

State Supreme Court Revises "Two-Injury" Rule

February 28, 2012 by [Sean Wajert](#)

The traditional single claim rule requires a plaintiff to bring at one time a suit for all the injuries arising from the same accident or incident, or risk being barred. In the toxic tort context, the issue is complicated by the fact that an exposure may put a plaintiff at risk for different diseases that have different latency periods, meaning different time periods before the injuries will manifest themselves. Courts have to consider the impact of the statute of limitations, res judicata, and the pros and cons of encouraging premature filings relating to the mere risk of future disease or of allowing a plaintiff to, in a sense, split a cause of action into separate claims arising from the same product, same exposure, and same alleged conduct of the defendant.

Last week, the Pennsylvania Supreme Court modified its rules on these issues, holding that plaintiffs seeking damages for certain asbestos-related health problems can file separate lawsuits for distinct cancers they may develop. See [Daley v. A.W. Chesterton Inc., et al.](#), No. J-98-2010 (Pa. 2012).

In 1989, plaintiff/appellee Herbert L. Daley was diagnosed with pulmonary asbestosis and squamous-cell carcinoma of the right lung. He sued several defendants, and the case eventually settled. A decade later, Daley was diagnosed with malignant pleural mesothelioma. He sued a dozen asbestos defendants. Plaintiffs conceded that the mesothelioma was caused by the same asbestos exposure that resulted in his lung cancer and pulmonary asbestosis for which he sought and obtained compensation in the 1990's. Defendants (who had not been in the first case, presumably because of the terms of the releases) filed motions for summary judgment, contending that, because Daley previously filed an action for a malignant asbestos-related condition in 1990, Pennsylvania's "two-disease" rule did not allow him to file an action for a second malignant asbestos-related disease – here, mesothelioma.

Pennsylvania had been one of the states to adopt a two-disease rule, which under certain circumstances created an exception to Pennsylvania's single cause of action rule, and allowed

certain second actions without running afoul of the two-year statute of limitations or the notion of *res judicata*. Specifically, the courts had adopted, for purposes of asbestos litigation, a two-disease rule, allowing plaintiffs to bring one action based on a nonmalignant asbestos disease and a subsequent action for any separately diagnosed malignant disease. The court determined that malignant and nonmalignant asbestos-related injuries constituted separate claims. Here, though, the issue was a little different: was plaintiff limited to one cause of action for a malignant asbestos-related disease and one cause of action for a nonmalignant asbestos-related disease?

Defendants argued, with compelling logic, that the rule clearly arose in the context of malignant vs. non-malignant disease. (Readers of *MassTortDefense* know the great administrative burdens, ethical questions, and significant policy issues, that the non-malignant asbestos claims have created.) Moreover, allowing plaintiffs to bring more than one lawsuit for asbestos-related diseases of the *same category* would cause the judicial system to be burdened with more piece-meal litigation. Residents of other states would seek to benefit by this expansion of the two-disease rule by filing suits in Pennsylvania. Allowing a plaintiff to bring separate lawsuits for separate malignant diseases, such as lung cancer and mesothelioma, would also make the determination of an appropriate award of damages more difficult due to an inability to segregate the damages for each of the separate diseases.

However, the state supreme court said that defendants were reading the asbestos precedents too narrowly; the decision to allow a plaintiff to file one cause action for a nonmalignant asbestos-related disease, and a subsequent cause of action for a malignant asbestos-related disease, arose from a recognition that requiring a plaintiff to seek recovery for all present and future asbestos-related diseases, including malignant and nonmalignant diseases, upon first experiencing symptoms of any asbestos-related disease, was likely to result in anticipatory lawsuits, protracted litigation, evidentiary hurdles, speculative damages, and excessive or inadequate compensation. While the separate disease rule initially developed from, and has since been applied in, cases involving a cause of action for a nonmalignant disease, followed by a cause of action for a malignant disease, the concerns that the rule was designed to address were, said the court, not limited to situations where a plaintiff suffers one

nonmalignant asbestos-related disease and one malignant asbestos-related disease. The court emphasized that with regard to mesothelioma, the estimated latency period for is 30 to 50 years, whereas the estimated latency period for asbestosis and most lung cancers is 10 to 20 years. Thus, it was unlikely a plaintiff would be diagnosed with mesothelioma until long after he had been diagnosed with, and the statute of limitations had expired for, lung cancer. Requiring a plaintiff to seek damages for a potential future diagnosis of mesothelioma at the time he is diagnosed with lung cancer not only imposes nearly insurmountable evidentiary hurdles on the plaintiff, said the majority, but also may subject a defendant to payment of damages for a serious disease which a vast majority of plaintiffs will not actually develop.

In view of these circumstances, the court concluded that a plaintiff who is diagnosed with a malignant disease, and later diagnosed with a separate and distinct malignant disease caused by the same asbestos exposure, may benefit from the separate disease rule. The court did note that relevant factors for "separate and distinct" may include evidence that the diseases: developed by different mechanisms; originated in different tissue or organs; affected different tissue or organs; manifested themselves at different times and by different symptoms; progressed at different rates; and carried different outcomes.

The decision was 6-1; time will tell whether the defendants were correct in predicting the rule change will lead to more asbestos filings, or the majority was right in predicting fewer.

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