

OFFICE OF SPECIAL MASTERS
(No. 90-1572V)
(Filed January 31, 1997)

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LUELLA EDINGBURG, as Mother and
Natural Guardian of TIEASHA
EDINGBURG, a Minor,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Respondent.

* * * * *

Michael J. Radtke, Esq., Chicago, Illinois, for petitioner.

Elizabeth Kroop, U.S. Department of Justice, Washington, D.C., for respondent.

ORDER OF DISMISSAL

WRIGHT, Special Master

This matter is now before me upon respondent's motion to dismiss filed June 18, 1996. Respondent argues, *inter alia*, that petitioner is barred from compensation because she violated Section 11(a)(6) of the Vaccine Act by bringing a civil action after November 15, 1988, for a vaccine-related injury associated with a vaccine administered before November 15, 1988. Respondent's Motion to Dismiss at 3.

Facts

Tieasha was born on September 3, 1979. On October 31, 1979, Tieasha received a DPT and an oral polio vaccine. Petitioner alleges that Tieasha suffered severe and permanent injuries as a result of the immunizations she received. Petitioner's Response to Respondent's Motion to Dismiss, filed July 29, 1996 (hereafter, "Petitioner's Response") at 1. On June 26, 1981, petitioner filed a civil action against the City of Chicago on behalf of Tieasha in the Circuit Court of Cook County for injuries allegedly related to her October 31, 1979, DPT and oral polio vaccinations.⁽¹⁾ Petitioner's Response at Ex. A. On June 15, 1989, petitioner amended her civil complaint to add two new defendants, Lederle Laboratories and Connaught Laboratories.⁽²⁾ Petitioner's Response at Ex. B. Petitioner voluntarily dismissed her civil lawsuit on July 12, 1990. *Id.* Petitioner's Response at Ex. C. On September 26, 1990, petitioner filed a petition for compensation under the National Childhood Vaccine Injury Compensation Act (hereinafter

"Vaccine Act" or "the Act").⁽³⁾

Discussion

In her motion to dismiss, respondent asserts petitioner violated Section 11(a)(6) of the Act by bringing a civil action after November 15, 1988, for an injury stemming from a vaccine administered prior to November 15, 1988. Section 11(a)(6) states:

If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section for such injury or death.

Section 11(a)(6) (footnote omitted). Since the alleged vaccine-related injury at issue in this matter allegedly occurred twenty-four hours after a vaccine administered on October 31, 1979,⁽⁴⁾ before November 15, 1988, Section 11(a)(6) would seem to apply to this petition.

Petitioner asserts that she has complied with Section 11(a)(5)(A), since she appropriately dismissed her civil action prior to filing the instant petition.⁽⁵⁾ Petitioner's Response at 5-6. However, the provisions of Section 11 are distinct statutory provisions; petitioner's compliance with one provision does not, as petitioner asserts, relieve her from her obligation to comply with the remaining provisions. See, e.g., Weddel v. Secretary of HHS, 23 F.3d 388 (Fed. Cir. 1994) (petition barred where petitioner complied with Section 11(a)(5)(A) but violated Section 11(a)(5)(B)); Salceda v. Secretary of HHS, 30 Fed. Cl. 316 (1994), on remand, No. 90-1304V, 1994 WL 139375 (Fed. Cl. Spec. Mstr. Apr. 6, 1994), aff'd, 70 F.3d 608 (Fed. Cir. 1995).

Since the Vaccine Act represents a waiver of sovereign immunity, the Act's provisions must be construed strictly. Mass v. Secretary of HHS, 31 Fed. Cl. 523, 528 (1994). The language of Section 11(a)(6) is clear and unambiguous. See Greider v. Secretary of HHS, 23 Cl. Ct. 348, 349 (1991) (finding language of section 11(a)(6) "to be crystal clear"). If a petitioner brings a civil action after November 15, 1988, for an injury due to the administration of a listed vaccine prior to that date, then that petitioner is barred from filing a petition for compensation under the Vaccine Act. Section 11(a)(6) essentially provides an election of remedies for petitioner; she may either file a civil action **or** file a petition for compensation under the Vaccine Act. Id.

This case turns, then, on whether, by adding the two vaccine manufacturers as defendants in an amended complaint filed on June 15, 1989, petitioner ran afoul of Section 11(a)(6). Petitioner argues that she only amended her complaint after November 15, 1988, she did not commence the action at that time. Further, she asserts that the "relation back doctrine" in Illinois permits the action against the vaccine manufacturers to be deemed "commenced" on the date of filing the initial complaint.

1. Bringing an Action

An action is typically "commenced" when a complaint is filed, and therefore, a person "brings" or

"commences" a civil action for purposes of Section 11(a)(6) when that person files a complaint. See Lamb v. Secretary, DHHS, 24 Cl.Ct. 255 (1991) (holding that "filing" is the equivalent of "bringing" or "commencing" an action). However, respondent argues, the fact that petitioner commenced her civil action against the drug manufacturer through the mechanism of an amended complaint is irrelevant; the action was not "brought" against the vaccine manufacturers until the date of the filing of the amended complaint. Respondent's Motion to Dismiss, at 3. Respondent further argues that whether the amended complaint may "relate back" to the date of filing of the initial complaint for purposes of the state statute of limitations, "state law obviously does not address the effect of bringing a new action under section 11 (a)(6) of the Vaccine Act." Respondent's Reply to Petitioner's Response to Respondent's Motion to Dismiss, filed August 23, 1996 (hereafter, "Respondent's Reply").

Respondent cites Piper v. Epstein, 326 Ill. App. 400, 62 N.E. 2d 139 (1st Dist. 1945), as supporting the notion that petitioner's amended complaint had the effect of "bringing an action" against the vaccine manufacturers. Id. In Piper, a hospital and two surgeons were sued for wrongful death. Two days prior to the expiration of the applicable statute of limitations, plaintiff served a summons on two nurses -- Nurses Dye and Cox -- and, two days after the statute of limitations had run, plaintiff filed an amended complaint against the two nurses. The Court held that service alone was sufficient to "commence an action" against the two nurses. The Court in Piper stated that an action is commenced "when a party puts in motion, under his claim, the instruments of the court. Where the court is one of general jurisdiction, it acquires jurisdiction of the plaintiff and the plaintiff's cause when he applies for its power and assistance to compel the defendant to render him his rights under the law." Id. at 412-13. Applied to the case at bar, then, the action was not "brought" or "commenced" against the two vaccine manufacturers under Illinois law until the court acquired jurisdiction over them. Since the action was "brought" after November 15, 1988, Section 11(a)(6) would bar the bringing of a petition under the Vaccine Act.

2. Relation Back

Petitioner argues, however, that under the Illinois "relation back doctrine," her action against the vaccine manufacturers was "commenced" on the date of her original complaint. Petitioner contends the following:

Under Illinois Law when petitioner filed her amended complaint adding defendants, the amended complaint, based on the same transaction or occurrence declared in the original complaint, related back to the commencement of the action against the original defendants.

Petitioner's Response at 5. In Piper, supra, the Court held that the action commenced against Nurses Dye and Cox related back to the date of the initial complaint for purposes of the state statute of limitations. However, the **only** purpose for the relation back doctrine is to save a cause of action from the tolling of the statute of limitations. See, Household Commercial Finance Services v. Trump, 863 F. Supp. 735, 742 (N.D. Ill. 1994). It has no effect on whether a civil action is commenced for purposes of Section 11 (a)(6).⁽⁶⁾

In the instant case, the statute of limitations was not in issue in petitioner's civil action. The applicable statute of limitations for plaintiff's cause of action against the two manufacturers is found in Chapter 735 of the Illinois Code of Civil Procedure. Section 13-213 ⁽⁷⁾ states in pertinent part:

In any such case, if the person entitled to bring the action was, at the time the personal injury, death or property damage occurred, under the age of 18 years, or under a legal disability, then the period of limitations does not begin to run until the person attains the age of 18 years, or the disability is removed.

735 IL. Comp. Stat. Ann. 5/13-213 (West 1996). Since Tieasha, the person who allegedly suffered the vaccine-related injury, is only 17 years old, the statute of limitations for any claims she has against the manufacturers would not run until she turns 18, on September 3, 1997. Since the statute of limitations could not be a defense to petitioner's amended complaint, the "relation back doctrine" is inapplicable.⁽⁸⁾

Conclusion

After considering the entire record, and for the reasons set forth herein, I find this claim is barred by Section 11(a)(6) due to the fact that petitioner commenced a civil action against the vaccine manufacturers on behalf of Tieasha Edingburg after November 15, 1988, for an injury associated with a vaccine administered before that date.⁽⁹⁾ In light of the above, this claim is hereby DISMISSED. In the absence of a motion for review filed pursuant to RCFC Appendix J, the Clerk of the Court is hereby directed to enter judgment in accordance with this order.⁽¹⁰⁾

IT IS SO ORDERED.

Elizabeth E. Wright

Special Master

1. In her civil complaint, petitioner alleged that the City of Chicago's board of health facility was negligent in failing to administer the proper vaccine, administering a contaminated vaccine, and administering the vaccine with a contaminated needle. Aff. at Ex. A. p. 2.
2. In her amended complaint, petitioner alleged that Lederle Laboratories and Connaught Laboratories failed to properly test and provide adequate warnings for their vaccines. Aff. at Ex. B.
3. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Sts. 3755 (codified as amended at 42 U.S.C.A. §§ 300aa-1 through -34 (West 1991 & Supp. 1996)). References shall be to the relevant subsection of 42 U.S.C.A. § 300aa.
4. Affidavit of Petitioner, filed September 26, 1990, at 9.
5. Section 11(a)(5)(A) states:

A plaintiff who on the effective date of this subpart has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after the effective date of the subpart or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

6. Under Illinois law, the "relation back doctrine" applies only to actions where parties have been added or a complaint is amended after the statute of limitations has run. See, McCullough v. Tomaich, 20 Ill. App.3d 262, 314 N.E.2d 643 (3rd. Dist. 1974) (holding amended complaint related back to date of original complaint for purposes of statute of limitations considerations). According to Illinois Code of Civil procedure §5/2-616(b): "[I]f the condition precedent has in fact been performed, **and for the purpose of preserving the cause of action . . . set up in the amended pleading, and for that purpose only**, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." 735 Ill. Comp. Stat. Ann. 5/2-616 (West 1996) (emphasis added).

7. Although this section of the statute was recently amended, the amendments did not affect the limitation time periods. See, 5/13-213, Historical and Statutory Notes.

8. Even assuming, *arguendo*, that the "relation back" doctrine does apply, petitioner's argument still fails. According to Illinois law, an amended complaint adding a new defendant will relate back to the filing date of the original complaint for purposes of complying with the applicable statute of limitations only if certain conditions are met: (1) the original action was timely filed; (2) the failure to join the defendant was inadvertent; (3) summons was in fact served upon the defendant; (4) the defendant was originally aware of the action; and, (5) the new claim in the amended complaint is part of the same transaction or occurrence as the original claim. Household Commercial Finance Services v. Trump, 863 F. Supp. 735, 742 (N.D. Ill. 1994).

Assuming that petitioner satisfies the first requirement of the relation back doctrine, that the original action was timely filed, there is no evidence that petitioner's failure to join the vaccine manufacturers was "inadvertent." "Inadvertence is excusable ignorance, not excusable failure to act after the facts are discovered. The failure to name an individual as a defendant in a timely fashion is not inadvertent where a plaintiff is aware of the identity or existence of a defendant before the limitations period expires." Nickels v. Reid, 277 Ill App. 3d 849, 861 (1st Dist. 1996) (citations omitted). "[W]here a plaintiff is aware of the existence of multiple potential defendants prior to the running of the statute of limitations, he may not rely on section 2--616 to add an additional defendant, even if the original defendant is ultimately found not to be liable for some reason." Mauro v. County of Winnebago, 282 Ill. App. 3d 156, 160 (2d Dist. 1996). Petitioner filed her civil action on June 26, 1981, and amended her complaint on June 15, 1989, eight years later. Clearly, petitioner's failure to name the vaccine manufacturers was not inadvertent, since it would not have taken eight years to discover who the manufacturers were. Therefore, petitioner would be unable to meet the second requirement of the relation back doctrine.

9. Since the issue of Section 11(a)(6) resolves this matter, it is unnecessary to address whether petitioner met the \$1,000 jurisdictional requirement of Section 11(c)(1)(D).

10. The parties may expedite entry of judgment by filing notices renouncing their right to seek review of this dismissal.