In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 06-0522V

Filed: 30 January 2008

ROBERT VERYZER	*	
	*	
Petitioner,	*	**PUBLISHED**[1]
	*	
	*	42 U.S.C. § 300aa-11(b)(2),
v.	*	Claim Preclusion, Res Judicata,
SECRETARY OF HEALTH AND	*	Cause of Action, Transactional Test,
HUMAN SERVICES,	*	Motion to Amend Pleadings
	*	
Respondent.	*	

Alan Milstein, Esq., Sherman, Silverstein, Kohl, Rose & Podolsky, Pennsauken, N.J., for Petitioner; *Robin Brodrick, Esq.*, U.S. Department of Justice, Washington, D.C., for Respondent.

ORDER DENYING MOTION TO AMEND PLEADINGS

On 6 April 2007, Petitioner filed his Motion to Amend the Petition, moving the Court to allow Petitioner to include within this Petition a claim for injury alleged to be related to the Hepatitis B vaccine, and filed contemporaneously a Memorandum of Law in support of that Motion. On 1 May 2007, Respondent submitted a memorandum in opposition to Petitioner's Motion. Finally, on 15 May 2007, Petitioner filed a Reply Memorandum. Having carefully considered the memoranda submitted by the parties, in light of the pleadings and exhibits filed already in this case, it is now incumbent upon the Court to rule on the Motion.

[1] Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this ruling within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

I. FACTUAL BACKGROUND

On 25 April 2001, Petitioner received both the Hepatitis B and Hepatitis A vaccines. Thereafter, Petitioner suffered ill symptoms of pain and neurological damage, which he believed resulted from the vaccinations he received. On 29 September 2003, Petitioner first filed a petition with this Court, pursuant to 42 U.S.C. § 300aa-11,[2] for compensation of a vaccine-related injury, arising out of his Hepatitis B vaccination (docket no. 03-2252V). At the time of that filing, the Hepatitis A vaccine had not been added to the Vaccine Table, found at 42 C.F.R. § 100.3(a), and a claim for compensation of injury from the Hepatitis A vaccination was not concurrently brought.

That petition faced several uphill challenges of proof, primarily due to trouble finding an expert to opine in support of Petitioner's claim that the Hepatitis B vaccine caused the condition from which Petitioner suffered. Therefore, on 2 November 2004, Petitioner opted out of the Vaccine Program, "withdrawing" his petition under § 21(b) of the Vaccine Act after receiving the 240-day notice, pursuant to § 12(g) of same.

That case was thus concluded without a final order of the Court, and without the entry of judgment on the petition's claim for compensation. Around that same time, Hepatitis A was added to the Vaccine Table, on 1 December 2004. See 69 Fed. Reg. 69,945-46. Shortly thereafter, Petitioner applied for, and was awarded, attorney's fees and costs for prosecuting that petition, and final judgment entered on the decision awarding attorney's fees on 3 January 2005.

Having finished with the Vaccine Program, Petitioner then sued the vaccine manufacturer, SmithKline Beecham Corp., in the Supreme Court for the State of New York, naming both vaccines as likely culprits for his injuries. However, the vaccine manufacturer objected, arguing that one of the two vaccines administered, and upon which Petitioner was litigating (Hepatitis A), was now on the Vaccine Table but that Petitioner had not brought a vaccine claim thereupon. The state court ordered the action dismissed without prejudice by consent, to allow Petitioner to bring another claim to the Vaccine Program, this time for Hepatitis A. See Affirmation of attorney Alan C. Milstein, Exhibit B to Petitioner's Motion.

Wherefore, Petitioner filed the instant Petition (docket no. 06-0522V), alleging that Hepatitis A actually caused Petitioner's injuries. In prosecuting the instant Petition, Petitioner retained an medical expert witness, whose recent opinion seems to indicate that the injury was necessarily caused by Hepatitis B, but not Hepatitis A or anything else.

Petitioner has now moved to amend the pending Petition to include a claim for injury allegedly related to his Hepatitis B vaccination, so as to claim recovery for the injury, and to allege causation from the Hepatitis B vaccine. Respondent objects, arguing that preclusion doctrines

[2] 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.

exclude the Hepatitis B vaccine from inclusion in the current Petition.[3] Petitioner responds that the Court "granted" the Notice of Withdrawal because Petitioner could not prove his case (in docket no. 03-2252V), inasmuch as he could not proffer medical expert testimony in support of the Petition. Petitioner argues that the original petition was never actually dismissed, and that therefore he is merely supplementing his one, unitary case with more evidence. Petitioner also argues that, because "judgment was not entered on the merits of the case and no determination was made regarding petitioner's claim" (Petitioner's Memorandum in Support of the Motion to Amend at page 2, paragraph 7), and that both the administration of the Hepatitis A and Hepatitis B vaccines were one transaction that should be considered as one claim for purposes of determining compensation (*Id*. at page 3, paragraph 16).

II. LEGAL STANDARD

The Vaccine Program is a creature of statute, and therefore it is to the Vaccine Act itself, first and foremost, that the Court must invariably turn for guidance. Unfortunately, the parties' briefs included scant discussion of the Act, and preferred to wax eloquent about the statutory intent and purpose instead of adequately contemplating the plain wording of the Vaccine Act itself.[4] This error runs afoul of traditional canons of statutory interpretation.

"The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, [a court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal marks and citations omitted). Longstanding Supreme Court precedent "permit resort to legislative history only when necessary to interpret ambiguous statutory text, as does also the tradition of the common law. Chief Justice Marshall in 1805 stated the principle that definitively resolves this case nearly 200 years later: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.'" *Id.* at 187, note 8, quoting *United States v. Fisher*, 2 Cranch 358, 399, 2 L.Ed. 304. See also W. Eskridge, P. Frickey, & E. Garrett, *Legislation and Statutory Interpretation*, App. C (2000); A. Scalia, *A Matter of Interpretation* 18-23 (1997); A. Scalia, "The Rule of Law as a Law of Rules," 56 *U. Chi. L.Rev.* 1175, 1185 (1989).

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[3] The Court, in ordering the parties to brief this Motion, was specific in the issues it sought the parties to address: namely, statutory analysis and claim and issue preclusion. Unfortunately, the parties seemed to assume this task begrudgingly, and their discussion of legal precedent guiding the Court's decision on this point was anemic, to put it gently.

[4] Petitioner cites *Aull v. Secretary of HHS*, No. 02-1183V, 2004 WL 2958453 (Fed. Cl. Spec. Mstr. Dec. 2, 2004) and *Lawton v. Secretary of HHS*, No. 90-0687V, 1991 WL 53653 (Fed. Cl. Spec. Mstr. Mar. 26, 1991) to explain the "purpose" of the Vaccine Act, without rendering a specific reference to the Vaccine Act itself. Respondent pays fleeting attention to the express wording of the Act before quoting at length from the Act's legislative history, without pausing to indicate whether he believes any textual ambiguity is present.

Respondent, to his credit, at least mentioned the operative statutory section, sandwiched between discussion of the Vaccine Program's "Guidelines for Practice", which have only minuscule precedental weight, if not none whatsoever. Wherefore, for the edification of the parties, the Court provides the following two portions of statutory text:

> Only one petition may be filed with respect to each administration of a vaccine.

42 U.S.C. § 300aa-11(b)(2).

> No person may bring a civil action for damages ... against a vaccine ... manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine ... unless a petition has been filed, in accordance with section 300aa–16 of this title, for compensation under the Program for such injury or death and ... such person elects to withdraw such petition under section 300aa–21(b) ... or such petition is considered withdrawn under such section.

42 U.S.C. § 300aa-11(a)(2)(A).

Respondent also cited legislative history from one of the earlier permutations of the statute, to amplify the statute's verbiage in subsection 11(b)(2) as follows:

> Section – Petitions: Subsection (c) allows a petitioner to withdraw a petition if it is not adjudicated within one year and, thereafter, to file a tort action unrestricted by the tort reforms of Part B of the Act. Under such extreme circumstances, the Committee intends that statutes of limitations be liberally interpreted so as not to leave a good-faith petitioner without remedy. The Committee notes, however, that an individual who withdraws a petition under this provision may not thereafter elect to return to the system. Nor may such an individual receive any payment from the compensation system.

H.R. Rep. No. 100-391, pt. 1, at 699 (October 26, 1987), 1987 WL 61524, as reprinted in 1987 U.S.C.C.A.N. 2313-1.

The parties did not cite a case directly on point with a dispositive, precedental interpretation of the statutory text to aid the Court's decision on this issue, and the Court's own search did not uncover one either. Therefore, the Court notes that, to the best of its knowledge, it treads gingerly on a virgin snowfall. That being said, the doctrine of claim preclusion, and *res judicata* more generally, provides considerable guidance to the Court's analysis of this question, as do previous opinions from the Vaccine Program discussing the statutory scheme of the Vaccine Act.

"Under the doctrine of claim preclusion, a judgment on the merits precludes the same parties from relitigating issues in a subsequent action that were or could have been raised in the prior action." *Faust v. United States*, 101 F.3d 675, 677 (Fed. Cir. 1996), citing *Allen v. McCurry*, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). "Claim preclusion prevents parties from litigating issues that could have been raised in a prior action." *Carson v. Department of Energy*, 398 F.3d 1369, 1375 (Fed. Cir. 2005), citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398,

69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). "This form of *res judicata* applies if (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." *Id*. "Unlike issue preclusion, which only bars matters actually litigated in a prior proceeding, claim preclusion forecloses matters that, although never litigated or even raised, could have been advanced in an earlier suit." *Id*. at note 8.

The general rule relating to claim preclusion has been stated slightly differently by the Federal Circuit in more recent years: "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit...[and] therefore encompasses the law of merger and bar." *Sharp Kabushiki Kaisha v. Thinksharp, Inc.*, 448 F.3d 1368, 1370 (Fed. Cir. 2006), citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). "For claim preclusion based on a judgment in which the claim was not litigated, there must be (1) an identity of parties or their privies, (2) a final judgment on the merits of the prior claim, and (3) the second claim must be based on the same transactional facts as the first and should have been litigated in the prior case." *Id*., citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Nevertheless, the basic principle of the judicial doctrine has remained fairly constant: The Court should bar as *res judicata* claims in a suit that could have been raised in an earlier action, "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact." *Id*. at 1372, quoting *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 485 n.26, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

III. ANALYSIS

Two sources of law inform the Court's analysis of the instant Motion: one primary and the other secondary. The first question of law is whether the text of the Vaccine Act itself allows or disallows subsequent litigation on an administration of a vaccine within the Vaccine Program. The second question is whether, if the text of the statute does not preclude subsequent litigation, whether the doctrine of claim preclusion is applicable in this case.

A. Statutory Analysis of the Vaccine Act

Even though the 240-day notice within the Vaccine Program has not been the subject of litigation on the specific issue at bar, the provisions of the Act pertaining thereto have been addressed in other contexts. *See*, *e.g.*, *Stewart v. Secretary of HHS*, No. 02-0819V, 2003 WL 22300298 (Fed. Cl. Spec. Mstr. Sep. 3, 2003). When the Court issues the 240-day notice, after 240 days passes without the issuance of a decision by the Court, Petitioner has the option to withdraw from the Program by written notice of such election. § 21(b). As has been previously noted, "this provision ensures that if a petitioner is dissatisfied with the amount of time being taken to evaluate his Program petition, such petitioner has an option to leave the system and proceed with a tort suit." *Stewart*, 2003 WL 22300298 at *5.

In the *Stewart* case, the Court responded to warnings that the language of this statutory provision created a statutory absurdity–a "loophole"–in that, "though medical records might be filed, a petitioner still could exit the Program without the special master having evaluated such records." *Id*. at *13. Rather than accepting that this way out of the Program allowed an aberrant result through faulty statutory interpretation, the Court ruled that this schema "is simply a product of Congress' own design of the Program," which gives "a petitioner the option to exit the Program even prior to an actual ruling on the petitioner's claim, after 240 days." *Id*. Though dismissing Respondent's concern at the time, the Court admitted the following to be true:

> Congress designed a system in which a claimant in fact may, if he so chooses, enter and exit the Program without having made a true effort to prove that his injury was vaccine-caused. A claimant may, if he desires, merely treat the Program as a 240-day delay before filing a tort suit, without giving the assigned special master a true opportunity to evaluate the merits of the claim....[T]he Program's design obviously leads to that possibility.

Id.

In footnote 12 of the *Stewart* opinion, the Court described the factual scenario of many cases in the Program, including the first petition filed by Petitioner:

> [V]ery often in Program cases a petitioner acknowledges in a petition that the medical records by themselves will not demonstrate vaccine causation, but promises to supply an expert report. In such case the special master will wait until receiving the expert report before reviewing the medical records filed with the petition. If, as in some such cases, the petitioner subsequently reports that no favorable expert opinion can be obtained, the special master will then, quite properly, dismiss the claim without ever studying the medical records. But I have never heard it argued that such a scenario constitutes a "loophole" in the Program.

Id. at *14, n. 12.

That having been said, the Court has also, on a separate occasion, concluded that "a judgment should be entered *only* after a special master files a decision that complies with § 300aa-12(d)(3)(A)–i.e., a ruling that decides whether compensation is to be provided and the amount of such compensation, and which includes findings of fact and conclusions of law." *Hamilton (Currie) v. Secretary of HHS*, Case No. 02-0838V, 2003 WL 23218074, *5 (Fed. Cl. Spec. Mstr. Nov. 26, 2003) (emphasis added, internal marks omitted). The Court enunciated a rule in *Hamilton (Currie)*, that "when a petitioner withdraws from the Program under § 300aa-21(b) after receiving a formal notice pursuant to § 300aa-12(g)(1), the special master should file some type of order or notice that merely acknowledges the dismissal or withdrawal, and notifies the Clerk of the Court that the proceedings 'on the merits' of the petition are concluded. The order or notice should specify that the document does not constitute a 'decision,' and that the Clerk of the Court should not enter a 'judgment.'" *Id*. The Court described the result of a petition's voluntary dismissal as essentially an ineffectual termination; because, without a written decision or a final judgment, the case is doomed

to float about in a sort of jurisprudential limbo,[5] never escaping the confines of the Vaccine Program. *Id*.; *see also Robinson v. Secretary of HHS*, Case No. 04-0041V, 2004 WL 2677197 (Fed. Cl. Spec. Mstr. Nov. 3, 2004). Considering those two tributaries of the Court's analysis here, the instant Motion serves as a junction, requiring the Court to decide whether Petitioner's notice of withdrawal was sufficient to terminate his first case filed with the Program, without a decision, without a final judgment–without any further action by the Court.

On the one hand, it seems clear that by his withdrawal under § 21(b) of the Vaccine Act, Petitioner exercised his option "to exit the Program even prior to an actual ruling on [his] claim." *Stewart* at *13. Moreover, Petitioner has already begun to exercise his option to abandon the Program to proceed with a tort suit. Petitioner's exercise of these options was an election between mutually exclusive remedies. In choosing as he has, it would appear that he has not stepped temporarily outside of the Program only to return on the same action, as his arguments contend. His "exit" via the mechanism of withdrawal, then, was final for the purposes of the Program, and is conclusive as to all *media concludendi*.

On the other hand, if withdrawal does not result in any final judgment, then there is conceivably an argument to be made that the original claim, alleging injury from Hepatitis B, could be reinstituted under RCFC 60(b),[6] upon the supposition that this Court maintained jurisdiction over the case because it was still an open (even if inactive) case.

The statutory section relating to this analysis that would seem to be conclusive on this issue is § 11(b)(2), set forth *supra*. Short and plain, that section limits petitioners to one petition per administration of a covered vaccine. Petitioner's argument, however, contends that his withdrawal under § 21(b) of the Vaccine Act did not completely terminate his cause of action, because the Court never ruled on the merits and no judgment was entered thereupon (see Petitioner's Memorandum in Support of the Motion to Amend at page 2, paragraph 7), such that his pending action is rightly-understood as the same action (i.e., the same *petition*), reinstituted, albeit with a different case number and docket. Another argument interposed by Petitioner raises the issue of what an "administration of a vaccine" constitutes, and whether the effectively simultaneous administration of both the Hepatitis A and Hepatitis B vaccines are contemplated by the statute as a single "administration".

Although these arguments are not definitively refuted by the plain language of the Vaccine Act, the interpretation of the statutory language in cases such as *Stewart*, *supra*, indicates that a petitioner's withdrawal under § 21(b) operates as a complete terminus to a petition as filed. Nonetheless, Petitioner's argument raises questions worthy of the Court's consideration. Therefore

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[5] Dante, Inferno, Canto IV, Circle 1.

[6] RCFC 60(b) provides a procedural mechanism for granting relief "from a final judgment, order, or proceeding." In contrast, Vaccine Rule 36 provides only for relief from judgment ("Following the entry of judgment by the Court..."). *See* Appendix B to the Rules of the United States Court of Federal Claims; *see also Bernhardt v. Secretary of HHS*, Fed. Cl. 00-0592V slip op. at 10-11 (Wiese, J., October 6, 2005) (available at http://www.uscfc.uscourts.gov/Opinions/Wiese/05/WIESE.Bernhardt.pdf).

the Court proceeds to consider whether the doctrine of claim preclusion operates as a bar to the second phase or institution of litigation of Petitioner's claim(s).

B. Claim Preclusion

Two components of the test stated by the Federal Circuit above are undoubtedly met here: the Court certainly had jurisdiction to hear the former claim, alleging that Petitioner had suffered a vaccine-related injury from the Hepatitis B vaccine which was on the Vaccine Injury Table at that time; and the parties (Petitioner Veryzer and Respondent, the Secretary of Health and Human Services) were effectively identical in both suits. What is left for the Court to consider is whether Petitioner's withdrawal under § 21(b) of the Vaccine Act suffices to satisfy the requirement for a "final decision on the merits," and whether the attempted re-allegation of injury from the Hepatitis B vaccine is "the same cause of action" as the previous petition filed by Petitioner.

1. A Final Decision on the Merits

In the *Sharp* case, *supra*, one party, ThinkSharp filed an application to register the word mark "thinksharp"but was opposed by the other party, Sharp, on the basis of confusion, regarding both word mark and word-and-design grounds. 448 F. 3d at 1369. ThinkSharp responded to only one of the grounds of opposition, resulting in a default judgment on the other, before the Trademark Trial and Appeal Board (TTAB). *Id*. Sharp then attempted to apply the default judgment to prevail against ThinkSharp regarding the non-defaulted claim, as an offensive application of *res judicata*. *Id*. at 1371. The TTAB decided that the default judgment on the one issue did not preclude consideration of the other. *Id*. at 1370. On appeal, the Federal Circuit affirmed, holding that ThinkSharp was not required to litigate both oppositions in order to preserve the right to litigate one. *Id*. at 1372-73.

Stating the general rules of claim preclusion, the Federal Circuit ruled in *Sharp*, that, "A default judgment can operate as *res judicata* in appropriate circumstances." 448 F. 3d at 1371. The Federal Circuit made the linchpin of its application of the claim preclusion doctrine the idea that a particular issue "should have been litigated in the defaulted opposition," noting that claim preclusion is not as "readily extended to claims that were not before the court." *Id*. at 1370-71.

In applying the rule stated in *Sharp*, the Court pauses to note that the offensive use of *res judicata* is not at issue in the motion at bar, and Petitioner's original petition (03-2252) was not comparable to a default judgment, where the court rendering judgment has not so much as glanced at the case file nor the filed materials within. It is clear that, inasmuch as the original petition was based centrally upon the allegation that the Hepatitis B vaccination caused Petitioner's alleged injury, it can certainly be said that the Hepatitis B vaccine causation claim should have been brought in that original action. Also, by Petitioner's own recitation of facts, the Court informally notified him that, based upon its review of the medical records, the case was not persuasive enough to prevail without a medical expert, and that if no medical expert could be found, the case would most likely prove unsuccessful. See Petitioner's Memorandum in Support of the Motion to Amend at page 2, paragraph 5. The previous case was penultimately ready for an active hearing on the central issue

of causation: Respondent had filed his 4(c) Report as well as a motion to dismiss, and all that lay between that point and a ripe moment for a hearing was an expert report in support of the petition. Consistent with the Federal Circuit's analysis in *Sharp*, *supra*, it is clear that the previous action was not passed over without consideration or evaluation by the Court, even if that informal step did not rise to the level of a judicial ruling on the record in that case.

In fact, there was nothing lacking from the Court's treatment of Petitioner's initial petition, alleging injury due to the Hepatitis B vaccination. It was given as complete a consideration "on the merits" as was contemplated by Congress, given its procedural posture. See discussion above of "Statutory Analysis under the Vaccine Act," *supra*. Whether the Court actually reviewed the medical records, affidavits, or other aspects of that petition, as filed, does not subtract from the finality of the conclusion of the case following Petitioner's withdrawal from the Program. The withdrawal noted by Petitioner in that previous case was, in a word, sufficient. It sufficed and met the requirement of an adjudication on the merits.

Therefore, in light of this analysis, as well as the interplay of the Program cases discussed above, the Court rules that Petitioner's withdrawal of his original petition (03-2252V) was the equivalent of a decision on the merits for claim preclusion purposes, and furthermore, that it terminated his original petition. As a result, Petitioner's heeding, to consider the latter-filed petition (the instant Petition, 06-0522V) as merely a reinstitution of the original, is rejected. These were two different, separate petitions. The question remains however, whether these two petitions effectively alleged the identical "cause of action" in each of them.

2. Same cause of action

Courts have often struggled to delineate what exactly is included and excluded from the signified term "cause of action." Many courts, among them the Federal Circuit, have resorted to a transactional hermeneutic through which to view what defines a cause of action for the purpose of analyzing claim preclusion. *See Foster v. Hallco Mfg.*, 947 F.2d 469 (Fed.Cir.1991). Therefore, in cases within the Federal Court's jurisdiction, "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose" are considered as the quantum unit of claim preclusion analysis. *Id*. at 478-79, citing Restatement (Second) of Judgments § 24(1).

Regardless of whether particular arguments were ever raised that might have proven successful, the law of claim preclusion firmly holds that, once it becomes manifest to the Court that the same transaction or occurrence is implicated in a subsequent action, which also formed the subject matter of a former case between the same two parties, the Court must dismiss the subsequent claim in that regard.

In the case of *Faust*, *supra*, the Federal Circuit ruled on a case appealed from the United States Court of Federal Claims, arising from a putative settlement agreement, which itself related to a separate, (original) suit from the Ninth Circuit Court Appeals and the United States Federal District Court for the Northern District of California. Originally a tax enforcement suit brought in

federal district court, the citizen, Mr. Faust, tried to make a deal with (speaking tongue-in-cheek, of course) the proverbial Mephistopheles, i.e., the federal government; specifically, he tried to enter into a settlement agreement with the IRS to resolve his tax liability. 101 F.3d at 676. Unfortunately for him, the District Court had already ruled against him and in favor of the counterclaim of the Department of Justice, and he had appealed. But Faust then dismissed his appeal to the Ninth Circuit, believing the matter resolved. Again, unfortunately for Faust, the Department of Justice had exclusive authority to settle the matter, and thus "because the IRS lacked authority to settle the case upon referral to the DOJ under 26 U.S.C. § 7122(a), there was no accord and satisfaction of the judgment." *Id*. at 677. Faust then sought salvation from the United States Court of Federal Claims, seeking a validating declaration regarding his settlement agreement, but met again with misfortune as the Court dismissed his claim by summary judgment. *Id*.

On appeal to the Federal Circuit, Faust argued that, "because the validity of the settlement agreement was never litigated before any trial court," claim preclusion did not obtain. 101 F.3d at 678. The Federal Circuit disagreed, holding that "[w]hether or not genuine issues of fact remain in dispute, Faust is precluded from relitigating the same claim, or cause of action," because the putatively new claim was "not a distinct and independent claim," but actually was essentially identical to the one decided in the previous case. *Id*. at 678-679. The question, still unanswered, remains in the instant case: Which claims (causes of action) were before this Court in the first case (03-2252V), and which were not? The Court must decide what constitutes a claim, for purposes of claim preclusion within the Vaccine Program.

The statutory sections set forth above show two separate transactional foci of the Vaccine Act. For purposes of satisfying Section 11(a)(2), and in other matters regarding the filing of civil suits outside of the Vaccine Program, the statutory text counts claims in terms of specific injury. In contrast, petitions for compensation for vaccine-injury within the Vaccine Program are not injury-specific, nor are they even vaccine-specific; they are *vaccine administration*-specific. Theoretically, all other things being equal, a petitioner could file separate petitions for separate administrations of the same vaccine, so long as each administration caused a distinguishable compensable injury. Accepting that, it follows that each singular administration of a single vaccine dose is what is meant by "administration" by the Vaccine Act. This excludes Petitioner's argument that the injection of multiple vaccine doses in a single doctor's visit count together as an administration. As shall be shown, Petitioner's proposed reading of the word "administration" is excluded by a thorough review of the statutory language itself.

§ 11(a)(6) bars claims *in the Program* where there has been filed a previous suit in other courts based upon the administration of a vaccine. Similarly, § 11(a)(10) provides for the filing of "petitions for compensation for a vaccine-related injury or death associated with the administration of a vaccine," with the Clerk of the United States Court of Federal Claims. And § 11(b)(1)(A) grants petitioners the right to file on the basis of an injury resulting from the administration of a vaccine. Even the content required of successful petitions maintains as its central focus the administration of the vaccine. § 11(c). Therefore, it is consistent with this scheme that § 11(b)(2) restricts petitioners to only "one petition ... with respect to each administration of a vaccine."

In all statutory references to claims litigated in the Vaccine Program, the refrain is indeed "the administration of *a* vaccine." The meaning is clear enough, and calls to mind one single dose of *a vaccine*, not different vaccines serially administered at the same medical visit, and not even multiple doses of the identical vaccine at different moments in time.

What this means is that once a petition has been filed and litigated to conclusion regarding one administration of a vaccine, that particular administration of a vaccine constitutes a claim, and is therefore precluded from inclusion as a cause of action in future litigation. The amendment sought by the instant Motion requests the Court to violate this rule. For that reason, the requirement for application of claim preclusion that both cases centrally involve the same transaction seems to have been met in this case.[7]

C. Discretionary Analysis

In his brief, Petitioner cites the Rules of the United States Court of Federal Claims, at Rule 15(a) which states that leave to amend pleadings "shall be freely given when justice so requires." The application of justice's requirements do not lend themselves easily to delineation; however, the Court is typically very amenable to granting motions to amend pleadings throughout the pendency of a petition. *See Stewart*, *supra*, at *4 (ruling, against Respondent's motion to dismiss, that "the presiding special master in each Program case has discretion...to allow petitioner to file at a later time any documents that were not filed with the petition...[and]...to defer the filing of such materials to a later time"). However, that latitude to allow subsequent filings is inversely proportional to the countervailing legal interest opposing amendment.

Here, the applicable law is clear, and militates for the application of the claim preclusion doctrine. In this case, what justice so requires is for the Court to apply the law as it stands. If Petitioner were moving to simply include new allegations of fact or new documentary evidence, the Court would certainly oblige. However, to allow the amendment of pleadings requested by Petitioner, to include a previously-filed claim, precluded from the Court's consideration by the law, the Court would be working illogic. For the Court's very next action would necessarily be to dismiss the claim brought on account of the administration of Hepatitis B to Petitioner on 25 April 2001. This result is patently absurd. For this reason, and for those *media concludendi* stated above, the Court **DENIES** Petitioner's motion to amend the pleadings.

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[7] Interestingly enough, the Vaccine Act does not localize its transactional analysis on vaccine administrations with regard to the filing of civil actions outside of the Vaccine Program, subsequent to rejecting judgment within the Vaccine Program. § 11(a)(2)(a) restricts petitioners from filing civil actions for "vaccine-related injury or death associated with the administration of a vaccine", until such time that those petitioners have sued upon said *injury* within the Vaccine Program. One result of this reading is that Petitioner may not necessarily have needed to dismiss his state court action to file a second petition for the same injury. Without speaking for the other court, the statute seems to allow that petitioner could have maintained a suit in another court outside of the Program, once the first Petition within the Vaccine Program had concluded, based upon the injuries which Petitioner has alleged he has suffered. There is no indication in the statute that petitioners must sue upon every administered vaccine–let alone every administration of a vaccine–before availing themselves of a litigative remedy outside the four walls of the Vaccine Program.

IV. CONCLUSION

As Petitioner's motion has been herein **denied**, Petitioner once again bears the burden of obtaining a medical expert witness to opine in a written report in support of causation for this Petition. The Court encourages the parties to discuss the unsettled issues in this case, so as to be prepared to present same to the Court at the next status conference in this case.[8]

Wherefore, the parties are **ordered** to contact the Court to schedule a status conference, so that any further preliminary matters may be addressed, and a hearing on causation may be scheduled. The Court may be reached by contacting my law clerk, Isaiah Kalinowski, Esq., at (202) 357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master

[8] If Petitioner is unable to tender an expert report supporting causation by the Hepatitis A vaccine, he may wish to move for a ruling on the record as it stands, which would lead the Court to file a written decision on the merits, with a judgment entered thereupon. He would then have the option of rejecting that judgment, which would allow him to file an action outside of the Vaccine Program. *See Hamilton (Currie)* and *Robinson*, *supra*.