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Due to the length of time that NYSLA's unconstitutional ban on Bad Frog's labels had been in effect, the court directed the district court to enjoin NYSLA from rejecting the company's label application. However, the court denied Bad Frog's claims for damages against the three NYSLA commissioners because it found that the commissioners' decision to reject Bad Frog's application was not unreasonable in light of the district court's findings. Therefore, the NYSLA commissioners were entitled to qualified immunity.

Bad Frog's State Law Claims

Bad Frog raised several state law claims against the NYSLA commissioners in their individual capacities under the New York State Constitution and the Alcoholic Beverage Control Law. In denying

Bad Frog's request for a preliminary injunction, the district court found that the Eleventh Amendment barred the claims. In its opinion granting summary judgment in favor of NYSLA and dismissing Bad Frog's federal claims, the district court declined to exercise supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(c)(3). The appellate court, disagreeing with the district court, found that the Eleventh Amendment did not bar all of Bad Frog's state law claims. However, due to the numerous novel and complex state law issues raised, the court of appeals declined to exercise supplemental jurisdiction.

Bad Frog Hits the Shelves With Finger Held High

In sum, Bad Frog's beer labels enjoy commercial speech protection

under the First Amendment. Under the *Central Hudson* framework, the State unconstitutionally banned the brewery's labels. Although the government's interests in insulating children from vulgarity and promoting tolerance were substantial, the prohibition on Bad Frog's labels did not materially advance these interests. Furthermore, the complete ban on the labels was more extensive than necessary to accomplish the state's interests. Therefore, the Second Circuit reversed the grant of summary judgment in favor of NYSLA, and directed the district court to enjoin NYSLA from prohibiting Bad Frog's labels.

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Court Established Accrual Rule for Keyboard Users Afflicted with Repetitive Stress Injury

By Michael J. Calhoun

In *Blanco v. American Telephone and Telegraph Co.*, 689 N.E.2d 506 (N.Y. 1997), the Court of Appeals of New York ruled on a certified question that the cause of action for computer keyboard users who suffer from repetitive stress injury ("RSI") accrues at the onset of the user's symptoms or latest use of the keyboard, whichever occurred first.

Common Issues Raised By Various Repetitive Stress Injury Cases

RSI is a latent injury affecting musculo-skeletal tissue. Activities that involve repeated movements and exertions of musculo-skeletal tissue, such as playing video games or operating a jackhammer, cause

RSI. Recently, however, many computer keyboard users have been afflicted by this disorder. Carpel tunnel syndrome, the predominant type of RSI involves "compression of the median nerve as it passes through the wrist between the flexor tendons and the transverse carpal tunnel ligament." Recent widespread use of computer keyboards accounts for the

significant increase in carpal tunnel syndrome cases. For instance, diagnoses of RSI increased by approximately “1000% between 1982 and 1991” and “account for 61% of all workplace illnesses.”

The issue of when a cause of action “accrue[s] against a keyboard manufacturer for [a] repetitive stress injury suffered by a keyboard user” was brought before the Court of Appeals of New York as a certified question. After observing a common pattern among RSI cases, an administrative judge assigned over ninety RSI cases to the Supreme Court of New York. The Supreme Court of New York subsequently consolidated the claims and allowed for joint briefing of certain legal issues since the cases presented similar questions because each plaintiff: (1) presented a history of keyboard use; (2) asserted that RSI was so “insidious . . . it is not possible to identify . . . the precise date of the onset of symptoms;” (3) identified dates on which some symptoms of RSI, such as numbness and pain, were first recognized; (4) submitted dates on which each were diagnosed with RSI; and (5) alleged that RSI has “no precise moment of injury’, but rather a ‘cumulative and prolonged process by which [each] plaintiff sustained injury [and] aggravated [an] existing injury.’”

Many of the keyboard users had no noticeable symptoms of RSI until a considerable time after their first use of a keyboard. Thus, the court had difficulty determining when a cause of action for RSI accrued. Plaintiffs presented two primary arguments for providing a distinctive accrual rule in RSI cases. First, Plaintiffs argued that in RSI cases the court should apply a New York “discovery” rule, which is applicable in toxic torts cases.

Under this statute, “the three year period within which an action to recover damages for personal injury must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” N.Y. C.P.L.R. 214-c (McKinney 1997).

Second, Plaintiffs argued that the statute of limitations should have been extended since Defendants had a “continuing duty to warn” keyboard users of potential hazards caused by defects in their products.

At trial, Defendants claimed that the statute of limitations expired and, therefore, Plaintiffs’ recovery was barred. However, Plaintiffs successfully argued at trial that the CPLR 214-c discovery rule should be applied to RSI cases. The trial court thus held that “accrual in RSI cases is measured from the onset of the plaintiff’s symptoms without requiring a diagnosis of their cause.”

The keyboard manufacturers appealed the trial court’s ruling. On appeal, the Appellate Division rejected the trial court’s application of the CPLR 214-c discovery rule to RSI cases. Instead, it held that a cause of action for RSI cases begins with the first use of a computer keyboard, not at the onset of symptoms. The Appellate Division held that the “first exposure” rule, used in New York toxic torts cases before the enactment of CPLR 214-c, controlled RSI cases. The court found RSI cases indistinguishable from cases in which a plaintiff suffered from repeated and prolonged exposure to toxic substances, such as asbestos.

Rejection of Discovery Rule Upheld

The Court of Appeals of New York, upholding the Appellate Division’s rejection of the CPLR 214-c discovery rule, affirmed that a keyboard is not a “substance” and does not fall under CPLR 214-c. However, the court found that CPLR 214, which provides that all causes of action for personal injuries, except those which fall under CPLR 214-c, must commence within three years from the time the actual injury occurred. Under CPLR 214, a cause of action accrues as soon as all of the facts supporting a prima facie case occur.

The Court of Appeals of New York also rejected Plaintiffs’ argument that the keyboard manufacturers had a “continuing duty to warn” keyboard users of potential defects in their products. The Court refuted the “continuing duty to warn” argument, stating that causes of action in negligence cases accrue at the date of injury.

Court Examined Latent Injury Cases in an Attempt to Find Guidance

Although the Court of Appeals rejected the trial court’s application of the CPLR 214-c discovery rule, it also rejected the Appellate Division’s application of the “first exposure” rule. However, the court recognized a similarity between cases in which the “first exposure” rule is applied and RSI cases. Specifically, both deal with latent injuries — injuries that have indiscernible symptoms and that develop slowly over time. The court cited *Martin v. Edward Labs*, 457 N.E.2d 1150 (N.Y. 1983), which

provided the basic framework for dealing with latent injury cases, and the Court of Appeals of New York identified three categories of latent injuries cases: assimilation cases, involuntary implantation cases, and voluntary implantation cases. Each type of case has its own corresponding "accrual" rule for the statute of limitations.

Assimilation cases involve situations where the injuries result from inhaling, ingesting, or injecting a harmful substance that is incorporated into the body. The "first exposure" rule was applied to such cases until the enactment of CPLR 214-c. In *Schmidt v. Merchants Dispatch Transp. Co.*, 200 N.E. 824 (N.Y. 1936), for instance, the court applied the "first exposure" rule when the Plaintiff contracted a lung disease known as pneumoconiosis, which resulted from his exposure to toxic silicone dust while working for the Defendant. Schmidt applied the "first exposure" rule because an injury to the Plaintiff, not the Defendant's negligence, caused the plaintiff's lung disease. Although the defendant's negligence directly caused the injury, it was not a direct cause of the lung disease.

Involuntary implantation cases involve objects that are left in someone's body after an operation. A discovery rule applies in such instances. In *Flanagan v. Mount Eden Gen. Hosp.*, 248 N.E.2d 871 (N.Y. 1969), the court applied a discovery rule in a medical malpractice suit where a physician left a surgical clamp inside a patient after an operation. The patient did not suffer any noticeable injury until eight years after the initial operation. The court applied the discovery rule because the clamp was implanted in the patient's body

without the patient's knowledge or consent. Furthermore, Plaintiff clearly had not brought a fraudulent claim of injury "since the objects retained their identity within the body." Likewise, there was a clear causal connection between the alleged negligence and the injury. Also, there was no significant issue of diagnostic credibility.

Finally, voluntary implantation cases arise when a device, such as a pacemaker, malfunctions after someone has the device implanted into his or her body. These cases are treated like product liability cases since the injury does not arise until the product malfunctions. In *Martin*, the cause of action for the recipient of a defective heart valve accrued when "the defect actually caused the injury," not when the heart valve entered the recipient's body. The court further distinguished voluntary from involuntary implantation cases, noting that in voluntary cases, a voluntary recipient knew that a foreign object was inserted into his body and consented to the implantation. The court also distinguished voluntary implantation cases from assimilation cases because "implants are intended to perform a continuing function."

"New Balance" of Policy Considerations Required to Determine RSI Accrual Rule

"A computer keyboard is not a toxic substance which is ingested into the body, nor is it an object implanted, but not assimilated, into the body." Although analogous to other latent injury cases, RSI cases are distinguishable because keyboards remain outside of their

users' bodies and there is no way to determine precisely when the injury first occurred. Thus, the Court of Appeals of New York stated, "[t]his case requires us to strike a new balance with respect to the competing policy interests at stake in order to correctly determine the accrual question."

Although toxic torts cases and RSI cases are significantly different, the court noted that they share several similarities. First, both require "repeated, prolonged exposure . . . before the damages will develop and manifest themselves." In other words, the injury in both types of cases is not evident until well after first exposure to the product that is the alleged cause of injury. This creates "a gap between the manufacturer's breach of duty and the resulting ultimate injury to the plaintiff." This gap makes it difficult to accurately assess a given defendant's liability. Further, "significant problems of proof" arise due to the time required for latent injuries to manifest.

Taking into consideration the similarities between toxic torts and RSI cases, the court provided a detailed analysis of the reasoning employed in cases that apply the so-called "first exposure" rule. *Schmidt* was the first New York case to apply a "first exposure" rule. The court in that case held that the cause of action for an injury accrues as soon as a "wrongful invasion of personal or property rights" takes place. *Schmidt*, 200 N.E. at 827. Then in *Schwartz v. Heyden Newport Chem. Corp.*, 188 N.E.2d 142 (N.Y. 1963), the "first exposure" rule from *Schmidt* was applied to a case where the plaintiff was exposed to a harmful substance used to make x-rays. Although *Schmidt* and

Schwartz are similar insofar as they are both “based upon the assumption that a toxic substance acts immediately upon the body to produce injury,” RSI cases are distinguishable in this respect. The court in the present case held that “the justifications that gave rise to the exposure rule do not apply” in RSI cases because a keyboard is not “an inherently toxic or dangerous substance.” Someone who touches or uses a keyboard is not doomed to contract RSI; rather, RSI results from “an accumulation of events.”

The court weighed several other policy considerations in reaching its final ruling. The court noted a balance between “a defendant’s interest in repose” and “the injured person’s interest in having a reasonable opportunity to assert a claim.” In addressing these two policy objectives, the court noted that there was a possibility of false claims in cases where “excessive

factual inquiries would be necessary.” The court also mentioned the difficulty of tracing the history of latent injuries. A related policy the court considered was that defendants have an extra burden in RSI cases since the history of a latent injury is difficult to trace. The court further recognized the possibility of a “causal break” between a defendant’s alleged negligence and a plaintiff’s claimed injury. Additional considerations included the promotion of justice, stability to human affairs, judicial economy, self-reformation by defendants, and possible unfairness to defendants who might have to defend against stale claims, and questions of credibility and professional diagnostic judgment.

In its final analysis, the court concluded that the cause of action for a keyboard user inflicted by RSI accrues when the user first

experiences symptoms of RSI or when he last used a keyboard, whichever happened earlier. The court noted that RSI cases pose certain problems of proof. The court explained, however, that it had tried to find the “proper balance between giving a plaintiff an opportunity to commence an action after becoming aware of a symptom of injury and providing certainty and predictability to manufacturers, employers and other economic actors in their risk assessment, while also avoiding stale claims.” In sum, the Court of Appeals of New York answered the certified question in the negative, remitted the case to the Supreme Court of New York, and ordered the Supreme Court to rule on RSI cases in accordance with its the ruling.

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Pharmacies Charge Prescription Drugs Manufacturers and Wholesalers with Antitrust Violations Through Price-Fixing Conspiracy

By Karina Zabicki

In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599 (7th Cir. 1997), the United States Court of Appeals for the Seventh Circuit reversed the decision of the Northern District Court of Illinois, holding: (1) indirect purchasers may not bring suit against manufacturers in federal court for an overcharge that direct purchasers

allegedly passed on to the indirect purchasers; (2) sufficient evidence existed to create a jury issue of whether the direct purchasers were participants in a price-fixing conspiracy; (3) a suit brought in an Alabama state court claiming a violation of state antitrust laws defeated the application of the “artful pleading” doctrine; and (4) a newly-merged company which

abandoned its predecessor’s participation in the alleged conspiracy did not clear it of liability for its predecessor’s antitrust violations.

This litigation involved hundreds of price-fixing cases brought under Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs and Defendants appealed four of these rulings, which the Seventh Circuit