was caused by his asbestosis and not by his earlier pleural disease, Wagner's claim would likely have been timely even if it had been governed by California's *asbestos-specific* statute of limitations. (See Code Civ. Proc., § 340.2, subd. (a)(1) [delaying running of statute until (at least) the occurrence of "disability"]; see also *Wagner*, at p. 1447 [noting that

complaint alleged that plaintiff's earlier-diagnosed pleural disease did *not* cause a "disability"].)

Also inapposite is *Chevron U.S.A. v. Workers' Compensation Appeal Bd.* (1990) 219 Cal.App.3d 1265 (*Chevron*). In this workers' compensation case, the sole issue was the proper date of injury for the purpose of calculating the compensation rate of the death benefit under Labor Code section 5412. That statute, however, specifically provided that in "'cases of *occupational diseases* or cumulative injuries,'" the applicable date of injury for purposes of determining benefits was the date when the "'employee first suffered disability *therefrom*.'" (*Chevron*, at p. 1270, quoting Lab. Code, § 5412, italics added.) The court concluded that this statutory language supported distinct dates of injury for the plaintiff's two asbestos-related diseases (asbestosis and, later, mesothelioma), so that the date of injury "with regard to the *mesothelioma* could not have occurred until he 'first suffered disability *therefrom*.'" (*Chevron*, at p. 1271, quoting Lab. Code, § 5412, italics added.) The particular statutory interpretation question in *Chevron* turns on the specific terms of the Labor Code and has no relevance here. If anything, *Chevron* confirms that, if it so chooses, the Legislature knows how to create separate recoveries for separate injuries. It has not done so here.

Finally, Plaintiff relies upon the extensively criticized Court of Appeal decision in *Martinez-Ferrer v. Richardson-Merrell, Inc.* (1980) 105 Cal.App.3d 316 (*Martinez-Ferrer*), which departed from the traditional first-injury rule. (See also *Zambrano v. Dorough* (1986) 179 Cal.App.3d 169 (*Zambrano*) [relying on *Martinez-Ferrer*].) *Martinez-Ferrer* and *Zambrano* are aberrational decisions that have since been sharply criticized for disregarding the well-settled rule against splitting a cause of action and have not been followed in subsequent published California decisions. (See

3 Witkin, Cal. Procedure (5th Ed. 2008) Actions § 592, pp. 764-766 [noting the extensive criticism of *Martinez-Ferrer*].)

For example, *Martinez-Ferrer* was specifically criticized in *DeRose* and *Miller*. (See *Miller*, *supra*, 1 Cal.App.4th at pp. 1625-1627; *DeRose*, *supra*, 196 Cal.App.3d at pp. 1024-1026.) The *DeRose* court explained that *Martinez-Ferrer*'s "assault on the rule against splitting a cause of action" was "completely unnecessary" because the *Martinez-Ferrer* court could have reached the same result applying a more traditional analysis. (*DeRose*, *supra*, 196 Cal.App.3d at pp. 1024-1026.) Given that the first injury at issue in *Martinez-Ferrer* (a short-lived rash) did not amount to more than nominal harm and thus did not trigger the statute of limitations in the first place, the first-injury rule was not implicated and would not have prevented the plaintiff from suing for cataracts 12 years later. (*Id.* at pp. 1024-1025 & fn. 7.) Moreover, as *Miller* explained, it was only in the context of what *might* be found by the jury in a later trial that *Martinez-Ferrer* suggested that a departure from the first-injury rule might be warranted. (*Miller*, *supra*, 1 Cal.App.4th at p. 1626 [citing *Martinez-Ferrer*, *supra*, 105 Cal.App.3d at p. 322].) Thus, *Miller* correctly noted that all of the relevant discussion in *Martinez-Ferrer* is "technically dicta, as it is premised on a set of hypothetical facts which the court speculated would be found in the future." (*Id.* at p. 1626.)[6]

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[6] While Plaintiff claims (P.O.B. 16) that this Court endorsed the *Martinez-Ferrer* dicta by citing the case "without any suggestion of disapproval" in *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110, fn. 5 (*Jolly*), the Court in *Jolly* merely rejected in passing the plaintiff's argument that five cases, including *Martinez-Ferrer*, supported the view that the discovery rule postpones the statute of limitations until the "plaintiff knew or reasonably should have known of the facts constituting wrongful conduct." (*Jolly*, *supra*, 44 Cal.3d at p. 1110 & fn. 5.) In rejecting the plaintiff's argument, the Court noted that the five cited cases "do no more than set out the discovery rule." (*Ibid.*) This limited-purpose citation, which relates to an

Likewise, the *DeRose* court sharply criticized *Zambrano* for "virtually obliterat[ing]" the statute-of-limitations accrual rule. (*DeRose*, *supra*, 196 Cal.App.3d at p. 1025.) As *DeRose* explained, *Zambrano* simply asserted, without analysis, that each separate injury is a separate "primary right[]" that gives rise to a new cause of action. (*Id.* at p. 1024, fn. 5.) *DeRose* correctly points out that this sweeping departure from the "longstanding rule in California ... that '[a] single tort can be the foundation for but one claim for damages'" (*id.* at p. 1024, fn. 5 [quoting *Panos v. Great Western Packing Co.*, *supra*, 21 Cal.2d at p. 638]) would "come as a shock to many readers." (*Id.* at p. 1025, fn. 8; see also *id.* ["Significantly, no reported case has relied upon *Zambrano*."].)

Plaintiff has simply failed to identify any real support in California case law for rejecting the settled first-injury rule, which has long been recognized and applied by California courts.

3. The Out-of-State Cases Cited by Plaintiff Are Irrelevant

Given the dearth of supporting California case law, Plaintiff's brief in this Court unsurprisingly relies heavily on a (cherry-picked) collection of out-of-state authorities—many of which likewise involve either federal law principles or the specific context of asbestos. Plaintiff, of course, overlooks the many jurisdictions that have explicitly rejected the multiple-injury approach and that instead adhere to the single-injury approach that prevails in California. (See, e.g., *Joyce v. A.C. & S., Inc.* (4th Cir. 1986) 785 F.2d 1200, 1203-1205 [rejecting multiple-injury rule under Virginia law, which holds that "there is but a single, indivisible cause of action for all injuries sustained, whether or not all of the damage is immediately apparent"]; *Matthews v. Celotex Corp.* (D.N.D. 1983) 569 F.Supp. 1539, 1542

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entirely separate point, did not purport to endorse the distinct aspect of *Martinez-Ferrer* upon which Plaintiff relies here.

[rejecting multiple-injury rule under North Dakota law]; *Spain v. Brown & Williamson Tobacco Corp.* (Ala. 2003) 872 So.2d 101, 112-115 [deeming statute of limitations to be triggered by physical injury attributable to addiction, not by later-diagnosed lung cancer]); see also *Jones v. Trustees of Bethany College* (W.Va. 1986) 351 S.E.2d 183, 187 [holding that statute starts to run when the plaintiff first suffers "noticeable personal injury" from a traumatic event and is not tolled "because there may also be a latent injury arising from the same traumatic event"].) In any event, the out-of-state cases cited by Plaintiff at most demonstrate that the law in some other jurisdictions may differ from California law. As a consequence, these cases have little or nothing to say about the questions presented in this case.

For example, two of the cases upon which Plaintiff relies are federal cases that, like *Coots*, construe the *federal* statute of limitations under the FELA. (*Mix v. Delaware & Hudson Ry. Co.* (2d Cir. 2003) 345 F.3d 82 (*Mix*); *Fonseca v. Consolidated Rail Corp.* (6th Cir. 2001) 246 F.3d 586 (*Fonseca*).) Moreover, it is doubtful that the actual results in these two cases would have been different under California's first-injury rule, because the earlier "temporary" injuries in *Mix* and *Fonseca* were arguably de minimis and therefore would not have constituted the "appreciable harm" necessary to give rise to a cause of action under *Davies*, *supra*, 14 Cal.3d at p. 514. (See *Mix*, at p. 91 [holding that, to avoid summary judgment under the FELA's statute of limitations, plaintiff was required to show that his earlier "tinnitus and hearing loss caused only temporary discomfort as a result of his exposure to noisy working conditions"]; *Fonseca*, at p. 590 [plaintiff contended that his earlier injuries were merely "the normal discomforts of a day's work"].) Here, by contrast, Plaintiff's COPD and periodontal disease were much more than a "temporary discomfort." (*Ante*,

p. 10, fn. 4.) Neither *Mix* nor *Fonseca* supports adopting Plaintiff's proposed "separate and distinct" injury rule.

Plaintiff's reliance upon several asbestos cases from various jurisdictions, such as *Wilson v. Johns-Manville Sales Corp.* (D.C. Cir. 1982) 684 F.2d 111, and *Jackson v. Johns-Manville Sales Corp.* (5th Cir. 1984) 727 F.2d 506, likewise does little to advance her position. (P.O.B. 26-28; see also P.O.B. 32-34 [citing additional asbestos cases].) As explained above, the California Legislature has addressed the particular problems of asbestos cases by adopting a special statute of limitations (*ante*, p. 15; Code Civ. Proc., § 340.2), and the fact that this result was accomplished in California by legislation undercuts rather than supports Plaintiff's argument. Here, the Legislature has adopted no similar statute for latent-disease claims in general or tobacco claims in particular.

Plaintiff's reliance on two tobacco cases decided under New York and Rhode Island law (P.O.B. 29-32) is similarly misplaced; neither opinion provides any basis for overturning the settled California law described above. In *Sackman v. Liggett Group, Inc.* (E.D.N.Y. 1996) 167 F.R.D. 6 (*Sackman*), which arose under New York law, the court's application of a multiple-injury rule was based on *Fusaro v. Porter-Hayden Co.* (N.Y. Sup. Ct. 1989) 548 N.Y.S.2d 856 (*Fusaro*) (see *Sackman, supra*, 167 F.R.D. at p. 14). *Fusaro*, however, did not purport to adopt a multiple-injury rule out of whole cloth as Plaintiff urges this Court to do. Rather, *Fusaro* construed and applied a New York statute of limitations *enacted solely for "latent" injury cases.* (*Fusaro*, 548 N.Y.S.2d at pp. 857-858, quoting N.Y. C.P.L.R., § 214-c(2), italics added; see also *Golod v. Hoffman La Roche* (S.D.N.Y. 1997) 964 F.Supp. 841, 850-852 [likewise relying upon cases construing N.Y. C.P.L.R., § 214-c(2)]; *Braune v. Abbott Labs*

(E.D.N.Y. 1995) 895 F.Supp. 530, 555 [same].) As noted, California has no similar statute.

Similarly unhelpful is Plaintiff's citation of *Nicolo v. Philip Morris, Inc.* (1st Cir. 2000) 201 F.3d 29. There, the First Circuit specifically noted that jurisdictions have reached different results on these issues (*id.* at pp. 32-33), but "lacking clear guidance from the Rhode Island courts," the court made its "best guess" as to how *Rhode Island* would address the statute of limitations question. (*Id.* at p. 40.) There is no such ambiguity about *California's* first-injury rule. Moreover, Rhode Island is one of the jurisdictions whose statute-of-limitations jurisprudence has previously been explicitly rejected by this Court as inconsistent with California law. (See *Jolly*, *supra*, 44 Cal.3d at p. 1110, fn. 6 [explicitly rejecting Rhode Island's overly expansive construction of the discovery rule].)[7]

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[7] None of the other out-of-jurisdiction cases Plaintiff cites is particularly instructive. For example, in *Hagerty v. L&L Marine Servs., Inc.* (5th Cir. 1986) 788 F.2d 315, 321, a Fifth Circuit panel urged in *dicta* that the en banc court or Congress reconsider the first-injury rule in federal Jones Act cases. In *Colby v. E.R. Squibb & Sons, Inc.* (D.Kan. 1984) 589 F.Supp. 714, 716-717, the district court construed Kansas' 10-year statute of *repose*, which places an outer limit on the extent to which the discovery rule can extend the statute of limitations. (See Kan. Stat. Ann. § 60-513(b).) California lacks any such statute, and *Colby*'s analysis is therefore irrelevant. In *Green v. A.P.C. (American Pharmaceutical Co.)* (Wash. 1998) 960 P.2d 912, the Washington Supreme Court recognized that "Washington has not yet applied the 'separate and distinct injuries' exception to the traditional rule regarding the harm element of the accrual of a cause of action," and the court declined to do so in the case at hand. (*Id.* at p. 917.) Finally, neither *Wilkinson v. Harrington* (R.I. 1968) 243 A.2d 745, nor *Lee v. Morin* (R.I. 1983) 469 A.2d 358, involved multiple injuries; in each case, the Rhode Island Supreme Court merely clarified the point at which the cause of action accrued for certain types of single-injury claims. (*Wilkinson*, at p. 238 [medical malpractice claims]; *Lee*, at p. 360 [construction defect claims].)

B. Plaintiff Offers No Sound Reason for This Court to Depart from California's Settled First-Injury Rule

Lastly, Plaintiff contends that a failure by this Court to adopt her proposed multiple-injury rule "would violate the public policy of this state," since the existing first-injury rule may foreclose plaintiffs from litigating certain latent injuries. (P.O.B. 2, 36.) Plaintiff's argument, however, does not account for the important public policies advanced by statutes of limitations that would be compromised under her proposed rule, nor does it consider the significant uncertainty that would be introduced into the law as courts would be forced to grapple with burgeoning disputes over which injuries may be deemed sufficiently "separate and distinct" to give rise to separate statutes of limitations. And on a more fundamental level, Plaintiff's argument fails to recognize that it is for the *Legislature*, not the courts, to determine whether a particular application of the statute of limitations strikes the correct balance between competing public policies.

As this Court has recognized, statutes of limitations are necessary to afford parties reasonable repose "by giving security and stability to human affairs" (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898) and to protect them from "defending stale claims" where important evidence may have been lost or compromised (*Jolly*, *supra*, 44 Cal.3d at p. 1112; *Norgart*, *supra*, 21 Cal.4th at p. 410). The first-injury rule advances these policies by triggering the statute of limitations for all physical injuries at the earliest infliction of "appreciable and actual [physical] harm" (*Davies*, *supra*, 14 Cal.3d at p. 514), thereby ensuring that once a plaintiff has suffered such harm, his or her ability to bring suit for physical injuries allegedly caused by the underlying conduct is circumscribed within a determinable time period. (See *ibid.* ["[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation."].)

Under Plaintiff's proposed multiple-injury rule, by contrast, the time frame during which a plaintiff can raise a claim, even after suffering an appreciable injury from the alleged wrongful conduct, is essentially *indefinite*, as the plaintiff would be potentially free to bring suit upon any subsequently developing injury (or injuries) regardless of how long after the initial injury the later injury occurred. The multiple-injury rule would therefore undermine the core purposes of the statute of limitations: dilatory plaintiffs could undermine the statute by invoking supposedly distinct injuries and defendants would lack protection from the burdens of litigating stale claims. Moreover, by requiring consideration of the possibility of subsequent lawsuits based on future injuries, such a rule could also undercut the "well-established public policy in this state that settlements of litigation are favored and should be encouraged." (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1338.)

Moreover, despite Plaintiff's contention that her proposed multiple-injury rule would serve "to promote rather than to undermine judicial economy and certainty" (P.O.B. 36, italics omitted), such a rule would allow plaintiffs to subject defendants and the courts to lawsuits for each injury that plaintiffs allege can be divided into distinct and separate injuries. Thus, for example, under Plaintiff's argument, she would be entitled to separate statutes of limitation for each of her claimed separate and distinct injuries: (1) COPD; (2) periodontal disease; and (3) lung cancer. And although Plaintiff contends that her proposed rule would provide courts with "better medical evidence relating to damages and causation" (P.O.B. 37), any such benefit would be undermined by the prejudicial effects of the passage of time, which, as this Court recognized, "threatens the loss of evidence, the fading of memories, and the disappearance of witnesses." (*Norgart*, *supra*, 21 Cal.4th at p. 410.)

In addition to multiplying the opportunities for litigation and increasing the likelihood of litigating stale claims, Plaintiff's multiple-injury rule would lead to arbitrary line-drawing regarding what conditions are truly "separate and distinct." For example, is gingivitis really "separate and distinct" from gum disease or alveolar bone loss (conditions the plaintiff in *Grisham* complained of) such that gingivitis, gum disease, and alveolar bone loss each warrant a separate limitations period? Is smoking-induced dyspnea, or shortness of breath, "separate and distinct" from other smoking-related respiratory problems like COPD (conditions about which the plaintiffs in both *Grisham* and *Cannata* complained) or orthopnea (which was alleged in *Soliman*), such that dyspnea, orthopnea, and COPD each gets its own limitations period? Adopting a multiple-injury rule would embroil litigants in time-consuming debates on this collateral issue. With no clear line to demarcate "separate and distinct" injuries, and given the virtually limitless ways in which injuries can be characterized, plaintiffs would predictably seek to subdivide every progressive condition into increasingly smaller discrete units, while defendants would inevitably push in the opposite direction. Adhering to the longstanding first-injury rule will allow courts to avoid addressing such difficult issues.

The uncertainty surrounding what constitutes a "separate and distinct" injury would only further undermine the statute of limitations' effectiveness in fostering diligence on the part of plaintiffs to pursue fresh claims. (*Norgart*, *supra*, 21 Cal.4th at p. 395.) The value of the statute of limitations as a spur to diligence lies primarily in its bright-line nature; as this Court has recognized, the statute "operates *conclusively* across the board, and not flexibly on a case-by-case basis." (*Ibid.*, italics added.) By adding a layer of complexity and uncertainty to the statute, however, Plaintiff's proposed rule would dilute the statute's effectiveness as a

deterrent of undue delay. Under the multiple-injury rule, dilatory plaintiffs could salvage stale claims by formulating strained "separate and distinct injury" arguments that take advantage of the indeterminate standards governing the divisibility of injuries. Even if such arguments ultimately may not pass muster before a court in any given case, defendants may well find themselves compelled to settle the untimely claims rather than risk adverse rulings in a murky area of law that might lead to burdensome litigation of stale claims (especially where crucial defense evidence has been lost in the interim). As a result, the multiple-injury rule would provide procrastinating plaintiffs with increased opportunities to benefit from dilatory claims, thus reducing their incentives to pursue their claims in a timely manner.

Plaintiff's proposed rule would further complicate the limitations analysis in an additional manner. Under Plaintiff's rule, courts must decide both whether the first injury was "only relatively mild" and whether the later injury was "serious, separate[,] ... distinct [and] latent." (P.O.B. 1.) This rule would thus force courts to develop—without any Legislative guidance—a distinct jurisprudence clarifying these indeterminate standards, as courts would be faced with distinguishing supposedly "relatively mild" injuries from "serious" injuries in order to determine whether a new statute of limitations had accrued.

Indeed, Plaintiff's unwieldy rule makes little sense in light of existing California law. Under the longstanding first-injury rule, courts are already required to determine, at the first instance, whether the initial injury constituted "appreciable and actual [physical] injury" sufficient to trigger the statute of limitations. (*Davies*, *supra*, 14 Cal.3d at p. 514.) Thus, plaintiffs are already afforded the sort of protection sought by Plaintiff's proposed rule: a de minimis injury suffered by a plaintiff *will not suffice* to

trigger the statute, because the statute runs *only if* the plaintiff's injury is deemed "appreciable and actual." (*Ibid.*) Plaintiff's proposed inclusion of a new category of "mild" but appreciable injury—one that would be enough to trigger the statute, but not as to all injuries—would merely add an unnecessary layer of indeterminacy and complexity to the existing analysis.

As this Court has recognized, statutes of limitations, by their nature, represent a compromise between the broad social goals of providing parties with "'repose by giving security and stability to human affairs'" and encouraging the disposition of legal claims on the merits rather than on procedural grounds. (*Norgart*, *supra*, 21 Cal.4th at p. 396, citation omitted.) Given this delicate balancing of public policies, any judgment that a particular application of the statute of limitations is too harsh or permissive must come from the *Legislature* rather than the courts, since the Legislature is best equipped to tailor the statute to reflect prevailing policy judgments. (*Id.* at pp. 396-397 [stating that it "belongs to the Legislature alone" to strike the appropriate policy balance in establishing limitations periods]; *Hamilton*, *supra*, 22 Cal.4th at p. 1145 [stating that if the statute of limitations is "deemed inadequate," it is "for the Legislature, not the appellate courts, to rewrite it"].) Indeed, as discussed above, the Legislature has, in the context of childhood sexual abuse and asbestos cases, made the judgment to depart from the traditional first-injury rule. (*Ante*, pp. 14-15.) And the *manner* in which the Legislature departed from the first-injury rule in the asbestos context notably *differed* from how it chose to refashion the rules in the context of childhood sexual abuse, reflecting a clear concern to closely tailor any adjustments to the particular context in question. (Compare Code Civ. Proc., § 340.1, with *id.*, § 340.2.)

Plaintiff, however, seeks to cure what she perceives as unfairness in the present governing rule with a hammer rather than a scalpel. Scrapping the first-injury rule in favor of a multiple-injury rule would constitute an unprecedented departure from longstanding California case law and would stand in stark contrast to the highly tailored alterations made by the Legislature in other contexts. And although the certified question as reformulated specifically refers only to tobacco cases, the implications of any abrogation of the first-injury rule will not be limited to that context: the question of whether California courts should continue to follow the first-injury rule is one that has broad implications for *all* personal-injury litigation—a fact made clear by the wide variety of cases in which the first-injury rule has been applied. (*See, e.g., Nodine, supra*, 240 F.3d at pp. 1153-1154 [medical devices]; *Miller, supra*, 1 Cal.App.4th at p. 1622 [residential exposure to mold]; *Sonbergh, supra*, 112 Cal.App.2d at p. 773 [assault].)

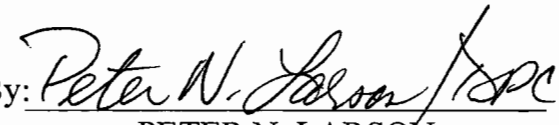
Adoption of the substantial change proposed by Plaintiff would open the door for innumerable plaintiffs in a wide variety of contexts to urge similar treatment, and it is the Legislature, not this Court, that is best suited to calibrate any modification to the first-injury rule in light of these broader concerns.

CONCLUSION

This Court should answer the certified question in the affirmative.

DATED: July 20, 2009

JONES DAY

By: 
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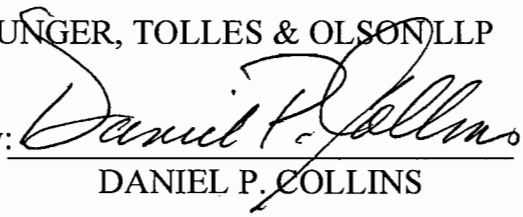
By: 
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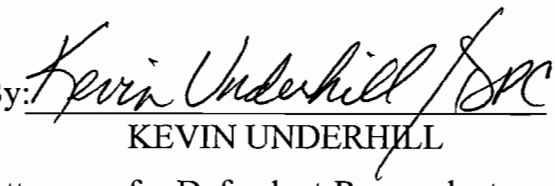
By: 
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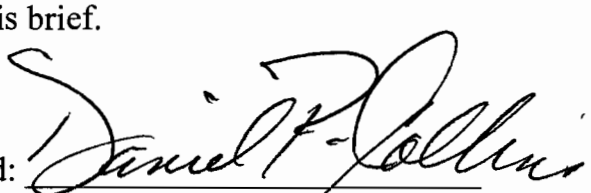
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.520(c)(1) of the California Rules of Court, that the enclosed "Respondents' Answer Brief on the Merits" is produced using 13-point Roman type (including footnotes) and contains approximately 10,648 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 20, 2009

Signed: 

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Pooshs v. Philip Morris USA Inc., et al.
No. S172023

I, Laurie E. Thoms, declare:

1. I am over the age of 18 and not a party to the within cause. I am employed by Munger, Tolles & Olson LLP in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, California 90071-1560.

2. On July 20, 2009, I served the attached document entitled

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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/S/
Laurie E. Thoms

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