ADA Practitioners Beware: A Brief Comment On *Soignier v. American Board of Plastic Surgery*

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Alternative dispute resolution under the Americans with Disabilities Act (ADA), including fledgling Justice Department programs to encourage mediation, have been the focus of recent ADA commentators.[1] While there is little question that Congress intended to encourage alternatives to litigation as a means of resolving disability disputes, the practical effects of those alternatives remain unclear. It appears, however, that a substantial roadblock has been erected in the path of alternative dispute resolution under the ADA. In *Soignier v. American Board of Plastic Surgery*,[2] the Seventh Circuit adopted an accrual rule for ADA cases that has profound implications for attorneys representing ADA litigants and for those litigants themselves.

This comment briefly describes the *Soignier* case and the Seventh Circuit's decision. The comment then argues that the rule will undermine the intended operation of the ADA.

I. The *Soignier* Case[3]

Dr. Wayne Soignier is a plastic surgeon in Dallas, Texas. He has a learning disability related to auditory processing and is dyslexic. The American Board of Plastic Surgery, Inc. ("the Board") is involved in setting ethical standards for plastic surgeons and is also the body that certifies plastic surgeons as "board certified." To that end, the Board administers a certifying examination to certain qualifying plastic surgeons. Part I of the examination is a written test. Part II of the examination is an oral test. According to the Board's rules, applicants for board certification may take the oral examination only five times. If not successful, they must complete an additional year of training in a plastic surgery residency before reapplying.

Dr. Soignier passed Part I of the certifying examination in 1983.

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1. *See, e.g.*, Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457 (1994).

2. 92 F.3d 547 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 771 (1997).

3. The facts set forth in this article are detailed in the Seventh Circuit's decision. *See Soignier*, 92 F.3d at 549-550. Most of them are also enumerated in the District Court's decision. *See* Soignier v. American Bd. of Plastic Surgery, No. 95-C-2736, 1996 WL 6553 (N.D. Ill. Jan. 8, 1996).

Beginning in 1983, Dr. Soignier took Part II of the examination four times, each time failing at least one portion of the oral test. After his fourth failure, Dr. Soignier wrote to the Board and requested his disability be reasonably accommodated in the examination process. The Board agreed to retest Dr. Soignier with minor accommodations. In November of 1992, Dr. Soignier took Part II of the certifying examination for the fifth time. During that 1992 examination, the Board failed to provide all the accommodations previously agreed upon, and Dr. Soignier again failed the test. Following the test, Dr. Soignier again wrote the Board to ask that he be retested with the accommodations previously agreed upon and certain additional accommodations. In May of 1993, the Board informed Dr. Soignier that it regarded the previous test as having been fair, that he would not be tested again, and that no further accommodations would be granted.

Dr. Soignier appealed both his failure of Part II and the denial of accommodations under the Board's internal appeals process. By letter dated November 30, 1994, the Board informed Dr. Soignier that his appeal had been denied. He would not be permitted to take the certifying examination again unless he completed an additional year of training in plastic surgery.

II. The District Court's Decision

On May 8, 1995, Dr. Soignier filed suit against the Board in the United States District Court for the Northern District of Illinois alleging violations of the Americans With Disabilities Act.[4] The Board immediately sought dismissal of Dr. Soignier's lawsuit on a variety of grounds. Among these arguments was the Board's contention that the action was barred by the two-year statute of limitations under Illinois law for personal injury claims.[5] The parties agreed that the two-year period applied to the case but joined issue over when the cause of action accrued.[6] The District Court held the cause of action accrued in November of 1992, when Dr. Soignier took the examination for the fifth time.[7] It reasoned that the internal appeals process was used to remedy past wrongs and did not constitute a new wrong extending the accrual date.[8] Because Dr. Soignier filed suit in May of 1995, the District Court held his claims to be time-barred and dismissed them pursuant to Rule 12 of the Federal Rules of Civil Procedure.[9]

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4. Soignier v. American Bd. of Plastic Surgery, No. 95-C-2736, 1996 WL 6553 (N.D. Ill. Jan. 8, 1996).
5. *Id.* at *1.
6. *Id.* at *1.
7. *Id.* at *2.
8. *Id.* at *2.
9. *Id.* at *2.

III. The Seventh Circuit's Opinion

Dr. Soignier appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit reviewed the District Court's decision *de novo* and affirmed it.[10]

On appeal, Dr. Soignier argued that his claims did not accrue until the negotiative process between the parties collapsed in May of 1993, and his suit was therefore timely.[11] Dr. Soignier also argued that limitations should have been tolled pending determination of his internal appeal.[12] The Board again contended that the claims accrued in November of 1992, at the time of Dr. Soignier's final testing.

The Seventh Circuit held Dr. Soignier's claims accrued in November of 1992, because each element of an ADA claim existed at that time.[13] The Seventh Circuit rejected Dr. Soignier's claim as untimely pursuant to *Delaware State College v. Ricks*.[14] The court held that traditional limitations doctrines from employment law cases barred his claim because he knew in November of 1992 that he had been tested without some of the accommodations he sought.[15] The court rejected Dr. Soignier's arguments concerning the negotiations between the parties, characterizing them as "future confirmation" of the earlier decision, rendered in response to Dr. Soignier's attempts to undo a previous discriminatory decision.[16] The court also held that commencement and running of the limitations period were unaffected by the internal appeal.[17]

IV. Implications of the Decision

Dr. Soignier's lawsuit against the Board arose under the "Public Accommodations and Services Operated By Private Entities" subchapter of the ADA.[18] That subchapter provides, in relevant part, that:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall

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10. Soignier v. American Bd. of Plastic Surgery, 92 F.3rd 547, 550, 554 (7th Cir. 1996).
11. *Id.* at 551.
12. *Id.* at 550.
13. *Id.* at 553.
14. 449 U.S. 250 (1980). In *Ricks*, the Supreme Court held that limitations begins to run in an employment discrimination claim when the discriminatory decision becomes known to plaintiff, not when the effects become painful. *Id.* at 258.
15. *Soignier*, 92 F.3d at 551-52.
16. *Id.* at 552.
17. *Id.* at 553.
18. 42 U.S.C. §§ 12181-12189 (1994).

> offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.[19]

Because the Board offers examinations related to professional certification, it falls within the express terms of the ADA.

Congress enacted the ADA in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ."[20] In its sweeping mandate against discrimination, the ADA mirrors previous civil rights statutes addressing discrimination on the basis of race, religion, national origin, creed, age, and gender.[21]

It is in practice that the ADA differs fundamentally from all other civil rights laws. By requiring "reasonable accommodation" and "accessibility" tailored to an individual's specific disability[22] (which shall be unique to that individual, as various disabilities may manifest themselves to differing degrees in different individuals), the ADA contemplates an interactive process by which the parties to a disability dispute shall exchange information and negotiate accommodation.[23] "Thus, while it may be clear that modifications have to be made, what is readily achievable is subject to interpretation in each individual case."[24] "[E]very request for an accommodation must be assessed on an individual basis, in terms of both the existence of a covered disability and what accommodation(s) will be provided . . . ."[25]

The federal regulations implementing employment provisions of the ADA describe this interactive process:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[26]

The regulations envision an interactive process requiring participation by both

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19. 42 U.S.C. § 12189 (1994).
20. 42 U.S.C. § 12101(b)(1) (1994).
21. *See, e.g.*, 29 U.S.C. §§ 621-634 (1994); 42 U.S.C. §§ 2000e-1 - 2000e-17 (1994).
22. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(a) (1994).
23. 29 C.F.R. pt. 1630 app. at 351 (1996).
24. Hermanek, *supra* note 2, at 472.
25. Robert A. Burgoyne, *ADA Update: Litigation and Enforcement Actions Involving Testing Accommodations, Fitness Inquiries, and Other Issues of Interest to Bar Examiners*, BAR EXAMINER, Nov. 1995, at 6, 9.
26. 29 C.F.R. § 1630.2(o)(3) (1995).

parties:

> The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.[27]

The implementing regulations for the "Examinations and Courses" portion of the ADA make clear that a similar type of interactive process is contemplated. Those regulations describe a number of accommodations that may be appropriate to make examinations and courses accessible to the disabled but leave the specific applicability of any certain accommodation to be determined on a case-by-case basis.[28]

This interactive process, rather obviously, renders the ADA different from any other type of civil rights claim. Nowhere is this difference any more important than in the context of limitations and the question of when an ADA cause of action accrues.

The Seventh Circuit's opinion essentially adopts as a rule the notion that an ADA cause of action accrues whenever all elements of the claim are present. In that court's view, this is whenever some accommodations are denied. According to the Seventh Circuit, Dr. Soignier had an actionable ADA claim in November of 1992, when the Board tested him without certain requested accommodations. This analysis misapprehends the nature of the ADA and misconstrues the applicable law.

The interactive process envisioned by the ADA is unlikely in most cases to be a completely fluid process. Negotiation generally entails at least some level of disagreement, and, under the ADA, may well involve experimentation with various accommodations. It is, for example, easy to envision circumstances in which a disabled individual might request a host of accommodations, but a testing entity or employer might prefer at least initially to grant more limited accommodations in the hopes they would achieve the required access; this is, after all, the process of negotiation. In the event the accommodations prove to be insufficient, the parties might then agree to try additional accommodations. This process of negotiation, experimentation, and determination of reasonable accommodation may go on for some time. Eventually, one of two things will happen: (1) both parties shall arrive at a set of accommodations on which they can agree; or (2) the disabled party shall demand accommodations the employer

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27. 29 C.F.R. pt. 1630 app. at 351 (1996); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996) ("The ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary."); *see also* Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 677 (1st Cir. 1995).

28. *See* 28 C.F.R. § 36.309 (1996); 28 C.F.R. pt. 36 app. B (1996).

or testing entity simply will not agree to grant, at which point the interactive process breaks down.

An example of this interactive process was presented in *Hinman v. Yakima School District No. 7*.[29] The plaintiff in that case, who suffered from asthma, began working as a high school guidance counselor in 1982.[30] In 1983, the school's smoking lounge was moved into an area near plaintiff's office.[31] Plaintiff informed the school that smoke from the lounge was affecting her asthma.[32] During the next two years, a number of accommodations were provided by the school, to little effect.[33] After taking a medical leave of absence, plaintiff returned to her job when the school promised to move the smoking lounge.[34] In 1985, after plaintiff had returned to work, she was informed the lounge would not be moved.[35] The school district argued that the subsequent lawsuit was untimely because the cause of action had accrued in 1983, when the lounge was moved to an area near plaintiff's office and not relocated after her complaints.[36] The court disagreed, holding the school district had not officially and unequivocally refused to make reasonable accommodation until 1985.[37] This decision takes into account the interactive process of negotiation engendered by disability claims.

The appropriate test for accrual of an ADA claim should reflect this interactive process: such a claim should accrue at the precise point in time that a plaintiff knows or should have reason to know that this interactive process has collapsed. This approach is consistent with the language, history, and purpose of the ADA.

The futility of other approaches is evident from the Seventh Circuit's decision, which relies heavily upon Title VII employment cases. But Title VII differs fundamentally from the ADA in that it does not contemplate or create an interactive process. This material difference affects accrual of the ADA cause of action. The Seventh Circuit held that Dr. Soignier's claim accrued in November of 1992, because he had by then taken the test without reasonable accommodation and each element of an ADA claim was therefore present. This is an untenable approach. An ADA plaintiff might well be disabled, otherwise qualified, and without accommodation before the defendant is even aware of the disability. Such a plaintiff could not, however, maintain an ADA claim in such a situation because the plaintiff has a burden to inform the defendant both of the

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29. 850 P.2d 536 (Wash. Ct. App. 1993).
30. *Id.* at 537.
31. *Id.*
32. *Id.*
33. *Id.* at 537-38.
34. *Id.* at 538.
35. *Id.*
36. *Id.* at 538-39.
37. *Id.* at 539.

disability and the necessary accommodations—in other words, to participate in the interactive process.[38] Even if the basic elements of the claim are present, the action is not ripe and has not therefore accrued until the interactive process is ended.

Taking into account the intended operation of the ADA, the only appropriate point of accrual is the point at which the plaintiff knows or has reason to know the interactive process has collapsed.

Under the rule enunciated by the Seventh Circuit, limitations on an ADA claim begin to run when any requested accommodations are denied. Because some accommodations may be denied very early in the interactive process, this rule could well (in fact, it almost certainly will) force ADA plaintiffs to file prophylactic lawsuits while still engaged in good faith negotiations concerning accommodations. This will produce two undesirable effects. First, ADA plaintiffs will be forced to file federal lawsuits that may well be completely unnecessary. Second, the filing of the lawsuit almost certainly means the collapse of the interactive process – a process that unhindered by a lawsuit might avoid the need for litigation.

Adoption of a limitations doctrine that so dramatically undermines settlement efforts is at odds with the ADA, which supports resolution through interactive negotiation. The ADA expressly states that "the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter."[39] As the sponsor of this provision has pointed out in congressional discussion of the ADA, it was offered as a reminder that "[t]here are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation."[40] Mindful of these admonishments, the federal agencies charged with enforcement and administration of the ADA are attempting to establish mediation programs to resolve disability disputes under the ADA.[41] To undermine these programs by forcing unnecessary lawsuits would impede the administration of the ADA.

Finally, the Seventh Circuit's decision could have dire consequences for the federal courts. In passing the ADA, Congress expressly acknowledged the immense pool of potential disability litigants:

> The Congress finds that-
> (1) some 43,000,000 Americans have one or more physical or

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38. *See* Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996).
39. 42 U.S.C. § 12212 (1994).
40. 136 CONG. REC. H2431 (daily ed. May 17, 1990) (statement of Sen. Wallop).
41. Hermanek, *supra* note 1, at 472.

> mental disabilities, and this number is increasing as the population as a whole is growing older;[42]

The ADA's potential to drive a litigation explosion soon became apparent. Within a year of the effective date, the Equal Employment Opportunity Commission had received more than 12,000 charges of disability discrimination.[43] Litigation under the ADA has been significant enough that one commentator has referred to it as the "Lawyers Full Employment Act."[44]

Juxtaposed against this looming increase in disability litigation is a federal appellate system already overwhelmed by civil and criminal appeals. "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago."[45] The rule adopted in *Soignier* could seriously undermine efforts to reduce the federal court backlog by forcing thousands of ADA plaintiffs to file unnecessary lawsuits in order to protect themselves from the limitations doctrine set forth by the Seventh Circuit.

V. Conclusion

The Seventh Circuit's decision has disturbing implications for ADA plaintiffs, defendants, and attorneys, as well as for the federal courts. The rule enunciated in *Soignier* shall likely force plaintiffs to file unnecessary lawsuits or risk losing valid claims, subject defendants to needless lawsuits, expose unsuspecting attorneys who pursue negotiations to malpractice actions, and flood the federal judiciary with ADA lawsuits. The better rule would be to hold that an ADA claim does not accrue until the plaintiff knows or has reason to know that the interactive process of negotiation between the parties has collapsed.

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42. 42 U.S.C. § 12101(a)(1) (1994).

43. Mark Hansen, *The ADA's Wide Reach*, ABA J., Dec. 1993, at 14; *see also* Kim I. Mills, *50,000 Complaints Filed Under Americans with Disabilities Act*, CHI. DAILY L. BULL., Aug. 22, 1995, at 1.

44. Jeff Jacoby, *The ADA -- aka The Lawyers' Full Employment Act*, L.A. DAILY J., Apr. 4, 1995, at 6.

45. Carol Krafka, Joe S. Cecil, and Patricia Lombard, *Stalking the Increase in the Rate of Federal Civil Appeals*, 18 JUST. SYS. J. 233 (1996) (quoting Report of the Federal Courts Study Committee, 1990, at 109-10).