OFFICE OF SPECIAL MASTERS

No. 02-1183V

(Filed: December 2, 2004)

* *		
DANIEL L. AULL and FRANCES C. AULL as Co-Administrators of the Estate of WILLIAM DANIEL BLAKE AULL, Deceased	*	
Petitioners,	*	
v.	*	TO BE PUBLISHED
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

David L. Yewell, Esq., Owensboro, Kentucky, for Petitioners.
Julia W. McInerny, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DISMISSAL DECISION

ABELL, Special Master:

Prior to filing this petition under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act" or "Act"),[1] Daniel L. Aull and Frances S. Aull ("Petitioners" or "Plaintiffs") had pending a civil action against the vaccine administrator for damages for a vaccine-related death.

The Act explicitly states that plaintiffs who have "pending a civil action for damages for a vaccine-related injury or death . . . may not file a petition . . . for such injury or death." § 11(a)(5)(B).

Therefore, based on the unambiguous language of the Act and in keeping with prior interpretation and precedent, this petition is hereby dismissed without prejudice.

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[1] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq*. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

BACKGROUND

On 11 September 2002, Petitioners filed an action seeking an award under the Vaccine Act for the alleged vaccine-related death of William Daniel Blake Aull ("Blake"). Their petition claims that Blake suffered an encephalopathy[2] after receiving certain vaccinations and subsequently died. *See* Verified Petition at 1 ("Petition I").

The original petition, however, is marred by critical discrepancies between allegations in the petition and facts in the accompanying medical records. Among several issues of import, the petition claims that Blake experienced a Table encephalopathy following a vaccine administered on 8 September 2000. However, the medical records and other sections of the original petition appear to indicate that Blake suffered from a pre-existing encephalopathic condition known as "Leigh's disease."[3] This condition, whose symptoms include seizure activity, was diagnosed in early April 1995, nearly one month after Blake first began experiencing seizures. Petition I at 3. Though such issues are arguably *de minimis,* other deficiencies were not.

In the first instance, the Court's attention was drawn to the petition's statement that "Blake, through his parents, never received compensation in the form of an award or settlement for the above described vaccine injuries and death." Petition I at 9. Though technically correct, based on this Court's extensive experience, most Petitioners - no doubt wishing to avoid any complications in the prosecution of their case - typically aver that no civil suits are pending and that no one has received any sort of compensation for the alleged vaccine-related injury or death. *See* §§ 11(c)(1)(E), 11(a)(3) to (7). An inquiry into this statement led to the discovery of a pending civil action against the vaccine administrator.

Second, and even more perplexing, is Petitioners' apparent misrepresentation concerning the vaccination itself. Petitioners represented to this Court, and apparently continue to maintain, that the vaccination given to Blake on 8 September 2000 was Diphtheria, Tetanus and Pertussis

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[2] An encephalopathy generally means an injury to the brain. However, the new Vaccine Injury Table found at 42 C.F.R. § 100.3(b)(2)(I) includes a specific definition of encephalopathy for petitions filed after 10 March 1995.

[3] The National Institute of Neurological Disorders and Stroke, part of the National Institutes of Health, explains Leigh's disease as follows:

> Leigh's disease is a rare inherited neurometabolic disorder characterized by degeneration of the central nervous system. Leigh's disease can be caused by mutations in mitochondrial DNA or by deficiencies of an enzyme called pyruvate dehydrogenase. Symptoms of Leigh's disease usually begin between the ages of 3 months to 2 years and progress rapidly. In most children, the first signs may be poor sucking ability and loss of head control and motor skills. These symptoms may be accompanied by loss of appetite, vomiting, irritability, continuous crying, and seizures. As the disorder progresses, symptoms may also include generalized weakness, lack of muscle tone, and episodes of lactic acidosis, which can lead to impairment of respiratory and kidney function. Heart problems may also occur. In rare cases, Leigh's disease can begin during late adolescence or early adulthood and progress more slowly.

NINDS Leigh's Disease Information Page, *at* http://www.ninds.nih.gov/health_and_medical/disorders/leighsdisease_doc.htm (Reviewed Mar. 21, 2003).

("DTP") and not Diphtheria and Tetanus Toxoids ("DT")[4] as is clearly stated in the records. In fact, after further investigation by this Court, the 8 September 2000 vaccination has been determined by a preponderance of the evidence to have been DT. The vaccination record filed with the Court shows the shot as DT, Petitioner's Exhibit Vol. I at 328; and the pharmaceutical company has stated definitively that, according to the lot number, it was indeed DT. Respondent Exhibit D.[5] Petitioners' counsel even agreed during a 9 January 2004 status conference that the vaccination was DT.[6] *See* Order, January 12, 2004 at 1. Though not at issue in the present decision, this Court notes that Petitioners continue to skirt this crucial fact.[7] It was not lost upon the Court that the Clarification to Petitioners Claim ("Pet. Clarification") mentions the "vaccination" only in the most generic terms.

Concerning the incongruities in the original filing, on 22 April 2003 this Court gave Petitioners 60 days to amend the defective petition. Unable to meet this deadline, Petitioners requested a 30-day extension which was granted. Petitioners failed to meet the extended deadline as well. During the next telephonic status conference, Petitioners' counsel informed the court - for the first time - of a prior civil action pending in Kentucky state court. *See* Order, filed July 23, 2003.

Petitioners subsequently provided the Court with a copy of the Verified Complaint ("Ver. Comp."). It shows that, on 10 September 2001, Daniel L. Aull and Frances S. Aull brought a civil action in the Daviess Circuit Court of the Commonwealth of Kentucky for damages for the death of their son. Seven separate parties were named as defendants in the complaint. Ver. Comp. at 6. However, only plaintiff Dr. David E. Danhauer is relevant to this Court in that Dr. Danhauer is the vaccine administrator of the 8 September 2000 DT vaccination at issue.

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[4] According to a Vaccine Information Statement issued by the Center for Disease Control and Prevention's National Immunization Program, DTP stands for "Diphtheria, Tetanus and Pertussis." In contrast, the Diphtheria and Tetanus Toxoids ("DT") vaccination contains no pertussis whatsoever. *Diphtheria, Tetanus and Pertussis Vaccines: What you need to know*, Vaccine Information Statement (U.S. Dep't of Health and Human Serv./Ctr. for Disease Control and Prevention, Nat'l Immunization Project), July 30, 2001, at 1, *available at* http://www.cdc.gov/nip/publications/VIS/vis-dtp.pdf.

[5] Respondent's Exhibit D is a letter from Adventis Pasteur stating that the lot number "U0014 can be identified as the DIPHTHERIA AND TETANUS TOXOIDS ADSORBED USP (for Pediatric USE) Vaccine." (emphasis omitted).

[6] This admission followed a 2 December 2003 Order to Show Cause, wherein the Court ordered Petitioners either to show cause for why this case should not dismissed (as their petition hinged entirely on the 8 September 2000 shot having contained pertussis) or to validate their claim that the vaccine at issue is DTP. Unable to validate their claim, Petitioners were given the opportunity to file a medical expert's report and attendant documentation setting forth how the DT vaccination administered on 8 September 2000 caused Blake's death.

[7] Petitioners later reneged on this admission as is evidenced in their Motion for Extension of Time for Petitioners to Comply with Orders of this Court Filed January 12, 2004 and January 27, 2004 at 2. In that motion, Petitioners claim that a 1995 vaccination (not at issue in this case) was incorrectly recorded as DT when, in fact, it was DTP. Without substantiation, they then allege that the 8 September 2000 vaccination record is similarly incorrect. *Id.*

Respondent moved to dismiss for lack of jurisdiction on the grounds that Petitioners violated the requirements of § 11(a)(2), (a)(3), and (a)(5). *See* Respondent's Motion to Dismiss at 1. That motion was denied.[8] On 30 April 2004, Respondent filed a Renewed Motion to Dismiss which asked the Court to consider several new issues.

In short, the Court has once again been asked to determine whether the Petitioners' pending civil action against the vaccine administrator for damages for a vaccine-related death prevented them from filing a petition under the Act.[9]

GENERAL DISCUSSION

In attempting to bring a petition under the Act while maintaining a civil action against the vaccine administrator for a vaccine-related injury or death, Petitioners - to borrow a phrase of mixed metaphors - have undertaken the Herculean task of sailing between Scylla and Charybdis while using the sword of Damocles to cut the Gordian knot that it might fit its Procrustean bed.

The purpose of the Vaccine Act is well known but bears repeating. Put simply, the Vaccine Act created a relatively fast and inexpensive system to compensate parties for injuries or deaths resulting from certain vaccines, thereby protecting vaccine manufacturers and administrators, whose services are of incalculable benefit to public health and safety, from effectively being sued out of business in civil court. Victims are compensated, instead, out of funds culled from taxes on the vaccinations themselves.

Therefore, the Act requires that certain claims, particularly those against vaccine manufacturers and administrators for damages relating to the administration of a vaccine, be pursued in this Court before being brought in civil court. § 11(a)(2)(A). However, the Act also encourages petitioners to bring their claims here. For example, reasonable attorney fees and costs are provided such that many petitioners suffer no out of pocket expenses in these proceedings. §

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[8] *Aull v. Secretary of HHS*, No. 02-1183V, 2003 WL 22853064 (Fed. Cl. Spec. Mstr. Nov. 5, 2003). In that decision, this Court held that the State civil action was not the sort that would bar a petition under the act, as the charge of postvaccinal negligence is not facially related to the *administration* of the vaccine. *See* § 11(a)(2)(A). Upon further consideration, the statute in question here, § 11(a)(5)(B), requires only that the injury be *associated* with a Table vaccine and does not require that it be associated with the *administration* of a vaccine. In addition, as will be discussed *infra*, this Court based its original denial in part on *DeLouis v. Secretary of HHS*, No. 96-655V,1997 WL 631504 (Fed. Cl. Spec. Mstr. Sep. 25, 1997) which - as Respondent points out - was reversed and remanded by the Court of Federal Claims in an unpublished decision. *DeLouis v. Secretary of HHS*, No. 96-655V (Fed. Cl. filed Jan. 20, 1995) ("*DeLouis II*"). It should be noted that neither this Court's previous denial nor *DeLouis II* are binding on this decision. *Hanlon v. Secretary of HHS*, 40 Fed. Cl. 625, 630 (1998) ("Special masters are not bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand"). However, the Court finds the *DeLouis II* rationale persuasive in the present case.

[9] After the parties' briefs were filed on the Renewed Motion to Dismiss, the Court asked Petitioners to provide a clarification of their claim since the initial petition, an amended petition, and their current brief are quite convoluted and apparently contradictory and as Vaccine Rule 2(d) requires that the petition "set forth a short and plain statement of the grounds for an award of compensation." Therefore, the current decision is based on the claim as articulated in the Clarification of Petitioners Claim.

15(e).

Though the Act mandates that certain cases be brought before this Court and includes certain incentives to encourage petitioners to file here first, nothing prevents petitioners from pursuing civil remedies not specifically precluded by the Act. For example, in *Amendola v. Secretary of HHS*, the Federal Circuit opines that negligence on the part of the vaccine administrator that is facially unrelated to the administration of the vaccine would not fall under the Act's demesnes. 989 F.2d 1180, 1186-1187 (Fed. Cir. 1993). Quoting *Amendola*,

> If this were a situation in which the direct cause of the injury was a contaminated needle, or the doctor's negligent dropping of an infant patient, or other negligence facially *unrelated to the vaccine's effects*, then the hypotheticals posed by the Amendolas might require further examination. In the case before us, in which the alleged negligence was a judgment call about whether to administer the vaccine under the circumstances presented, *and the injury resulted from the administration of the vaccine*, we have no difficulty in concluding that any resulting injury from the vaccine is vaccine-related.

Id. (emphasis in original).

In another case, a Special Master held that a civil tort action against the vaccine administrator for negligent postvaccinal care filed *subsequently* to the filing of the petition did not necessarily preclude Petitioner from proceeding in the Program. *Lawton v. Secretary of HHS*, No. 90-687V, 1991 WL 53653 (Fed. Cl. Spec. Mstr. Mar. 26, 1991). In that case, the special master averred that "the Vaccine Act does not imply any congressional intent to preclude petitioners from pursuing suits for separate independent acts of alleged malpractice against physicians." *Id.* at *4. Put another way, the Act does not preclude petitioners from pursuing remedies not expressly forbidden therein.

It does not follow, however, that if a plaintiff elects to pursue a permissible civil court remedy that such plaintiff may also pursue a remedy under the Act. In fact, the Act explicitly prohibits this very occurrence by stating that "a plaintiff [who] has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition . . . for such injury or death" § 11(a)(5)(B). A House Conference Report concerning the 19 December 1989 amendment of § 11(a)(5) notes, "Subparagraph (A) clarifies that a petitioner must petition to have his or her action dismissed and may not simply allow the action to lie dormant during the compensation proceeding. Subparagraph (B) clarifies that a plaintiff in such an action whose action is still pending may not enter the compensation system. In keeping with the purposes of the Act and this conference agreement, the Conferees intend that plaintiffs in pending actions who wish to have such actions dismissed without prejudice so that they may enter the compensation system be allowed to do so without prejudice or other disincentives." H.R. Conf. Rep. No. 101-386, at 513-514 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3117. Whereas civil actions not specifically excluded by the Act may be available to petitioner plaintiffs, if they elect to pursue such actions the Act may preclude them from concurrently filing a petition for compensation on that same injury.

The foregoing proposition is borne out in numerous cases. According to *Lawton*, "Congress did not intend to prohibit suits such as petitioner's, which are brought against

physicians *outside of their role as vaccine administrators*." No. 90-678V, 1991 WL 5365, at *4 (emphasis in original). In contrast, *Carlson v. Secretary of HHS* states, "It was not Congress' intent that petitioners keep their civil actions alive in the traditional tort system while pursuing a petition in this forum." No. 90-839V, 1991 WL 62123, at *5 (Fed. Cl. Spec. Mstr. Apr. 5, 1991), *aff'd*, 23 Cl. Ct. 788, 791 (1991), *aff'd mem.*, 968 F.2d 1227 (Fed. Cir. 1992). In *Klahn v. Secretary of HHS*, the Court of Federal Claims says, "The filing of a civil action prior to the initiation of a vaccine claim indicates that the person has chosen to forego his or her opportunities under the Program and to pursue a traditional tort remedy. Moreover, use of the term 'to file' indicates that one may not initiate or take the first step in seeking recovery under the program." 31 Fed. Cl. 382, 386 (1994). *Klahn* further held, "If a civil action has been filed before the petitioner has chosen to participate in the compensation system, the petitioner is prohibited from passing through the gate into the compensation system." 31 Fed. Cl. at 387.

ANALYSIS

It is axiomatic that, in construing the Act, the Court must first turn to the language itself. As this court has previously stated, when interpreting the meaning of a statute, the controlling principle is the "basic and unexceptional rule" that courts must give effect to the clear meaning of the statute as written. *Campbell v. Secretary of HHS*, No. 01-688V, 2004 WL 1047393, at *1 (Fed. Cl. Spec. Mstr. Apr. 22, 2004) (quoting *Estate of Cowart*, 505 U.S. 469, 476 (1992)). However, as the Federal Circuit has noted, "When the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of context and treating them as self-evident. This rather straightforward homily is captured in the more pretentious proposition that parts of a statute *in pari materia*[10] must be construed together." *Amendola v. Secretary of HHS*, 989 F.2d 1180, 1181 (Fed. Cir. 1993) (footnote added). Or, to put it another way, individual parts of a statute must be examined in the context of the whole such that the Act stands *ut res magis valeat quam pereat*.[11]

First, it is necessary to establish what part of the Act is at issue in the present case as there appears to be some confusion among the parties and in the case law. Whenever a pending civil case throws doubt on the validity of a petition, it seems the first reaction is to look toward § 11(a)(2)(A). That subsection, however, deals *solely* with whether a case may be brought in civil court. It says that one cannot bring certain claims in civil court against a vaccine administrator or manufacturer for a vaccine-related injury associated with the *administration* of a Table vaccine. *Id.* From that subsection, the Federal Circuit has rightly intuited that it is possible to bring certain claims in civil court on vaccine-related injuries provided, for example, they are not brought against the vaccine administrator or manufacturer on an injury associated with the *administration* of a Table vaccine. *See Amendola* 989 F.2d at 1186-1187. Hence, § 11(a)(2)(A) deals primarily

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[10] Meaning "of the same matter" (or subject), this phrase stands for the rule that statutes of the same or similar material must be interpreted with reference to each other.

[11] One part of a statute should be construed by another part such "that the matter may have effect rather than fail." *Black's Law Dictionary* 1697 (7th ed. 1999), *see also* 1 William Blackstone, *Commentaries* at 89, *available at* http://www.yale.edu/lawweb/avalon/blackstone/introa.htm#3.

with whether a civil court has jurisdiction over or whether it ought to dismiss a vaccine-related case. That subsection in and of itself, however, does not limit the jurisdiction of this Court.

In contrast, numerous portions of § 11(a) do limit the jurisdiction of this Court. Subsection 11(a)(5)(B), for example, says that plaintiffs who are pursuing compensation on a vaccine-related injury in civil court cannot also bring a petition here.[12] It is important to note that § 11(a)(5)(B) implicitly recognizes that certain civil actions may be permissible; yet, § 11(a)(5)(B) holds that if one files a permissible suit for damages on a vaccine-related injury in civil court, one cannot also file a petition in this Court. In this manner, the Act "preclude[s] a petitioner from both receiving compensation under the Act and collecting a civil award for a *vaccine-related injury*." *Lawton v. Secretary of HHS*, No. 90-678V, 1991 WL 53653, at *3 (Fed. Cl. Spec. Mstr. Mar. 26, 1991) (emphasis in original).

It is imperative, then, that the Court examine § 11(a)(5)(B), the pertinent subsection of the Act, in relation to its context and prior interpretation. Subsection 11(a)(5)(B) says, "If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death."[13] A "pending" case, of course, is "any action that has not been dismissed." *Carlson v. Secretary of HHS*, 23 Cl. Ct. 788, 791 (1991), *aff'd mem.*, 968 F.2d 1227 (Fed. Cir. 1992). Furthermore, while the courts have recognized that an injury or death associated with the administration of a vaccine is most definitely vaccine-related, *see Amendola* 989 F.2d at 1187, the Act itself defines a "vaccine-related injury or death" more broadly as any "injury or death *associated* with one or more of the

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[12] Subsection 11(a)(5) acts as a jurisdictional bar by limiting the Court's ability to hear certain petitions. *Flowers v. Secretary of HHS*, 49 F.3d 1558, 1561 -1562 (Fed. Cir. 1995) (citing *Matos v Secretary of HHS*, 35 F.3d 1549, 1552 n. 8 (Fed. Cir. 1994); *Carlson v. Secretary HHS*, 23 Cl. Ct. 788, 793 (1991), *aff'd mem.*, 968 F.2d 1227 (Fed. Cir.1992)).

[13] Subsection 11(b)(1)(A) identifies those persons who may file petitions including "the legal representative of any person who died *as the result of the administration of a vaccine* set forth in the Vaccine Injury Table." § 11(b)(1)(A) (emphasis added). Due to the convoluted nature of their argument, there remain some questions about Petitioners' ability to file a petition under § 11(b). *See* Respondent's Reply to Petitioners' Opposition to Respondent's Renewed Motion to Dismiss for Lack of Jurisdiction at 4. Put simply, if Petitioners argue that Blake received only a vaccine-related injury but that his death was caused by postvaccinal negligence, they may not be able to pursue a claim under the Act. *See Campbell v. Secretary of HHS*, No. 01-688V, 2004 WL 1047393, at *4 (Fed. Cl. Spec. Mstr. Apr. 22, 2004).

In the alternative, such a finding may preclude Petitioners from recovering under the Act. *See Lawton v. Secretary of HHS*, No. 90-678V, 1991 WL 53653, at *3 (Fed. Cl. Spec. Mstr. Mar. 26, 1991) ("If [decedent's] injury were proven to be vaccine-related but his death, rather than being a sequella of the injury, was due to medical malpractice, I could award no death benefit."). Petitioners have stated, "That postvaccination negligence on the part of the doctors is what caused Blake's death in the present case. The fact that Blake also suffered a table injury for purposes of the Vaccine Act is not at issue and does not affect the civil action concerning proximate cause and whether [the vaccine administrator] was negligent in failing to properly treat Blake when he presented at the emergency room with grave but treatable symptoms." Petitioners' Opposition to Respondent's Renewed Motion to Dismiss for Lack of Jurisdiction at 8-9. Subsection 15(a)(2) provides an award "[i]n the event of a *vaccine-related death*." (emphasis added). Furthermore, recovery under that subsection may be awarded *only* on a vaccine-related death and not on a vaccine-related injury. *E.g., Buxkemper v. Secretary of HHS*, 32 Fed. Cl. 213 (1994), *Cohn v. Secretary of HHS*, 44 Fed. Cl. 658 (1991), *Sheehan v. Secretary of HHS*, 19 Cl. Ct. 320 (1990). This issue, however, must be addressed only if the petition was properly brought in the first place.

vaccines set forth in the Vaccine Injury Table." § 33(5) (emphasis added).

Therefore, incorporating the definition of a vaccine-related death (in brackets) *mutatis mutandis*, § 11 (a)(5)(B) now reads: "If a plaintiff has pending a civil action for damages for [an injury or death associated with a Table vaccine], such person may not file a petition under subsection (b) of this section for such injury or death."

The Federal Circuit, however, has added its own twist to § 11(a)(5)(B). *See Schumacher v. Secretary of HHS*, 2 F.3d 1128 (Fed. Cir. 1993).[14] Though conspicuously absent from § 11(a)(5)(B), *Schumacher* adds the qualifying phrase "against a vaccine administrator or manufacturer" to the term "a civil action." Hence, "a civil action," "mean[s] only a civil action against a vaccine administrator or manufacturer, *even though the modifying phrase 'against a vaccine administrator or manufacturer' is not included in the provision*." *Schumacher*, 2 F.3d at 1132 (emphasis added).

Combining the *Schumacher* holding (in brackets) and the statutory definition of "vaccine-related death" (also in brackets) with § 11(a)(5)(B) *mutatis mutandis*, that subsection now reads: "If a plaintiff has pending a civil action [against a vaccine administrator] for damages for [an injury or death *associated* with a Table vaccine], such person may not file a petition . . . for such injury or death."

By their own admission,[15] at the time the petition was filed, Petitioners had pending, as plaintiffs, a civil action against the vaccine administrator for damages for an injury or death associated with a Table vaccine. Subsection 11(a)(5)(B) of the Act clearly bars such persons from filing a petition.

FURTHER ANALYSIS

The parties have proffered several interesting legal theories in support of their positions. Though *obiter dictum* in some instances, a brief analysis of certain arguments may prove instructive.

First, Respondent alleges that this Court erred in denying the original motion to dismiss as that denial was based in part on a decision that was later reversed and remanded. *DeLouis v. Secretary of HHS*, No. 96-655V, 1997 WL 631504 (Fed. Cl. Spec. Mstr. Sep. 25, 1997), *rev'd and remanded*, *DeLouis v. Secretary of HHS*, No. 96-655V (Fed. Cl. filed Jan. 20, 1995) ("*DeLouis II*"). The Court thanks Respondent for reminding it of that unpublished decision.

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[14] In *Schumacher*, the original petition was dismissed as the petitioners had pending against the vaccine administrator (among others) a civil action for damages for a vaccine-related injury or death. Petitioners dismissed their action against the vaccine administrator and filed another petition under the Act. The court held that the remaining civil action did not bar the newly filed petition as it did not include the vaccine administrator or manufacturer. *Schumacher v. Secretary of HHS*, 2 F.3d 1128, 1129 (Fed. Cir. 1993).

[15] Petitioners explicitly state, "In this Vaccine Act claim, the Petitioners are claiming compensation for death as a sequella to a *vaccine-related injury*." Pet. Clarification at 1 (emphasis added).

Though decisions by the Court of Federal Claims have no precedential value on separate cases before this Court, *Hanlon v. Secretary of HHS*, 40 Fed. Cl. 625, 630 (1998), the reasoning in such decisions can be of assistance.

DeLouis II held that the filing date on a dismissed civil action against a treating physician (who also happened to be a vaccine administrator) for negligent care could be used for the Act's tolling provision.[16] Hence, it does not matter whether a civil case was pled as negligence, what matters is only "whether the claim, in fact, *is* one 'for' damages 'arising from' a 'vaccine related injury.'" *Id.* at *9 (citing § 11(a)(2)(A)). In actuality, § 11(a)(2)(A) states that parties may not pursue damages in civil court for vaccine-related injuries "associated with the *administration* of a vaccine" (emphasis added).[17] Consequently, the Federal Circuit rightly opined that a civil action against a vaccine administrator for negligence wholly unrelated to the administration of a vaccination would not fall under § 11(a)(2)(A), *see Amendola v Secretary of HHS,* 989 F.2d 1180, 1186-1187 (Fed. Cir. 1993), and, by inference, could not be used for equitable tolling under § 11(a)(2)(B).

Regardless of whether the rationale in *DeLouis II* is correct in that particular case, it is actually quite persuasive in the present case. *DeLouis II* focused on the language of § 11(a)(2)(A); whereas, the present case involves § 11(a)(5)(B). The former subsection prohibits cases from being filed in civil court when they should be brought here. The latter prohibits petitions from being filed here when petitioners are seeking damages for a vaccine-related injury in civil court. More important, § 11(a)(5)(B) does not include the qualifying language "administration of a vaccine."[18] Following the rationale in *DeLouis II*, it does not matter that the Petitioners' civil suit alleges negligent postvaccinal care, rather at issue is solely whether the civil suit seeks damages from the vaccine administrator for an injury or death associated with a Table vaccine. § 11(a)(5)(B). As the Plaintiffs' pending civil action seeks damages for a death associated with a Table vaccine, they could not file a petition under the Act.

Petitioners proffer several cases which they believe are helpful to their cause including *Abbott v. Secretary of HHS*, 19 F.3d 39 (Fed. Cir. 1994) (unpublished opinion). As was the case with *DeLouis II*, this unpublished decision is not of precedential value to the Court but may

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[16] Subsection 11(A)(2)(B), the tolling provision, states that when a civil action is dismissed because it runs afoul of the Act, the Court may look to the filing date of that civil action when the petition might otherwise be untimely. *See* § 16(a)(2).

[17] Subsection 11(a)(2)(A) states in relevant part that "[n]o person may bring a civil action for damages . . . against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the *administration of a vaccine*." (emphasis added).

[18] Although the Court might be tempted to read such language into the statute where it does not exist (as per *Schumacher v. Secretary of HHS*, 2 F.3d 1128 (Fed. Cir. 1993)), it should not. *See DeLouis II* at *9, "Courts are generally forbidden to read into a statute any requirements not specified therein. It would be especially egregious to do so when the judicial rewriting subverts both the clear overall purposes, and the express requirements set out in other significant portions, [sic] of the statute." *See also* text accompanying Footnote 14 *supra*.

otherwise be helpful or persuasive.[19] In *Abbott*, a mother's petition on behalf of her son was not barred by § 11(c)(1)(E) even though the mother had previously collected a settlement on a state wrongful death suit. *Id.* The Act requires that the petition contain an affidavit demonstrating that the person who died "has not previously collected an award or settlement of a civil action for damages for such vaccine-related injury or death." § 11(c)(1)(E). *Abbott* held that since the deceased son had not received an award or settlement, the mother's settlement did not bar her from filing a petition on her son's behalf. *Abbott*, 19 F.3d 39, at *3. In the present case, Petitioners contend similarly that, since the damages in their state wrongful death suit flow to statutorily prescribed beneficiaries and not to the son's estate, their civil suit should not bar them from filing a petition under the Act.

Abbott, however, is easily distinguished from the present case. First and foremost, the civil suit in *Abbott* was not pending at the time the petition was brought; hence, § 11(a)(5)(B) was not triggered. Second, even if the civil case had been pending, § 11(a)(5)(B) would not have applied since the suit was not against the vaccine administrator or manufacturer. *Schumacher,* 2 F.3d at 1129. Furthermore, had the plaintiff petitioner in *Abbott* received a settlement or damages from the vaccine administrator, she would have been precluded from filing a petition by § 11(a)(7).[20] Similar to the present case, the civil suit in *Abbot* alleged negligent postvaccinal care. However, "In the [state] wrongful death action, [petitioner] obtained a settlement for damages based on [decedent's] death which was associated with [a Table] vaccine whether or not . . . the chain of proximate causation was broken by the negligence of the staff at the home where [decedent] died." *Abbott*, 19 F.3d 39, at *3. Hence, *Abbot* - on which Petitioners rely - clearly states that damages recovered on a wrongful death suit *were* associated with a Table vaccine and that postvaccinal negligence does not break the association.

Likewise, in the present case, it does not matter to whom the damages flow; rather, § 11(a)(5)(B) only asks whether a plaintiff is seeking damages for a vaccine-related injury or death. Regardless of the alleged postvaccinal negligence, the Petitioners' pending state wrongful death suit seeks damages from a vaccine administrator for a vaccine-related death. Therefore, they could not file a petition under the Act.

Petitioners also point to a Special Master's decision in *Lawton v Secretary of HHS*, No. 90-678V, 1991 WL 53653 (Fed. Cl. Spec. Mstr. Mar. 26, 1991). In that case, the Special Master held that a civil tort action against the vaccine administrator for negligent postvaccinal care which was filed subsequently to the filing of the petition did not necessarily preclude Petitioner from

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[19] Unpublished Federal Circuit decisions are not precedent according to Rule 47.6(b) of the *Federal Rules of Appellate Procedure*, *Federal Circuit Rules,* at 86 (May 1, 2004), *available at* http://fedcir.gov/pdf/cafc2004.pdf. "An opinion or order which is designated as not to be cited as precedent is one determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent." *Id.*

[20] Subsection 11(a)(7) says that if a plaintiff receives an award or settlement on a civil action against a vaccine-administrator for a vaccine-related injury or death, that person cannot file a petition under the act. *But see Massing v. Secretary of HHS,* 926 F.2d 1133 (Fed. Cir.1991) (holding that prior settlement of death action against non-administrator bars petition under subsection 11(a)(7)).

proceeding under the Act. *Lawton* correctly recognized that the Act "preclude[s] a petitioner from both receiving compensation under the Act and collecting a civil award for a *vaccine-related injury*." *Id.* at 2 (emphasis in original). However, the Special Master essentially held that the injury was not vaccine-related as it did not implicate vaccine *administration*, *Id.* at 3; this despite the fact that the Act itself explicitly defines a "vaccine-related injury or death" as a death *associated* with a Table vaccine with no mention of vaccine administration. § 33(5). Subsection 11(a)(5)(B), meanwhile, states that plaintiffs in a civil suit (against a vaccine administrator) for damages for an injury or death associated with a Table vaccine *cannot* file a petition. It is only necessary that the injury or death be *associated* with a Table vaccine. It matters not how the Petitioners characterize the state court proceedings. If one sues a vaccine administrator for damages for a vaccine-related injury or death, one cannot file concurrently under the Act.

Lawton further states that, "Congress did not intend to prohibit suits such as petitioner's, which are brought against physicians *outside of their role as vaccine administrators*." No. 90-678V, 1991 WL 5365, at *4**.** That is certainly the case and finds support in the well established legal rule *tout ce que la loi ne defend pas est permis*.[21] Accordingly, the Act may not prevent petitioners from suing a vaccine administrator in civil court for negligence unrelated to the *administration* of a vaccine. § 11(a)(2)(A); *see also Amendola*, 989 F.2d at 1186-1187. However, it does not follow that the Act allows one concurrently to file a petition based on that same vaccine-related injury or death. In fact, the Act expressly forbids such an occurrence. § 11 (a)(5)(B). Therefore, Petitioners' reliance on *Lawton* is misplaced.

Put simply, that their civil case is not necessarily prohibited by the Act does not mean they are permitted to bring a concurrent petition under the Act on the same vaccine-related injury. The Act states that plaintiffs *must* bring their suits here first before they can pursue a civil action against a vaccine administrator or manufacturer for a vaccine-related injury or death associated with the administration of a vaccine. § 11(a)(2)(A). Other civil actions are fair game. However, if one is pursuing or has secured compensation in a civil action on a vaccine-related injury one may not seek compensation under the Act. § 11(a)(5)(B) and (a)(7).

SALCEDA V. SECRETARY OF HHS

Though raised by neither party, *Salceda v. Secretary of HHS* directly addresses the issue presented in the present case. No. 90-1304V, 1994 WL 139375 (Fed. Cl. Spec. Mstr. Apr. 6, 1994). On remand, the Court of Federal Claims asked the Special Master to reconsider § 11(a)(5)(B) in light of congressional intent and the Federal Circuit's holding in *Schumacher v. Secretary of HHS*, 2 F.3d 1128 (Fed. Cir. 1993). Upon reconsideration, the Special Master held that a pending civil suit for postvaccinal negligence against the vaccine administrator would not bar one from filing a petition.[22]

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[21] "Everything that the law does not forbid is permitted." *Black's Law Dictionary* 1695 (7th ed. 1999).

[22] The Special Master in *Salceda* went on to dismiss the case on other grounds. That dismissal was affirmed by the Court of Federal Claims and later by the Federal Circuit. Neither of the higher courts, however, addressed the Special Master's interpretation of § 11(a)(5)(B). *Salceda v. Secretary of HHS*, 33 Fed. Cl. 164 (1995), aff'd by *Salceda v. Secretary of HHS*, 70 F.3d 608 (Fed. Cir. 1995).

Let us first dispense with the usual disclaimer that decisions by other special masters or the Court of Federal Claims on separate cases are not binding on this Court, *Hanlon v. Secretary of HHS*, 40 Fed. Cl. 625, 630 (1998), and further note that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is a 'step to be taken cautiously' even under the best circumstances." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)). That being said, the concerns raised by *Salceda* have weighed heavily on this Court.

At issue in *Salceda* is the apparent "dichotomy between health care providers that are also vaccine administrators (protected from suit under respondent's theory) . . . and health care providers that are not vaccine administrators." No. 90-1304V, 1994 WL 139375, at *3. Under *Schumacher*, which held that the phrase "civil action" for the purposes of § 11(a)(5)(B) is limited to actions against vaccine administrators or manufacturers, 2 F.3d 1128, petitioners are allowed to file under the Act while pursuing a civil action for damages on the same vaccine-related injury provided that civil action does not include the vaccine administrator or manufacturer.

In reconsidering the legislative history of §11(a)(5)(B) in light of *Schumacher*, the Special Master in *Salceda* found that Congress in no way intended to create "two classes of defendant: one class which allegedly commits postvaccinal negligence whom plaintiffs, following *Schumacher*, may haul into court; and a second class which may have committed the same negligence but, because they also administered the [vaccine], are immune from suit." No. 90-1304V, 1994 WL 139375, at * 4.

However, § 11(a)(5)(B) in no way makes vaccine administrators immune to civil suits. It merely states, in light of *Schumacher*, that if one chooses to file a civil action against a vaccine administrator or manufacturer for damages arising from a vaccine-related injury or death, one cannot concurrently pursue compensation under this program. Only in a few specific instances is one prevented from bringing a civil action against a vaccine administrator or manufacturer.[23] For example, certain civil actions against vaccine administrators for vaccine-related injuries or deaths associated with the administration of a Table vaccine must first be brought here. § 11(a)(2)(A). However, vaccine administrators may be sued in civil court for negligence concerning a vaccine-related injury provided that injury is facially unrelated to the *administration* of the vaccine. *See Amendola,* 989 F.2d at 1186-1187. *Ergo*, Petitioners' present civil action against the vaccine administrator for negligent postvaccinal treatment, constituting a vaccine-related injury arguably not associated with the administration of a vaccine, likely is permissible under the Act. That is a matter for the civil court to decide. Regardless, § 11(a)(5)(B) creates no disparity between vaccine administrators and non-administrators. It is no wonder then that *Salceda* encountered a wall of "total silence" in the legislative history. No. 90-1304V, 1994 WL 139375, at * 4.

However, the question in *Salceda* could be restated: Why should a plaintiff whose treating

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[23] Certain civil actions against vaccine administrators for vaccine-related injuries associated with the administration of a Table vaccine must must first be brought here. In those instances one cannot *bring* a civil action against a vaccine administrator or manufacturer, § 11(a)(2)(A), and neither can one *join* them as a party to such actions. §11(a)(3).

physician also happened to be the vaccine administrator be prevented from filing for compensation under the Act, while a plaintiff whose treating physician was not the vaccine administrator be allowed to file for compensation, especially when a plaintiff who has successfully sued an administrator or a non-administrator on a vaccine-related injury may be barred from filing by § 11(a)(7) as interpreted by *Massing v. Secretary of HHS,* 926 F.2d 1133 (Fed. Cir.1991)?

This conundrum rests squarely on the shoulders of *Schumacher*. 2 F.3d 1128. In *Schumacher*, the Federal Circuit notes that the phrase "civil action" is often qualified throughout the Act but in certain subsections it appears without qualifications. *Id*. One might assume from the plain language of the statute, reading it *in pari materia*, that Congress meant for "civil action" to refer to *any* civil action unless otherwise qualified. Such an interpretation avoids the implication that Congress was ignorant of the language it employed, *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1983), and finds support in the maxim *expressio unius est exclusio alterius* or, as otherwise stated, "explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context." *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 779 (D.C. Cir. 1990). However, by limiting a "civil action" to those against a vaccine administrator or manufacturer, the *Schumacher* decision turns § 11(a)(5)(B) into something of a legal absurdity by allowing petitioners double recovery on the same vaccine-related injury provided they do not sue the vaccine administrator or manufacturer. Such an outcome is anathema to the Act. *Lawton v Secretary of HHS*, No. 90-678V, 1991 WL 53653, at *3 (Fed. Cl. Spec. Mstr. Mar. 26, 1991). Accordingly, the absurd or disparate result is not that these Petitioners are barred from pursuing a petition while concurrently suing the vaccine administrator in civil court on the same vaccine related injury. Rather, the absurdity is that others are allowed two bites at the apple provided they do not involve the vaccine administrator or manufacturer in their civil action.

The Special Master in *Salceda* resolved this apparent absurdity by allowing the petitioner with a pending civil suit against a vaccine administrator for negligent postvaccinal care to remain in the program. While, this Court is sympathetic to the Special Master's plight particularly in light of the rule that "statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion," *Lau Ow Bew v. U.S.*, 144 U.S. 47, 59 (1892) (citing *Holy Trinity Church v. U.S.*, 12 S.Ct. 511 (1892), *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875), *U. S. v. Kirby*, 74 U.S. 482 (1868), and *Oates v. First Nat. Bank of Montgomery*, 100 U.S. 239 (1879)), § 11(a)(5)(B), in light of *Schumacher*, *mutatis mutandis*, clearly states that "a plaintiff [who] has pending a civil action [against a vaccine administrator] for damages for a vaccine-related injury or death . . . may not file a petition." By definition, a vaccine-related injury or death is one "associated with a Table vaccine," § 33(5), and that association is not broken by negligent postvaccinal care. *Abbott*, 19 F.3d 39, at *3.

Petitioners are plaintiffs who had pending a civil action against the vaccine administrator for damages for a vaccine-related injury or death. As such, they could not file a petition under the Act. § 11(a)(5)(B). Petitioners Clarification explicitly states that, "In this Vaccine Act claim, the petitioners are claiming compensation for death as a sequella to a vaccine-related injury." Pet.

Clarification at 1. Or to put it another way, "[W]e have a death due to an immunization which significantly aggravated a preexisting chronic encephalopathy which created an inability to fight off an undiagnosed, untreated pneumonia which was the actual and direct cause of Blake's death." Pet. Clarification at 4 (emphasis added). Therefore, by their own admission, Blake's injury or death is associated with a Table vaccine and, by definition, is vaccine-related. This Court knows of no case aside from *Salceda* where a petitioner, who had pending a civil claim against a vaccine administrator for a vaccine-related injury or death, was allowed to proceed in this program.

As noted by *Salceda*, the Vaccine Act is intended to be "user friendly." No. 90-1304V, 1994 WL 139375, at *4, and this Court makes every effort to help petitioners preserve their claims and avoid potential pit-traps. Yet there are some problems, including potential inequities or absurdities, that this Court cannot fix, particularly where it lacks jurisdiction over the petition in the first place. *See Robinson v. Secretary of HHS,* No. 04-0041V (Fed. Cl. Spec. Mstr. November 3, 2004). To have properly filed a petition, Petitioners could have dismissed the civil action against the vaccine administrator before filing a petition in this Court; or, conversely, they might have withdrawn the present petition, dismissed the civil action against the vaccine administrator, and then re-filed the petition.[24] *See Schumacher v. Secretary of HHS*, 2 F.3d 1128, 1129 (Fed. Cir. 1993). As it presently stands, however, the Court has no ability to cure this jurisdictional defect *sua sponte*. Instead, the Court is bound by the unambiguous language of the statute as illumined by the surrounding context and by precedential and persuasive interpretation. Moreover, this Court has not the "liberty to add an exception ... [or] to remove apparent hardship"; instead, "the 'proper theater' *** 'is the halls of Congress.'" *Keene Corp. v. United States*, 113 S. Ct. 2035, 2045 (1993) (citing *Scoot's Case*, 15 Wall 36, 45 (1873)).

CONCLUSION

The Act is very narrow in those civil actions it prohibits and very broad in the petitions it allows. However, it explicitly states that anyone with a civil action pending for damages on a vaccine-related injury or death may not file a petition. Therefore, this petition is hereby **DISMISSED** without prejudice. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell
Special Master

[24] If a party files a petition on a vaccine-related injury when alternatively they could have filed a permissible civil action, the Act allows for tolling of the statute of limitations. "If a petition is filed under [§ 11] for a vaccine-related injury or death, limitations of actions under State law shall be stayed with respect to a civil action brought for such injury or death" from the time the petition is brought until either the petitioner elects to file a civil action following judgement or withdraws the petition. § 16(c).