In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-946V

(Filed: April 9, 2010)

TO BE PUBLISHED

SHON S. BURCH, for herself and on behalf of her daughter, Sabian E. Burch, and JONATHAN BURCH, on his own behalf and on behalf of his daughter, Sabian E. Burch,	*	Sovereign Immunity Doctrine; Can an unborn child "receive" a vaccine administered to her mother?
Petitioners,	*	
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Clifford Shoemaker, Vienna, Virginia, appeared for petitioners.

Melonie McCall, Department of Justice, Washington, D.C., appeared for respondent.

RULING ON LEGAL ISSUE

HASTINGS, ***Special Master***

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereafter "the Program")[1]. The petitioners have sought my ruling concerning a legal issue pertinent to petitioners' primary theory of entitlement to a Program award. They ask that I reconsider my analysis, concerning that legal issue, that I gave in my Ruling issued on February 8, 2001. For the reasons set forth below, based upon certain opinions of the United States Supreme Court issued since 2001, I hereby reach a different conclusion than that stated in my 2001 Ruling.

---

[1]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006 ed.). Hereinafter, all "§" references will be to 42 U.S.C. (2006 ed.).

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

The following facts appear to be undisputed. Shon S. Burch and Jonathan Burch are the mother and father, respectively, of Sabian E. Burch, who was born on November 21, 1996. While Shon Burch was pregnant with Sabian, she received an "MMR" (measles, mumps, rubella) vaccination on March 25, 1996. After Sabian was born, the infant was determined to be suffering from a serious neurologic abnormality known as Aicardi's Syndrome. Sabian has suffered from a seizure disorder, brain malformation, and significant developmental delay.

B. Procedural history

The instant petition, filed on November 19, 1999, alleged that Sabian's severe neurologic abnormality was a result of the MMR vaccination that her mother received on March 25, 1996, while pregnant with Sabian. On April 18, 2000, respondent filed "Respondent's Report," taking the position that, as a matter of fact, the evidence does not support a conclusion that Sabian's neurologic abnormality was caused by the MMR vaccination in question. The parties thereafter agreed that as to this claim of petitioners, a crucial legal issue is whether Sabian, while *in utero*, "received" the MMR vaccine from the MMR vaccination administered to her mother, as the term "received" is used at § 300aa-11(c)(1)(A). They agreed to brief the issue. Respondent's "Motion to Dismiss" was filed on July 13, 2000. Petitioners' response was filed on September 6, 2000.

In my Ruling issued on February 8, 2001, I concluded that the petitioners' stated legal theory was untenable, based on a number of Supreme Court rulings, issued during the 1990s, concerning the "sovereign immunity doctrine." However, the petitioners at that time, representing that certain proposed legislation was being considered by Congress that might change the applicable law, requested that I hold the case in abeyance, rather than dismiss it. I did as petitioners requested. No such legislation was ever enacted. However, after waiting in vain for years for the passage of such legislation, the petitioners filed a request that I *reconsider* my 2001 Ruling in light of certain recent Supreme Court opinions. Both parties filed new briefs, and I have considered the new precedent, resulting in this Ruling.[2]

---

[2]I note that there has been considerable delay between the filing of the petitioners' 2009 reply brief, concerning the issue discussed in this Ruling, and the issuance of this Ruling. Under ordinary conditions, I would have been able to issue this Ruling much more promptly after the conclusion of briefing. However, during the time period in question, I was engaged in the task of preparing the decision in the autism "test case" which was eventually filed as *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. March 12, 2010). Because of the extreme importance of that case and the large number of families who would be potentially affected by that *King* ruling,
(continued...)

II

THE LEGAL ISSUE PRESENTED, AND RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION

The legal question at issue in this case is whether, *assuming* that petitioners could prove as a factual matter that their daughter Sabian's neurologic abnormality resulted from the MMR vaccine that was administered to her mother on March 25, 1996, they would be eligible for a Program award on her behalf. In my 2001 Ruling, I concluded, as a matter of law, that they would *not*. Based on subsequent opinions of the United States Supreme Court, however, I now conclude that they *would* qualify for a Program award if they could make such a factual showing.

A. The relevant statutory provision

Under the Program, compensation is available, under certain circumstances, to a person who has suffered an injury after having "received" a vaccine of the type set forth in the statute. The relevant statutory provision reads, in pertinent part, as follows:

> A petition for compensation under the Program for a vaccine-related injury or death shall contain–
>
> (1) * * * an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died–
>
> (A) received a vaccine set forth in the Vaccine Injury Table * * *.

§ 300aa-11(c)(1)(A). Thus, the person whose injury is the subject of the Program petition must have "received" a vaccine set forth in the Vaccine Injury Table.

B. Statutory construction principles

Before I state my analysis of the particular statutory provision here in question, I note that respondent has argued that in reaching an interpretation of that statutory provision, I am bound by the "sovereign immunity" principles of statutory construction, which would mean that I should "strictly" and "narrowly" construe the statute. On the other hand, there also exists another principle of statutory construction that states that a "remedial" statute is generally to be construed in a "liberal"

---

[2](...continued)
I found it appropriate to postpone my analysis of the issue discussed in this Ruling until I completed the *King* decision. I believe that was an appropriate utilization of my time, given the circumstances. However, I recognize that it was unfortunate that the Burch family had to wait several additional months for this Ruling, and I regret that I was not able to complete this Ruling sooner.

fashion so as to give broad effect to the "remedial" purpose behind the statute. Accordingly, in the following subsections of this Ruling, I will examine each of these principles of statutory construction.

1. The doctrine of "sovereign immunity"

a. The basic statutory construction principles of "strict and narrow" construction

The starting point of the doctrine of "sovereign immunity," a judge-made doctrine which dates from the early days of our country, is that the federal government, as this nation's "sovereign," may not be sued without its consent. *See*, *e.g., United States v. Horn*, 29 F. 3d 754, 761 (1st Cir. 1994); *M.A. Mortenson Co. v. United States*, 996 F. 2d 1177, 1180 (Fed. Cir. 1993). From that initial principle, the federal courts have derived certain principles of *statutory construction* that have been applied in interpreting legislation that is alleged to have *waived* that immunity with respect to a particular type of suit against the United States. One principle is that a statutory waiver of sovereign immunity must be "unequivocally expressed." See, *e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Horn, supra,* 29 F. 3d at 762. The second is that the statutory language setting forth such a waiver is to be "construed strictly" or "construed narrowly" in favor of the government. *Nordic Village, supra*, 503 U.S. at 34; *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991); *Horn, supra*, 29 F. 3d at 762.

In this case, of course, as the respondent does not dispute, the overall statute establishing the Program, to which I will sometimes refer as the "Vaccine Act" (see 42 U.S.C. § 300aa-1 through 34), unquestionably *does* waive the government's immunity from suit, in order to permit monetary awards to persons whose circumstances fall within that Act's requirements. The sovereign immunity principles of statutory construction set forth above, however, are still of great significance here, because in this case I am required to determine the meaning of *one particular provision* of the Vaccine Act. Respondent argues that because this particular provision is *part* of the Vaccine Act, which *as a whole* constitutes a waiver of sovereign immunity, in reaching an interpretation I must "narrowly and strictly" construe the statutory language. (Resp. Mot. filed 7-13-00, p. 3.)

b. Less restrictive enforcement of the statutory construction principles in the mid-20th century

After reviewing a great number of the cases that have discussed these principles of statutory construction, to which I will sometimes refer collectively as the "sovereign immunity doctrine," I note that over the years the federal courts, especially the Supreme Court, appear to have waxed and waned in their level of enforcement of the doctrine. In fact, there have been opinions, especially in the middle of the last century, in which the courts indicated that the doctrine was falling into "disfavor." *See*, *e.g.*, *National City Bank of New York v. Republic of China*, 348 U.S. 356, 359-60 (1955); *Keifer and Keifer v. Reconstruction Finance Corp*, 306 U.S. 381, 390-91 (1939); 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3637 at 317-18 (3d ed. 1998), and cases cited therein. Several Supreme Court opinions, indeed, suggested that waivers of sovereign immunity in some circumstances could be construed "liberally" rather than

"strictly." *See*, *e.g., United States v. Shaw*, 309 U.S. 495, 501 (1940); *United States v. Yellow Cab Co.*, 340 U.S. 543, 555 (1951); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940). In other cases, that same Court stated that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *Block v. Neal*, 460 U.S. 289, 298 (1983); *Yellow Cab, supra,* 340 U.S. at 554. That Court has also indicated that in construing a statute that waives sovereign immunity, a court must be careful not to "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 118 (1979); *Bowen v. City of New York*, 476 U.S. 476, 479 (1986). It has added that, in such statutory construction situations, a federal court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).[3]

c. More restrictive enforcement during the 1990s

In a series of opinions handed down during the 1990s, however, the Supreme Court vigorously *reaffirmed and reemphasized* the principles of requiring "unequivocal" expression of an immunity waiver and of "strictly construing" such waivers. *Nordic Village, supra*, 503 U.S. at 33; *Ardestani, supra*, 502 U.S. at 137; *United States v. Idaho*, 508 U.S. 1, 6-9 (1993); *Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 615, 619, 626 n.16, 627 (1992); *United States v. Williams*, 514 U.S. 527, 531 (1995); *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); see also, Wright, Miller & Cooper, *supra*, § 3654, pp. 318-19, 327, 333-38; John Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 780. As to the statements regarding "liberal" construction and the like set forth in the cases cited in the previous paragraph, the 1990s Supreme Court opinions indicated that those statements were confined to two particular types of cases, and should *not* be applied beyond those cases. That is, the Court explained that in the context of the "sweeping language" of the Federal Tort Claims Act allowing suits against the United States, as well as those statutes which allow certain federally-created agencies to "sue or be sued" as if they were non-governmental entities, the Court had elected to narrowly construe *exceptions* to those broad waivers of sovereign immunity, and, thus, in effect, to broadly construe the waivers themselves. *Nordic Village, supra*, 503 U.S. at 34. But the Court emphasized that those specific exceptions did *not* mean that waivers of sovereign immunity in *other* types of statutes were to be "liberally construed;" instead, the "traditional principle" that statutes "must be construed strictly in favor of the sovereign" would remain the general rule. *Id.*

---

[3]The lower courts have also at times suggested something other than "strict construction" of statutes waiving sovereign immunity. *See, e.g., May Dept. Stores Co. v. Smith*, 572 F. 2d 1275, 1276-77 (8th Cir. 1978) ("courts have been liberal in finding that [sovereign] immunity has been waived"); *Bank of Hemet v. United States*, 643 F. 2d 661, 665 (9th Cir. 1981) ("[t]he time is long past when the bar of sovereign immunity should be preserved through strained and hypertechnical interpretations of relevant acts of Congress"); *In re Town & Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991) ("[i]t is well established that when the federal government waives its immunity, the scope of the waiver is construed to achieve its remedial purpose").

Moreover, the 1990s Supreme Court decisions cited above did more than to merely reaffirm the sovereign immunity doctrine in the face of prior indications that the doctrine might have been falling into "disfavor;" those decisions seemed to actually make it more rigorous than ever before. As one commentator put it, those 1990s decisions gave the sovereign immunity doctrine "some extra teeth." Nagle, *supra*, 1995 Wis. L. Rev. at 796. For example, those decisions specified that the existence and extent of the waiver must be unequivocally indicated in the language of the *statutory text itself*, meaning that the courts must not utilize legislative history to infer the existence or extent of a waiver that is not apparent in the statutory text. *Nordic Village*, 503 U.S. at 37; *Lane v. Pena*, 518 U.S. at 192; *United States v. Idaho*, 508 U.S. at 6. In one case where the text itself did not contain an unequivocal waiver, the Court declined to find a waiver even though such an interpretation admittedly would have fostered the general purpose behind the statute. *Ardestani*, 502 U.S. at 138. The commentators, as well as at least one Supreme Court justice, referred to those 1990s pronouncements as creating a "clear statement rule" with regard to sovereign immunity waivers. *United States v. Williams*, 514 U.S. 527, 541 (1995) (J. Scalia, concurring); Wright, Miller, and Cooper, *supra*, § 3654, p. 333; Nagle, *supra*, 1995 Wis. L. Rev. at 774. Some commentators even dubbed it a "super strong clear statement rule."[4] See W. Eskridge and P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

Further, the 1990s rulings indicated that any "ambiguities" in the statutory language *must* be interpreted in favor of immunity. *Lane v. Pena*, 518 U.S. at 192; *United States v. Williams*, 514 U.S. at 531. They also specified that if more than one "plausible" reading of the statutory provision exists (*Nordic Village*, 503 U.S. at 36-37), or there are two possible interpretations of "equal likelihood" (*Department of Energy v. Ohio*, 503 U.S. at 626 fn. 16), then a court must choose the interpretation that produces the more limited award.[5]

d. Less restrictive interpretation in recent years

In recent years, however, the Supreme Court decisions concerning the sovereign immunity doctrine seem to have taken a large step back from the rigorous enforcement of the doctrine specified in the 1990s opinions described above. There are two separate aspects to this change.

First, several opinions concern the issue of *which portion* of a federal statute are subject to the "narrow construction" rule. Those opinions indicate that when dealing with a statute that waives

---

[4]Indeed, a dissenting opinion in one Supreme Court case complained that those 1990's decisions adopted a "radically new and unforgiving approach to waivers of sovereign immunity." *Lane v. Pena*, 518 U.S. at 210 (J. Stevens, dissenting).

[5]See also *Marathon Oil Co. v. United States*, 374 F. 3d 1123, 1127 (Fed. Cir. 2004) ("[i]f a statute is susceptible to a plausible reading under which sovereign immunity is not waived, the statute fails to establish an unambiguous waiver and sovereign immunity therefore remains intact"); *Levernier Construction v. United States*, 947 F. 2d 497, 503 (Fed. Cir. 1991) (the statutory provision is to be given the "most restrictive" interpretation).

the federal government's immunity from suit, it is *not* appropriate to apply the sovereign immunity principle of "narrow construction" to interpretations of *all* parts of such a statute, but only to interpretations of *certain portions* of the statute. See *Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1943 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003); *Scarborough v. Principi*, 541 U.S. 401, 420 (2004) (suggesting that the narrow construction rule need not be applied to "each and every requirement" of the statute). Those opinions seem to indicate a change by the Supreme Court from its strong statements in the 1990s rulings that even where a statute clearly does provide a waiver of sovereign immunity, that waiver nevertheless must be narrowly construed, in favor of the government, "in terms of its scope." *Lane v. Pena*, 518 U.S. at 192; *Blue Fox*, 525 U.S. at 261; *see also, United States v. Williams*, 514 U.S. at 541 ("clear statement" rule with regard to waivers of sovereign immunity "applies even to determination of the scope of explicit waivers") (Scalia, J., concurring).

Second, the Supreme Court's ruling in *Richlin Security Service Co v. Chertoff*, 128 S.Ct. 2007 (2008), seemed to indicate a *general relaxation* by that court of the rigorous enforcement of the "narrow construction" principle mandated in 1990s opinions described above. In *Richlin*, the court interpreted a provision of the Equal Access to Justice Act (EAJA), which permits a federal courts to award attorneys fees to parties who have successfully sued the U.S. government. The government argued that pursuant to the sovereign immunity statutory construction principle of "strict construction," the court should choose the interpretation that would produce lower awards. (128 S.Ct. at 2019.) The court disagreed. The court stated that the "sovereign immunity canon [of "strict construction"] is, just that--a canon. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." (*Id*.) Thus, even though the court acknowledged that there might be "some ambiguity" in the provision being interpreted (*id*. at 2014), the court did *not* find itself to be required to choose the interpretation that would produce lower awards (*id*. at 2019). To the contrary, the court gave the provision the "broad construction" urged by the petitioner. (*Id*. at 2014.)

This discussion in *Richlin*, in my view, indicates a *substantial change* in the Supreme Court's usage of the sovereign immunity doctrine from the 1990s cases noted above.[6] In the 1990s cases, the court stressed that any ambiguities must be resolved in the government's favor, but in *Richlin* the court seemed to acknowledge "some ambiguity" (128 S.Ct. at 2014) in the statutory language, yet did *not* resolve that ambiguity in the government's favor. In the 1990s cases the court indicated that if there were more than one "plausible" interpretation of the statute, the more narrow interpretation must be chosen. But in *Richlin*, the court adopted the petitioner's interpretation despite observing that the petitioner's interpretation was "more plausible" (*id*. at 2013), a phrase

[6]Other court decisions have also noted that *Richlin* marked a substantial change in the Supreme Court's usage of the sovereign immunity doctrine. See, e.g., *Griffin v. United States*, 85 Fed. Cl. 179, 187-88 (2008) (observing that in *Richlin* the Supreme Court "emphasized the limitations of [the strict construction] canon"); *Lublin Corporation v. United States*, 84 Fed. Cl. 678, 679 (2008) (stating that in *Richlin* "the Supreme Court took a slightly narrower view" of the strength of the strict construction canon).

implying at least *some* amount of "plausibility" in the government's interpretation. While the 1990s cases strongly implied that the sovereign immunity doctrine of "strict and narrow construction" overrode all other canons of statutory construction, in *Richlin* the court explicitly stated that the narrow construction principle did *not* "displace" other traditional tools of statutory construction. (*Id*. at 2019.) And, very significantly, the court in *Richlin* even adopted an interpretation of the statute that the court itself characterized as a "broad construction." (*Id*. at 2014.)

2. The principle of "liberal" construction of "remedial" legislation

Another principle of statutory construction must also be considered. That is, a number of federal courts have stated that "remedial" or "welfare" legislation should be given a "broad construction" or a "liberal interpretation" in order to further the "remedial," "beneficent," or "humanitarian" purposes behind the statute. *See*, *e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987); *Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532, 543 (1994); *Monell v. Dept. of Social Serv. of City of New York*, 436 U.S. 658, 684 (1978); *Urie v. Thompson*, 337 U.S. 163, 180 (1949); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Cosmopolitan Shipping Co. v. McCallister*, 337 U.S. 783, 790 (1949); *Jefferson County Pharmaceutical Ass'n. v. Abbott Laboratories*, 460 U.S. 150, 159 (1983); *Jones v. Metropolitian Atlanta Rapid Transit Auth*., 681 F. 2d 1376, 1380 (11th Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *Connecticut Light & Power Co. v. Secretary of the U.S. Dept. of Labor*, 85 F.3d 89, 94 (2d Cir. 1996); *Bechtel Construction Co. v. Secretary of Labor*, 50 F. 3d 926, 932 (11th Cir. 1995); *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993). Thus, the question arises whether the Vaccine Act should be viewed as legislation that is "remedial" in nature, and therefore should be "liberally" construed so as to give a wider application to the remedial purposes behind the statute.[7] The cases that I have identified mentioning this "remedial legislation" rule do not provide any precise definition of what legislation should be considered to be "remedial" in nature. However, the cases all seem to refer to statutes that are designed to benefit or protect classes of persons who have been harmed or disadvantaged in some fashion. In that light, it seems reasonable to conclude that the Vaccine Act, which is designed to benefit persons injured by vaccinations, does constitute a "remedial" statute. *See, e.g.*, *Flowers v. Secretary of HHS*, 49 F. 3d. 1558, 1562 (Fed. Cir. 1995); *McGowan v. Secretary of HHS*, 31 Fed. Cl. 734, 740 (1994); *Zatuchni v. Secretary of HHS*, 73 Fed. Cl. 451, 455 (2006), *aff'd*, 516 F. 3d 1312 (Fed. Cir. 2008).

C. Analysis of current state of law concerning application of statutory construction principles

After carefully studying the more recent Supreme Court decisions cited above, as well as the parties' briefs filed in this case, I conclude that the applicable law concerning the application of

[7]The petitioners in this case have not cited these cases, nor have they cited this principle of liberal construction of remedial statutes. Nevertheless, I have found it appropriate to consider on my own this potentially-applicable theory of statutory construction.

statutory construction principles has *substantially changed* since I issued my ruling in this case in 2001.

First, the four Supreme Court decisions cited above at p. 7 indicate that there has been a relaxation in the case law concerning *which portions* of a statute that grants a waiver of immunity must be interpreted under the principle of "narrow construction." While in this case I ultimately do *not* rely upon that *particular* change in the Supreme Court's analysis, that change does seem to be part of a general relaxation by that court in the rigor of enforcement of the sovereign immunity doctrine since the 1990s cases.

More importantly, for purposes of this case, the *Richlin* opinion indicates a *substantial change*, from the 1990s cases, concerning the Supreme Court's application of the sovereign immunity doctrine. As explained above (pp. 7-8), the *Richlin* court indicated that ambiguity in a statute need *not* always be resolved in the government's favor. The *Richlin* court abandoned the rule that if there were more than one "plausible" interpretation of the statute, the more narrow interpretation must automatically be chosen. *Richlin* explicitly stated that the sovereign immunity doctrine of "strict construction" does *not* override all other canons of statutory construction. (128 S.Ct. at 2019.) And the *Richlin* court even adopted an interpretation of the statute that the court itself characterized as a "broad construction." (*Id*. at 2014.)

III

ANALYSIS OF THE STATUTORY PROVISION HERE AT ISSUE

The question of whether an unborn child *in utero* "received" a vaccine that was administered to her mother, under the meaning of the word "received" as used in § 300aa-11(c)(1)(A), presents a difficult issue of statutory interpretation. Petitioners argue that Sabian "received" the MMR vaccine administered to her mother while Sabian was *in utero*, contending as a matter of fact that the vaccine injected into the mother's body would necessarily pass into the unborn child's system, "just as that fetus receives the nutrients that the mother ingests." (See petitioners' "Opposition" filed on September 6, 2000, p. 2.) Petitioners argue that since the vaccine passes into the unborn child's system, the child has "received" the vaccine. Respondent argues, on the other hand, that the term "received" applies only to situations in which a person was *directly administered* the vaccine by the vaccine administrator--*i.e.*, was injected with a vaccine or ingested it ("ingested" meaning that the person was given the vaccine orally, as with an oral polio vaccine). Respondent argues that Sabian did not "receive" the vaccine within the statutory meaning; only her mother did.

The parties have cited, or I have found, only a few opinions dealing directly with the issue of whether an unborn child can be said to have "received a vaccine" when his or her mother received a vaccination while the child was *in utero*. In *Di Roma v. Secretary of HHS*, No. 90-3277, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993), a special master of this court opined that the unborn child had *not* "received" the vaccine within the statutory meaning of that word, concluding that the statutory requirement that the injured person have "received" the vaccine "eliminates any possibility

* * * of a claim for compensation for an *in utero* injury." 1993 WL 496981 at *2. In *Rooks v. Secretary of HHS*, No. 93-689V, 1995 WL 522769 (Fed. Cl. Spec. Mstr. Aug. 22, 1995), another special master of this court also ruled that an unborn child had not "received" the vaccine within the statutory meaning, because the vaccine was not "directly administered" to the fetus. 1995 WL 522769 at *1. The same special master later reached the same conclusion in *Melton v. Secretary of HHS*, No. 01-105, 2002 WL 229781 (Fed. Cl. Spec. Mstr. Jan. 25, 2002).

In both the *Rooks* and *Melton* cases, however, judges of this court reversed the special master's decisions, ruling that an *in utero* child did, as a matter of law, "receive" the vaccine, if the vaccine passed through the mother's system into that of the fetus. *Rooks v. Secretary of HHS*, 35 Fed. Cl. 1 (1996); *Melton v. Secretary of HHS*, No. 01-105V, unpublished Order filed July 8, 2002.[8]

I find this statutory interpretation question to be a difficult one, with reasonable arguments on both sides.[9] On one hand, I can see some merit in respondent's argument. It is true that when one thinks of a person "receiving" a *vaccine*, one would normally think of having the vaccine *directly administered* to the person in question. So, there is some appeal to respondent's argument that when Congress used the phrase "received a vaccine" in § 300aa-11(c)(1)(A), Congress had in mind only such persons to whom a vaccine was directly administered.

On the other hand, I find *greater* merit in the argument, adopted by the judges in *Rooks* and *Melton*, that an unborn child can be said to have "received" a vaccine under the ordinary meaning and usage of the term "received." (35 Fed. Cl. at 9-10; *Melton* Order at 4.) That is, assuming that it is true as a factual matter that the MMR vaccine would have naturally flowed through the mother's system into Sabian's system at that stage of the pregnancy,[10] then it does seem logical to conclude that Sabian "received" the vaccine. Although Sabian did not have the vaccine administered directly to her by the vaccine administrator, it is reasonable to say that she did "receive" it through her mother's system. As the judge in *Rooks* pointed out, there seems to be no particular reason to restrict the word "received" in the statute to receipt by *injection* or *ingestion*, as respondent argues. Certainly, under the ordinary usage of the word "receive," a person can "receive" things by means other than injection or ingestion.[11] I see no inherent reason why a person could not be said to

---

[8]I filed a copy of the *Melton* Order into the record of this case on March 22, 2010.

[9]I note that I have not found any legislative history that relates specifically to the statutory provision at issue here.

[10]For purposes of this legal ruling, I am *assuming* that factual scenario to be accurate. That seems to be the factual scenario assumed in the opinions of *Rooks* and *Melton* as well. However, I note that the petitioners in these cases have not yet provided evidence showing that scenario to be accurate.

[11]Significantly, since 2001 a new type of vaccination has been added to the Vaccine Injury Table, which is administered *neither* by injection or ingestion, but by *nasal spray*. *See*, National

(continued...)

"receive" a vaccine in this additional fashion--that is, by transfer from a pregnant woman's system into the system of the unborn child.

My analysis concerning the word "received," stated in the previous two paragraphs, is no different from my analysis in 2001.[12] My *result* in the 2001 Ruling, however, was dictated by my interpretation of the sovereign immunity doctrine, as that doctrine was discussed in the 1990s cases described above. I concluded in 2001 that the statutory language of § 300aa-11(c)(1)(A) was *ambiguous* in its application to this situation, and that both competing interpretations were at least "plausible." Therefore, I concluded, I was *not* free to choose the interpretation that I found to be more persuasive. I was bound under the 1990s cases, rather, to choose the interpretation that would produce the most narrow and restricted waiver of sovereign immunity. *Nordic Village*, 503 U.S. at 36-37; *Department of Energy v. Ohio*, 503 U.S. at 626 n. 16. In other words, I concluded that I was bound to adopt the respondent's interpretation, since that interpretation produced the more narrow waiver.

In light of the *Richlin* opinion, however, my analysis now is altered. Under *Richlin*, as discussed above, I am no longer required to necessarily interpret any statutory ambiguity in the respondent's favor. Under *Richlin*, when faced, as here, with two plausible interpretations of a statute, I am no longer required to automatically choose the more narrow construction. Pursuant to *Richlin*, I am no longer bound to conclude that the sovereign immunity canon of "strict construction" automatically overrides other principles of statutory construction.

This altered analysis of the sovereign immunity doctrine, in fact, changes the result of the statutory interpretation issue in this case. No longer bound to automatically choose the more narrow interpretation, I am free to weigh relative merits of the two competing interpretations. Further, *Richlin* specifies that I am free to consider general principles of statutory construction *other* than the sovereign immunity canon of narrow construction. Thus, I can `take into account the statutory consideration of "liberal construction" of remedial statutes, described above (p. 8). It appears to me that, under *Richlin*, with respect to interpretations of the *Vaccine Act*, which clearly is a "remedial" statute, the sovereign immunity canon of "strict construction" is, in effect, "offset" by the competing statutory construction principle of "liberal construction" of remedial statutes; therefore, I am free to adopt the *more persuasive* of the possible statutory interpretations, without the need to automatically favor *either* a narrow or a liberal interpretation. See *McMahon v. United States*, 186 F. 2d 227, 229

---

[11](...continued)
Vaccine Injury Compensation Program: Addition of Trivalent Influenza Vaccines to the Vaccine Injury Table, 70 Fed. Reg. 19092-01 (April 12, 2005). This development, obviously, further undercuts the respondent's argument that a person can "receive" a vaccine only by injection or ingestion.

[12]I note that in my 2001 Ruling in this case, I specifically noted that, but for the sovereign immunity doctrine, I would likely have interpreted the statutory provision in petitioners' favor. (2001 WL 180129 at *11, fn. 13.)

(3rd Cir. 1950), *aff'd* 342 U.S. 25 (1951), in which the court suggested that in the case of a statute that is *both* "remedial" *and* constitutes a waiver of sovereign immunity, the two competing statutory construction principles would in effect cancel each other out, so that the court would construe the statutory language "without throwing any weights on either side of the scale." 186 F. 2d at 229.[13]

As indicated above, I find the interpretation stated by the judges in *Rooks* and *Melton*[14] to be at least somewhat more persuasive, so that I hereby adopt that interpretation in this case.

Moreover, I agree with the judge in *Rooks* that the petitioners' interpretation of the term "received" would be more in keeping with the general spirit of the Vaccine Act, which was intended to "generously" assist injured persons whose injuries may have been vaccine-caused. (35 Fed. Cl. at 6-8.) That interpretation also is consistent with the statement in the legislative history indicating that Vaccine Act awards are to be made with "generosity." (H.R. Rept. No. 99-908, 99th Cong., 2d Sess. at 3 (reprinted at 1986 U.S.C.C.A.N. at 6344).)

Therefore, to reiterate, I hereby adopt the interpretation of the word "received" that I find to be more persuasive, which is the interpretation advanced by the petitioners.[15]

---

[13]See also federal court decisions which, assert that "remedial" statute affording relief against the United States should be interpreted "liberally." See *In re Town & Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151-52 (9th Cir. 1991); *Thurston v. United States*, 179 F. 2d 514, 515 (9th Cir. 1950); *Demutiis v. United States*, 48 Fed. Cl. 81, 86 (Fed. Cl. 2000).

[14]I also note that in *Brausewetter v. Secretary of HHS*, No. 99-278V, 1999 WL 562700, at *3 (July 16, 1999), a special master indicated agreement with the judge's interpretation of the word "received" in *Rooks*, although that case did not involve the precise issue in this case.

[15]As explained above, several recent Supreme Court decisions (see p. __ above) suggested that the sovereign immunity principle of "strict construction" may not necessarily apply to *all* portions of a statute that waives sovereign immunity. See also *McGowan v. Secretary of HHS*, 31 Fed. Cl. 734, 740 (1994), and *Zatuchni v. Secretary of HHS*, 73 Fed. Cl. 451, 458 (2006), which similarly suggest that the sovereign immunity statutory construction principles apply only to "jurisdictional" provisions of the Vaccine Act. It is possible, therefore, that the "strict construction" rule is not properly applicable at all to the particular statutory subsection at issue here, § 300aa-11(c)(1)(A). I need not decide this issue, however. That is because, as explained above, even assuming that § 300aa-11(c)(1)(A) *is* a portion of the statute generally subject to the "strict construction" principle, I have concluded that the appropriate interpretation of the section would still be the interpretation advanced by the petitioners in this case.

IV

CONCLUSION

In light of my legal ruling above, the petitioners should determine whether they can obtain an expert report opining (1) that the vaccine likely proceeded through Mrs. Burch's system into the system of the *in utero* Sabian, *and* (2) that the vaccine likely caused injury to Sabian. If they are able to obtain such an expert report, they should file it as soon as possible. If no such report is filed in 60 days, the petitioners shall file a status report at that time, and additional status reports at 60-day intervals thereafter until such an expert report is filed.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master