



NEWSLETTER OF THE
WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

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THE SEVENTH CIRCUIT, "GRADUAL AWARENESS" AND THE STATUTE OF LIMITATIONS: WHAT NOW?

By Sarah A. Zylstra, Boardman, Suhr, Curry & Field LLP

In a recent opinion, the Court of Appeals for the Seventh Circuit reversed a dismissal by the Western District of Wisconsin, holding that the statute of limitations had not run as the district court had concluded. *Barry Aviation, Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682 (7th Cir. 2004). Although the Seventh Circuit has held previously that the statute of limitations begins to run when a person "knew or should have known" of an injury, it has now held that a plaintiff's knowledge of an injury may occur gradually. *Compare Horbach v. Kaczmarek*, 288 F.3d 969, 977 (7th Cir. 2002) (noting that commencement of the statute of limitations period begins when plaintiff "knew or should have known" that he was wrongfully injured) with *Barry Aviation*, 377 F.3d at 688 (reversing dismissal of a complaint on grounds that plaintiff became gradually aware of defendants' misrepresentations). The court's analysis raises interesting questions regarding the discovery rule and the running of the statute of limitations.

The facts of the case are set forth in the district court's opinion, *Barry Aviation, Inc. v. Land O'Lakes Municipal Airport Comm'n*, 219 F.R.D. 457 (W.D. Wis. 2003). An aviation company sued a town, an airport commission, and certain individuals for making false representations regarding the future redevelopment and existing use of a municipal airport. The plaintiff company alleged that defendants fraudulently induced it to enter into a contract to become a fixed-based operator of a municipal airport. *Id.* at 458. A fixed-based operator generally sells and rents aircraft, operates charters, repairs airplanes, and provides fuel services and aircraft storage facilities at public airports. *Id.* at 458-59.

According to the complaint, Barry Aviation met with defendants' representatives in 1993 and were told that: (1) there were plans for substantial redevelopment of the airport in the future; and (2) the airport had over 10,000 aviation "operations" a year. *Id.* at 459. An "operation" is defined as the arrival or departure of an aircraft from an airport. *Id.* Barry Aviation was given the airport master records showing

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ANNUAL MEETING & CLE PROGRAM APRIL 21, 2005

The Western District Bar Association's Annual Meeting will take place on April 21, 2005. The business meeting of the association begins at 10:30 a.m. at the federal courthouse. The meeting will be followed by a luncheon at the Concourse Hotel.

Judge Sykes of the United States Court of Appeals for the Seventh Circuit will be the keynote speaker at the luncheon. Judge Sykes was nominated by President Bush to the Seventh Circuit and began service on July 4, 2004. Judge Sykes previously served on the Wisconsin Supreme Court and, prior to her appointment to the Wisconsin Supreme Court, was elected to the bench as a Milwaukee County Circuit Court judge.

An information-packed CLE program begins at 1:30 p.m. back at the federal courthouse. The CLE program will be followed by the always popular judges' panel. Finally, a reception with hors d'oeuvres and beverages will conclude the day. We look forward to seeing you at the WDBA Annual Meeting and related activities.

Western District of Wisconsin Bar Association 2004-05

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that the airport had a total of 10,000 operations in the 12-month period ending September 13, 1991. *Id.* Based on these written materials and other representations made by defendants, Barry Aviation entered into a 20-year fixed-base operator contract with the town and the airport commission. *Id.*

During the first two years of the contract, Barry Aviation renovated and expanded the operations, investing over \$1.5 million in facilities and equipment. Nonetheless, the airport experienced “an unexpected and unprecedented low level of business” during the years “1993 through 2001.” *Id.* Barry Aviation alleged further that it brought these “material deviations from the operations” to the attention of “defendants” at “various times” during “this time period.” *Id.* In response, defendants allegedly told Barry Aviation that the lower than expected operations were its fault, caused by its method of operations and its personnel as well as by the seasonal nature of the airport’s operations. *Id.*

Prior to entering into the 20-year contract, Barry Aviation was given the town’s 1993 Project Statement, which was prepared for the purpose of obtaining state and federal capital improvement funds. The town represented to the Federal Aviation Administration and the Wisconsin Department of Transportation that 11,000 operations took place at the airport for the 12-month period ending July 1993. *Id.* at 459. In 1997 and 1998, defendants sought further federal funds and provided materials to the FAA and DOT certifying that 11,200 operations took place at the airport in 1997. Defendants provided Barry Aviation with the materials they submitted to the FAA and DOT, materials which Barry Aviation found to be inconsistent with its own count of operations. *Id.* at 460. As a result of these inconsistencies, Barry Aviation asked defendants in 2000 for the public records on which they had based their FAA and DOT submissions. *Id.* Instead of providing such records, defendants gave Barry Aviation the same Project Statement they had provided when the parties contracted initially for the fixed-based operations in 1993. *Id.*

Sometime in 2000, while cleaning out a portion of the basement of the airport terminal, Barry Aviation discovered official airport records from 1985 through 2000. *Id.*

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PRESIDENT'S COMMENTARY

By

James R. Troupis

President

Western District of Wisconsin Bar Association

It is axiomatic that the right to vote is the protector of all other rights. (“We hold these truths to be self-evident . . . certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”) Why then the surprise by so many at the prospect that *Iraqi voters* would find such a powerful urge to vote?

As the images of Iraq on Election Day were broadcast around the world I was transfixed. From early that Sunday morning until well after the evening news I came back again and again to watch and hear as ordinary Iraqis risked all they had — (“ . . . we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.”) Among the most articulate commentators on that day was Senator Joe Lieberman. He explained that each time a Connecticut soldier has made the ultimate sacrifice in defense of Iraqis; he has either attended the funeral or personally called the parents. One hundred percent of the time, those parents expressed to him their unflinching support of that sacrifice and asked, he said, time and again, that he assures them the mission would be completed and this sacrifice would not be for something meaningless. Choking back tears, Senator Lieberman said, that on this day, the day of the Iraqi election, he could say without reservation that the sacrifice had been worth it. A powerful day in the history of freedom.

In the late 1990's I was privileged to go back to my father's homeland in the Peloponnesas of Greece, and I witnessed a remarkable event. In a country with a stormy past since World War II, where democracy (despite its founding there) has found a difficult path, all of my relatives were travelling for hours, often overnight, for the opportunity to vote in local elections. As my cousins explained it to me, the municipal and local elections ultimately control the make-up of

the national government, and every Greek citizen is entitled to vote at his original birthplace. So, despite all the hardships, my cousins traveled from Athens to the tiny village of our ancestors to cast a ballot. Ancient practices and modern elections combined.

Then, this past week, I was on the tiny island/country of Anguilla. Virtually every citizen of Anguilla traces ancestry to Africa, and it remains to this day a British colony/protectorate. The day we arrived (President's Day in the U.S.) was Election Day in Anguilla, and everyone was involved—or so it seemed. Certainly, everyone had an opinion. That night the election results were quite literally counted on television, in front of the cameras. Each ballot was taken out of the box (all paper ballots, of course), it was shown to the camera and the public, and then the vote was read aloud. This island nation has only 12,000 or so citizens, but all night the counting continued on television and radio. The following day is a National Holiday to celebrate a successful democratic election. What a sight!

In my first presidential column I emphasized the importance, indeed obligation, in my view, that lawyers actively participate in electoral politics because it is the source of all law. In my second column, I expressed the view that it is not the place of courts to make law, that is for others. This theme of liberty and democracy, protected by lawyers and courts, could not have been more on display than it was on Election Day in Iraq. There is a powerful craving in all of us to seek freedom and liberty. It is our natural and abiding right and we, as attorneys ought to celebrate and protect that freedom in every way.

Seventh Circuit

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Those records, which contained the original operations logs prepared by defendants, demonstrated that the operation numbers provided to Barry Aviation, the FAA and DOT were “well over 2,000% the actual amount of operations performed by the airport in the relevant years.” *Id.* Barry Aviation filed its lawsuit on November 22, 2002.

In addition to state law claims, Barry Aviation alleged that defendants violated RICO and unconstitutionally took its property (by fraudulently inducing Barry Aviation to enter into a public contract) in violation of the due process and equal protection clauses. The Fourteenth Amendment claim was brought pursuant to 42 U.S.C. § 1983. Defendants brought a motion to dismiss, in part, on grounds that the statute of limitations had run on Barry Aviation’s RICO and § 1983 claims. Without viable federal claims, the court would have lacked supplemental jurisdiction over the state laws claims. The statute of limitations for RICO claims is four years and for § 1983 claims is six years. *Id.* at 464.

In considering the motion to dismiss, the district court began by noting that Barry Aviation’s specific allegation of fraud was that defendants fraudulently induced it to enter into a contract on June 15, 1993, by misrepresenting the number of operations at the airport. *Id.* Based upon this allegation, the court held that plaintiff pleaded itself out of federal court because Barry Aviation admitted in its complaint that it suffered “an unexpected and unprecedented low level of business” during the years “1993 through 2001” and that it brought these “material deviations from the operations” to the defendants’ attention during this time period. *Id.* The court held that, according to Barry Aviation’s own allegations, “plaintiff knew and reported these ‘material deviations from the operations’ to defendant as early as 1993.” *Id.* As a result, the statute of limitations for the RICO claim expired in 1997 and for the § 1983 claims in 1999. The court noted that it was “of no importance that plaintiff learned more facts to support its theories of liability over the years.” *Id.*

The Court of Appeals for the Seventh Circuit reversed, holding that:

The complaint in this case can be read fairly as alleging that Barry Aviation became *aware gradually* of the possibility of injury as business levels continued to fall short of anticipated goals. At some point, no doubt, a reasonable person would have investigated whether this disappointing business pattern was the product of fraudulent misrepresentations by the defendants, but the complaint before us does not preclude the possibility that this date was within the applicable statute of limitations.

Barry Aviation, 377 F.3d at 688-89. (emphasis added). The court held that the complaint could be read to allege that when Barry Aviation made an inquiry about the representations in 1997, defendants took “additional affirmative steps” to prevent or at least deter Barry Aviation from learning of the misrepresentations by providing false materials that were previously submitted to the FAA and DOT. *Id.* at 689.

Although the Seventh Circuit notes correctly that a cause of action accrues when a plaintiff “knew or should have known” that it sustained an injury, its opinion does not seem to apply that rule. *Id.* at 688. The court implies that the statute of limitations is measured from the point in which Barry Aviation “became aware gradually of the possibility of injury as business levels continued to fall short of anticipated goals.” *Id.* at 688.

The Seventh Circuit’s analysis begs the question: How does one become “aware gradually?” At what point on the continuum of gradual awareness is the limitations period measured? Is gradual awareness a contradiction in terms? This author believes so. There is only one point in time that a person knows a certain fact. A person may have suspicions prior to knowledge, but knowledge itself is bimodal. It is impossible to know something gradually. Similarly, there is only one point in time that a plaintiff first should know a certain fact. Either one knows or one does not know; either one should know or one should not know.

As the district court and the court of appeals seem to admit, the statute of limitations began to run in this case: (1) when Barry Aviation knew of the fraudulent misrepresentations or (2) when a reasonable person should have known, whichever came first. The district court held that Barry Aviation knew as early as 1993 of the fraud when the unexpected and unprecedented low level of business did not match expectations. At that point in time, according to Barry Aviation's allegations in its complaint, it brought the "material deviations from the operations" to the attention of defendants. The district court read this allegation as knowledge that the operations were not as defendants represented them. Therefore, because Barry Aviation's complaint demonstrated that it knew the representations were untrue in 1993, the district court did not need to determine when a reasonable person should have known of the misrepresentation.

The Seventh Circuit concludes (although not explicitly) that Barry Aviation's allegations do not show unequivocal awareness of fraud. The court, however, does not complete the analysis—that is, it does not identify when Barry Aviation did know that the misrepresentations were fraud or when a reasonable plaintiff should have known. Barry Aviation argued that it found out about the fraudulent misrepresentations when it stumbled upon the official records in 2000. It appears the Seventh Circuit accepted this possibility because it is the only basis for reversing the district court.

However, even if the Seventh Circuit was open to the possibility that Barry Aviation did not know the representations were untrue until 2000, it still should have analyzed when a reasonable person should have known. If it did so, at a minimum, the RICO claim should have been dismissed. Barry Aviation alleged in its complaint that, because its business levels were inconsistent with the represented operation levels, it asked for the underlying FAA and DOT documents in 1997. Barry Aviation alleged that, instead of receiving the underlying documents, it received the same Project Statement it had received earlier. By 1997, Barry Aviation was suspicious enough to request underlying documentation, which it did not receive. Wouldn't any

reasonable person have known by 1997 of the probability of fraud when defendants did not turn over the official records as requested? Still, Barry Aviation waited five years after this point to bring its lawsuit.

The Seventh Circuit has made clear previously that, to constitute discovery of an injury, a plaintiff need know only that he or she was injured and need not be aware of all the facts surrounding that injury or even that the injury was caused by a civil conspiracy. *See, e.g., McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) (noting that "as to accrual, we, like the Supreme Court, have maintained that there is an important distinction between discovery of an injury and discovery of a cause of action" and holding that a plaintiff need have knowledge only of the injury and not of the cause of action for the statute of limitations to run). If the statute of limitations began to run at least by 1997 (when Barry Aviation knew its operations did not match defendants' representations and therefore, requested official records), the RICO claim would have been untimely while the § 1983 claim would have been timely. However, the Seventh Circuit reversed the district court on both the RICO and § 1983 claim solely on the basis of Barry Aviation's "gradual awareness."

The decision of the Court of Appeals for the Seventh Circuit may have a significant impact on the analysis of limitations periods. The court seems to have considered only when Barry Aviation became aware of the fraud and ignored when a reasonable plaintiff should have known. Moreover, the court propounds that a party may become aware gradually, which appears to be both a contradiction in terms and a slippery concept to apply. The result of this decision is that plaintiffs may have a new avenue to pursue when faced with the affirmative defense that the statute of limitations has run on their claims.

PRO BONO PROGRAM PROPOSALS

There will be a special and important proposal to expand dramatically pro bono representation on the agenda of this year's annual WDBA meeting. While counsel have willingly stepped forward with their time, the ongoing costs of litigation are sometimes daunting, especially for smaller law firms. In the early 90's, a variety of federal programs allowed reimbursement for pro bono expenses, but in recent years those programs have disappeared. Several years ago the Western District Federal Court transferred what remained of those funds to the WDBA to administer and the remaining amount available is now less than \$3,000.

At the winter meeting of the WDBA Board of Governors, a consensus was reached to seek passage of a resolution by the full membership that would allow the Board of Governors to authorize a new comprehensive pro bono program. Subject to drafting and final approval, the program that will be proposed at this spring's annual meeting of the membership will have the following elements:

- a.) **FUNDRAISING.** From June 1, 2005 - December 31, 2005 the WDBA will match all funds contributed to a newly created pro bono fund, up to \$10,000. This will provide a total fund of at least \$20,000. (It is anticipated that these special contributions will be charitable contributions fully deductible to those contributing.)
- b.) **COST REIMBURSEMENT.** The newly created pro bono fund will only be made available for cost reimbursement.
- c.) **OVERSIGHT.** Funds will be distributed by three designated trustees appointed by the Board of Governors, one of whom will be the President of the WDBA and one of whom will be the Clerk of the Court or her designee.
- d.) **COURT APPOINTMENT REQUIRED.** Reimbursement will only be available for case appointments made by the Federal District Court for the Western District of Wisconsin for cases pending before that Court (including any appeal, if the appointment continues through that appeal).
- e.) **CRITERIA FOR ELIGIBILITY.** Distributions will be based on a number of designated mandatory and non-mandatory items. The mandatory criteria will be an agreement that in the event counsel is reimbursed for costs, or otherwise recovers an amount sufficient to cover previously advanced costs, then that amount will be paid back to the fund. The trustees will designate additional non-mandatory criteria that will be used to evaluate proposals for reimbursement.

This exciting new program will be discussed at the Annual Meeting and with the approval of the membership will be undertaken during this coming year. If you have any suggestions in advance of the annual meeting please let any member of the Board of Governors know your thoughts.

STATE LAW LIBRARY HOLDS NATIONAL LIBRARY WEEK AND RESEARCH TEACH-IN EVENTS

April 10-16 is National Library Week, an annual event sponsored by the American Library Association. Libraries across the country are holding special events, and the State Law Library is no exception. Since it's a law library, they are also observing National Legal Research Teach-In, another annual event sponsored by the American Association of Law Libraries.

"We've put together a week of fun and educational activities to highlight the library's resources, especially some of the newer electronic ones now available to onsite library users," said Connie Von Der Heide, Reference and Outreach Services Librarian. "We hope anyone interested in knowing more about the library and our services will take a moment or two to come and participate. All are invited."

Registration forms are available on the State Law Library website <http://wsll.state.wi.us>, or by contacting Tammy Keller, Program Assistant, at 608-261-7553 or tammy.keller@wicourts.gov.

Tuesday, April 12 – State Law Library Guided Tours, 9:00 a.m. and 2:00 p.m. Sign up for a free, guided tour of the library. Meet library staff, see firsthand the many print and electronic resources available in the library and through our website, and learn how the library can assist you with legal reference and research needs. Each tour lasts approximately one hour and is limited to 12 people. Registration is required.

Wednesday, April 13 – Using Shepards Public Access @ the State Law Library, 9:00-10:00 a.m. and 10:30-11:30 a.m. (class offered twice)

Shepard's Public Access allows fast, easy Shepardizing and retrieval of cases, statutes and more. It's available for free use at the Wisconsin State Law Library, Dane County Legal Resource Center and Milwaukee Legal Resource Center. LexisNexis representative Lisa Rosenfeld will show you how to maximize your use of this timesaving tool during either of these one-hour sessions. FREE class. 1 CLE credit applied for. Registration is limited to 8 per class.

Thursday, April 14 – How to Use WestPack @ WSL / Drop-in, 9 a.m. to 3 p.m., Computer Training Room. The Wisconsin State Law Library now offers FREE in-library access to selected Westlaw databases! You can now search AllFeds, AllStates, Wisconsin caselaw, statutes and more, all for free on our public access stations! Here is your chance to receive one-on-one or small group instruction from our trained staff on how to use WestPack efficiently and effectively in your research process. No registration is required – drop in anytime between 9 a.m. and 3 p.m. for free instruction and goodies!

The Wisconsin State Law Library, an agency of the Supreme Court of Wisconsin, serves the legal information needs of judges, government officers and employees, attorneys, and the public by maintaining an extensive legal collection and providing reference and research assistance, document delivery services, and instruction in the use of print and electronic legal research tools. The Library is located at 120 Martin Luther King Jr. Blvd. in downtown Madison. Library hours are 8 a.m. to 5 p.m. Monday through Friday. For more information call 608-266-1600 or visit the Library's web site <http://wsll.state.wi.us>.

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It is the mission of the Western District of Wisconsin Bar Association to promote the just, speedy, respectful and efficient determination of every action filed in the District Court: by acting as an effective liaison among the District Court, federal practitioners, litigants and the public; by encouraging, fostering and supporting educational opportunities that improve the practice of law in this District; and by serving the needs of the District Court, federal practitioners, litigants and the public.

