**OFFICE OF SPECIAL MASTERS**

**No. 96-0388V**

**(Filed: November 30, 1999)**

* * * * * * * * * * * * * * * * * * * * * * * * * * * *

BILL AND LORI MOGENSEN, as Legal Representatives of the estate of their minor daughter, KATIE MOGENSEN,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

* * * * * * * * * * * * * * * * * * * * * * * * * * * *

**TO BE PUBLISHED**

*Curtis R. Webb*, Twin Falls, Idaho, for petitioners.
*Mark W. Rogers*, United States Department of Justice, Washington, D.C., for respondent.

**DISMISSAL ORDER**

***EDWARDS,*** Special Master

Petitioners, Bill and Lori Mogensen (Mr. Mogensen and Mrs. Mogensen or the Mogensens), as legal representatives of the estate of their daughter, Katie Mogensen (Katie), seek compensation under the National Vaccine Injury Compensation Program (Program).[1] In a petition that they filed on July 1, 1996, the Mogensens allege that Katie suffered a residual seizure disorder after she received a measles-mumps-rubella (MMR) immunization on April 4, 1990. Petition (Pet.) ¶¶ 2-4. According to the Mogensens, the first manifestation of Katie's residual seizure disorder "occurred at breakfast between April 11, 1990[,] and April 18, 1990," when Katie exhibited a brief seizure. Pet. ¶ 5.

---

[1] The statutory provisions governing the Vaccine Program are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West Supp. 1999). For convenience, further reference will be to the relevant section of 42 U.S.C.A.

Katie's MMR immunization was "administered after the effective date" of the Act that established the Program. § 300aa-16(a)(2). Under § 300aa-16(a)(2), "no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." Thus, on its face, the Mogensens' petition is barred by § 300aa-16(a)(2). Indeed, the Mogensens acknowledge that their petition is untimely. Pet. ¶ 10. Nevertheless, the Mogensens assert that the special master should toll the applicable statute of limitations because the Secretary of the Department of Health and Human Services "failed to comply with [a statutory] mandate to prepare and disseminate materials advising the parents of children receiving childhood vaccines of the availability of the National Vaccine Injury Compensation Program." Pet. ¶ 10a, citing § 300aa-26. The Mogensens argue that the statute of limitations "is premised upon the parents of vaccine[-]injured children being informed of the availability of the Program." Pet. ¶ 10c. The Mogensens claim that they "did not, in fact, learn of the existence of the Program until April" 1995. Pet. ¶ 10b.

Respondent denies that the Mogensens are entitled to have the statute of limitations tolled in their case. Respondent contends that the Mogensens "have not come close to meeting the traditional requirements for obtaining equitable tolling." Respondent's Response to Petitioners' Brief in Support of Application to Equitably Toll Statute of Limitations (Response Brief), filed September 4, 1996, at 2. Respondent maintains that the Mogensens' "ignorance" of "their <u>legal rights</u> to maintain a cause of action" is "simply" insufficient to "engender any right to relief from" the statute of limitations. *Id.* at 5-6 (emphasis in original). Moreover, respondent charges that the Mogensens' "leisurely" actions between the time that the Mogensens learned about the Program and the time that they contacted an attorney to discuss their claim do not constitute "due diligence." *Id.* at 9.

The special master convened a hearing limited to factual issues. Mr. Mogensen, Mrs. Mogensen, and their attorney, Curtis R. Webb (Mr. Webb), testified.

## BACKGROUND

Katie was born by "elective repeat cesarean section" on October 12, 1988, at Magic Valley Regional Medical Center, in Twin Falls, Idaho. Petitioners' exhibit (Pet. ex.) 4 at 1. Although Mrs. Mogensen's physicians expressed some concern regarding "mild to moderate placental insufficiency," Pet. ex. 3 at 12, and possible "poor fetal growth," Pet. ex. 3 at 13, Katie appeared normal at birth. *See* Pet. ex. 4 at 1. She weighed six pounds, six ounces. Pet. ex. 3 at 14. Her APGAR scores were eight at one minute and nine at five minutes.[2] *Id.* Upon discharge from the hospital, Katie was "gaining weight [and] eating actively." *Id.*

---

[2] An APGAR score is a numerical expression of the condition of a newborn infant, usually determined at 60 seconds after birth, being the sum of points gained on assessment of the heart rate, respiratory effort, muscle tone, reflex irritability, and color. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1498 (27th ed. 1988).

As an infant, Katie received routine medical attention from Kevin Kraal, M.D. (Dr. Kraal). *See, e.g.*, Pet. ex. 4. By the time that Katie was three-and-one-half months old in February 1989, her weight had "fallen off the curve" on a growth chart to "the 5th percentile." Pet. ex. 4 at 3. Dr. Kraal suspected "failure to thrive." *Id.* He determined to monitor Katie's weight. *Id.* In March 1989, Dr. Kraal noted that although Katie's weight remained "below the 5th percentile," Katie's weight was beginning again to follow "a normal curve" on a growth chart. Pet. ex. 4 at 4. But, in April 1989, when Katie was six months old, Dr. Kraal referred Katie to Paul V. Miles, M.D. (Dr. Miles), for "evaluation of failure to thrive." Pet. ex. 5 at 2.

Dr. Miles examined Katie on April 12, 1989. Pet. ex. 5 at 2. Dr. Miles recorded that Katie's "general health" was "excellent," with "[n]ormal appropriate development." *Id.* Dr. Miles noted that Mrs. Mogensen's height placed Mrs. Mogensen "in the tenth percentile." *Id.* In addition, Dr. Miles noted that Mr. Mogensen's height placed Mr. Mogensen "also in the tenth percentile." *Id.* After conducting a "bone age" test and a "sweat chloride" test--both of which showed results within normal limits--Dr. Miles concluded that Katie exhibited only "genetic small stature." Pet. ex. 5 at 3.

Dr. Miles continued to follow Katie for her small stature. *See generally* Pet. ex. 5 at 3-6. In addition, for the balance of 1989 and into early 1990, Dr. Miles treated Katie for typical childhood ailments. *See generally* Pet. ex. 5 at 3-7. Dr. Miles did not reflect explicitly in his records any problems with Katie's neurologic development.

On April 4, 1990, Katie received a diphtheria-pertussis-tetanus (DPT) vaccination, oral polio vaccine (OPV), and an MMR immunization at the South Central District Health Department, in Twin Falls, Idaho.[3] Pet. ex. 2 at 1. Mrs. Mogensen recalled that health department personnel told her "the standard things" about possible side effects of the vaccines. Transcript (Tr.), filed April 3, 1997, at 7. Mrs. Mogensen recalled also that health department personnel required her to sign "three pieces of paper" before "a nurse" administered the vaccines to Katie. Tr. at 8; *see also* Tr. at 36-37; Pet. ex. 2 at 3-8. Mrs. Mogensen could not remember significant details about the contents of the material that she signed. *See* Tr. at 9, 37. Indeed, Mrs. Mogensen admitted that she "probably" did not read "fully" the material. Tr. at 36; *see also* Tr. at 37, 52. Mrs. Mogensen explained that she "felt [she] knew" the material because she "had two other children who had gone through the vaccinations." Tr. at 52; *see also* Tr. at 10. And, Mrs. Mogensen offered that health department personnel "didn't tell [her] anything different" when Katie presented for vaccinations on April 4, 1990. Tr. at 52. Thus, Mrs. Mogensen stated that she was "sure" that the material "was basically the same" as material that she had reviewed when her other children were vaccinated. *Id.* Mrs. Mogensen denied specifically that health department personnel informed her about the Program. Tr. at 9.

---

[3] Katie had received previously other vaccinations at the South Central District Health Department, in Twin Falls, Idaho, including DPT and OPV on December 14, 1988, DPT and OPV on February 15, 1988, and DPT on June 7, 1988. Pet. ex. 2 at 1. Katie did not experience apparently any notable adverse reactions to the other vaccinations.

Mrs. Mogensen testified that "[w]ithin a week to two weeks after" the April 4, 1990 MMR immunization, Katie experienced her first seizure while she "was sitting in her high chair at breakfast." Tr. at 10; *see also* Tr. at 31, 35-36. Mrs. Mogensen said that she observed the seizure "out of the corner of [her] eye." Tr. at 10. Mrs. Mogensen described the seizure as "a really fast, little jerk." *Id.* According to Mrs. Mogensen, Katie's arms "went up quickly and [Katie's] head went down quickly at the same time." *Id.* Mrs. Mogensen remembered that the motion "seemed odd," as if Katie "just had shivered funny or something." *Id.* Although Mr. Mogensen indicated that he did not witness Katie's first seizure, he testified that Mrs. Mogensen told him "[a]pproximately a week or two after" Katie's April 1990 immunizations that "she had seen something unusual." Tr. at 56.

Mrs. Mogensen recalled that she "didn't notice" another seizure "until maybe a few days" after Katie's initial episode. Tr. at 10. Mrs. Mogensen indicated that she "thought" that Katie's second seizure "was kind of odd again." *Id.* But, according to Mrs. Mogensen, "as time progressed" and Katie's seizures began to occur "in clusters," she "knew something was wrong." *Id.* Mrs. Mogensen stated that she scheduled "an appointment" for Katie with Dr. Miles. Tr. at 11.

Dr. Miles examined Katie on May 5, 1990. Pet. ex. 5 at 7-8. Dr. Miles indicated that Katie had "been having some starring [sic] episodes with some mild jerking." Pet. ex. 5 at 8. Mrs. Mogensen insisted that she informed Dr. Miles that Katie's "little jerks" had begun "shortly after [Katie's] immunizations." Tr. at 31-32. However, Dr. Miles recorded that Katie's symptoms had emerged "over the past two *months*," antedating apparently Katie's April 4, 1990 immunizations. Pet. ex. 5 at 8 (emphasis added); *see also* Pet. ex. 5 at 7. In addition, Mrs. Mogensen insisted that she asked Dr. Miles "if he thought that the immunizations could have caused [Katie's] seizures." Tr. at 11; *see also* Tr. at 12. Mrs. Mogensen offered that she "was thinking" that the MMR immunization might have "done something" to Katie. Tr. at 12; *see also* Tr. at 30. Mrs. Mogensen explained that she implicated "specifically" the MMR immunization because the MMR immunization "was something new" that Katie "hadn't had" previously. Tr. at 12; *see also* Tr. at 29-30. While Dr. Miles noted Katie's "recent DPT/OPV and MMR," he stated that he did "not think the immunization[s] had anything to do with" Katie's condition. Pet. ex. 5 at 8. Mrs. Mogensen related that even though Katie's MMR immunization was her "prime suspect" as the cause of Katie's seizures, she "trusted [Dr. Miles] a lot and had a great deal of faith in him." Tr. at 30. Thus, Mrs. Mogensen stated that based upon Dr. Miles's opinion, she "kind of put" her suspicions about the MMR immunization "on the back shelf." Tr. at 38; *see also* Tr. at 30, 46. Therefore, Mrs. Mogensen admitted, she did not consider consulting a lawyer in 1990 about her legal rights. Tr. at 51. And, according to Mrs. Mogensen, Dr. Miles did not discuss the Program with her. Tr. at 13.

Dr. Miles was "concerned about [Katie's] episodes." Pet. ex. 5 at 8. Based upon Mrs. Mogensen's description of the events, Dr. Miles presumed that the episodes represented "minor motor seizures." *Id.* Dr. Miles planned to obtain an electroencephalogram (EEG) to confirm his diagnosis. *Id.*

Katie's EEG was "abnormal." Pet. ex. 5 at 8. After consulting David B. Bettis, M.D. (Dr. Bettis), a neurologist, Dr. Miles prescribed Zarontin for Katie. *Id.* Nonetheless, Katie's seizures persisted. Pet. ex. 5 at 9.

Dr. Bettis evaluated Katie on June 11, 1990. *See* Pet. ex. 6 at 1-2. Neither Mrs. Mogensen nor Mr. Mogensen recalled mentioning Katie's April 4, 1990 MMR immunization to Dr. Bettis during Katie's June 11, 1990 examination. *See* Tr. at 14, 38-39, 58, 66-67. Rather, Mrs. Mogensen emphasized that the Mogensens' overriding concern at the June 11, 1990 examination "was trying to figure out how to take care of" Katie because "she was having hundreds of seizures a day." Tr. at 38; *see also* Tr. at 13. Indeed, in his record of Katie's June 11, 1990 examination, Dr. Bettis did not discuss a temporal relationship between any immunizations and the onset of Katie's seizures. *See* Pet. ex. 6 at 1-2. Nevertheless, Dr. Bettis's recitation of Katie's medical history differs significantly from Dr. Miles's apparent initial understanding of Katie's medical history. According to Dr. Bettis, Katie "began having staring spells with flinches of her shoulders about 2 months" before the June 11, 1990 appointment, when she was "18 months of age." Pet. ex. 6 at 1. Thus, a literal interpretation of Dr. Bettis's chronology of the onset of Katie's seizures coincides closely with the sequence that the Mogensens advance, corroborating strongly the Mogensens' testimony.

In January 1991, the Mogensens desired "a second opinion" about Katie's condition. Pet. ex. 5 at 12. Vera F. Tait, M.D., a neurologist at the University of Utah Primary Children's Medical Center Division of Pediatric Neurology and Rehabilitation, examined Katie on February 8, 1991. *See* Pet. ex. 14, ¶ 14; Pet. ex. 7 at 1-2. In reflecting that Katie's immunizations were "U[p]T[o]D[ate] [except for] HiB," Dr. Tait wrote: "(*s[ei]z[ures] started [1] w[ee]k after MMR)." Pet. ex. 7 at 1. Dr. Tait noted that after onset, Katie's seizures had "[increased in] freq[uency] + intensity." *Id.* Dr. Tait recommended various diagnostic procedures. Pet. ex. 7 at 2. And, Dr. Tait considered changing Katie's seizure medication. *Id.*

Dr. Tait remained apparently Katie's treating neurologist until Dr. Tait "left the field of pediatric neurology" in 1992. *See* Pet. ex. 8 at 8. At some point, according to Mrs. Mogensen, Dr. Tait offered the Mogensens a grim prognosis of Katie's condition. *See* Tr. at 17. In late 1992, Colin B. Van Orman, M.D. (Dr. Orman), a pediatric neurologist at the University of Utah Primary Children's Medical Center Division of Pediatric Neurology and Rehabilitation, became Katie's treating neurologist. *See* Pet. ex. 8 at 9-10.

Mrs. Mogensen testified that in Spring 1994, her sister telephoned her "one evening" about "a program on TV" that was featuring a segment on potential adverse reactions to DPT. Tr. at 18; *see also* Tr. at 39. Mrs. Mogensen said that she was able to watch "the very end of" the program. Tr. at 46; *see also* Tr. at 19, 39. According to Mrs. Mogensen, Katie "was just like a lot of [the] kids" in "some of the stories" on the program. Tr. at 40. Mrs. Mogensen declared that the program "reignited" her belief that Katie's immunizations "probably had hurt" Katie. Tr. at 39; *see also* Tr. at 47.

Mrs. Mogensen related that the television program provided a telephone number for the National Vaccine Information Center (NVIC). Tr. at 19. Mrs. Mogensen recalled that "within two or three days" after she had viewed the program, she obtained the "lot number" of Katie's April 4, 1990 DPT vaccination "from the health department." Tr. at 41; *see also* Tr. at 19. Then, Mrs. Mogensen recounted, she called NVIC for "a short list of hot lot numbers." Tr. at 19; *see also* Tr. at 40-41, 48. Mrs. Mogensen indicated that she did not get "enough information" from her initial call to NVIC. Tr. at 41. Mrs. Mogensen said that she "kind of hemmed and hawed" for "another day or two" about the cost of a particular publication available from NVIC before she ordered the item that she referred to as "the VAERS report." Tr. at 41-42; *see also* Tr. at 49. Mrs. Mogensen stated that "Katie's DPT number was on that report." Tr. at 19.

Mrs. Mogensen remembered that she received also with the VAERS report a "form" that "listed the different" items for purchase from NVIC. Tr. at 20-21; *see also* Tr. at 40-42; Pet. ex. 1A. Mrs. Mogensen testified that she "ordered a little pamphlet" that described possible risk factors for injury from DPT. Tr. at 20-21; *see also* Tr. at 49. Mrs. Mogensen acknowledged that the NVIC order form includes an entry for a publication entitled *The Compensation System and How It Works*. Tr. at 22, 42. But, Mrs. Mogensen did not recall reviewing the entry. Tr. at 22, 42. Mrs. Mogensen offered that the compensation system "wasn't something [she] was really interested in at the time." Tr. at 22; *see also* Tr. at 42. Rather, Mrs. Mogensen asserted, she "was concerned" only about the cause of Katie's seizures. Tr. at 47; *see also* Tr. at 23, 42. Mrs. Mogensen explained that she thought that "if [she] could just tell the doctors the immunizations caused [Katie's] seizures, they'd be able to figure out" a "better" treatment plan. Tr. at 47-48; *see also* Tr. at 21, 23.

In August 1994, Dr. Van Orman referred Katie to a "comprehensive epilepsy program in Minneapolis," Minnesota, for an assessment of her "intractable" seizure disorder accompanied by "major developmental delay." Pet. ex. 8 at 11. Katie entered Children's Hospital in St. Paul, Minnesota, on October 18, 1994, for an initial consultation by the Minnesota Epilepsy Group. Pet. ex. 9 at 1-4. Katie's attending physician, Ronald Spiegel, M.D. (Dr. Spiegel), stated that the "[g]oal" of the consultation was "to record [seizure] events and clarify seizure type as well as determine whether or not Katie may be a candidate for surgical treatment." Pet. ex. 9 at 3. During Katie's hospitalization, the Mogensens reported apparently that Katie's seizures commenced "soon after a third DPT immunization" when Katie was "approximately 18 months of age." Pet. ex. 9 at 1.

Katie returned to Children's Hospital in St. Paul, Minnesota, in April 1995, for "an anterior partial corpus callosum resection." Pet. ex. 9 at 5. Her attending physician was Frank J. Ritter, M.D. (Dr. Ritter). *Id.* The Mogensens recounted that following Katie's surgery, they participated with Dr. Ritter in an extensive conference about Katie's prognosis. Tr. at 15-16, 59-60; *see also* Pet. ex. 9 at 12. Mr. Mogensen estimated that the conference lasted two to three hours. Tr. at 59. The Mogensens recalled that during the conference, Dr. Ritter addressed their concern regarding the relationship between Katie's immunizations and Katie's condition. Tr. at 16-17, 59. Mrs. Mogensen offered that Dr. Ritter "couldn't say for sure" that Katie's immunizations "did cause the seizures" and that Dr. Ritter "couldn't say for sure" that Katie's immunizations "did not cause the seizures." Tr. at 17. Nevertheless, the Mogensens remembered that Dr. Ritter discussed the National Vaccine

Injury Compensation Program. Tr. at 15, 23, 60. The Mogensens asserted that Dr. Ritter was the first person to inform them about the Program. Tr. at 17, 59, 67.

Mr. Mogensen stated that Dr. Ritter did not review any specific criteria for compensation under the Program. Tr. at 60, 69. Indeed, Mr. Mogensen denied that Dr. Ritter mentioned even a statute of limitations. Tr. at 61. However, Mrs. Mogensen indicated that Dr. Ritter "said something about" the statute of limitations. Tr. at 43. According to Mrs. Mogensen, Dr. Ritter "implied . . . that he didn't know whether the statute of limitations had run out yet or not." Tr. at 27; *see also* Tr. at 43. Regardless, the Mogensens testified that Dr. Ritter encouraged them to apply for compensation. Tr. at 15, 27, 60-61. And, the Mogensens remembered that Dr. Ritter recommended that they contact an attorney. Tr. at 18, 43, 60-61.

The Mogensens related that after they returned home with Katie following the conference with Dr. Ritter, they deliberated about filing a claim for compensation. Tr. at 24, 62. But, Mr. Mogensen said, the issue of compensation for Katie's injury was not the Mogensens' "top priority." Tr. at 62. Both Mr. Mogensen and Mrs. Mogensen stressed that their primary concern was Katie's recuperation from major surgery. Tr. at 24, 43, 62. Besides, Mrs. Mogensen added, they "wanted to make sure that [they] felt in [their] hearts that the vaccine had caused [Katie's] problem before [they] would ever apply for anything." Tr. at 24; *see also* Tr. at 25, 43. Mr. Mogensen echoed Mrs. Mogensen's sentiment. Mr. Mogensen stated that he and Mrs. Mogensen "wrestled" with the "moral" issue of pursuing a claim because "lawsuits and that type of thing bother" them. Tr. at 62.

Mrs. Mogensen remembered that Dr. Ritter sent them "some information" regarding the Program "about a month" after Katie's surgery. Tr. at 18; *see also* Tr. at 43; Pet. ex. 1B. Mrs. Mogensen remarked that Dr. Ritter may have included with the material "a couple of names" of attorneys who were "out of state." Tr. at 18. Mrs. Mogensen indicated that "[i]t took [her and Mr. Mogensen] a while to read through" the material that Dr. Ritter had provided. Tr. at 43; *see also* Tr. at 24. Mrs. Mogensen described the material as "hard to understand" and difficult "to decipher." Tr. at 24.

Mrs. Mogensen recalled that she and Mr. Mogensen read "something about the statute of limitations" in the material that Dr. Ritter had provided. Tr. at 24. According to Mrs. Mogensen, the information "led [her and Mr. Mogensen] to believe that maybe [Katie] still qualified" for compensation because "[m]aybe" they had not waited "too long" to file. Tr. at 24-25. However, Mr. Mogensen was emphatic that nothing in the material that Dr. Ritter had provided prompted any concern that the Mogensens had missed a deadline. Mr. Mogensen declared: "I felt in my own interpretation of what I was reading that Katie would have been eligible" for compensation. Tr. at 70; *see also* Tr. at 63-64.

Mrs. Mogensen remembered also that she purchased a videotape of "vaccine television shows" from NVIC. Tr. at 22; *see also* Tr. at 50. NVIC shipped the videotape to Mrs. Mogensen on June 13, 1995. Pet. ex. 12 at 1. Mrs. Mogensen said that she "probably watched [the videotape] within a day or two" after receiving the videotape. Tr. at 51. Mrs. Mogensen commented that the

videotape "may have" mentioned the Program. *Id.* But, Mrs. Mogensen offered, she was "focusing" more on a feature about a child who "was a lot like" Katie. *Id.* Mr. Mogensen recalled "[v]aguely" that he "may have watched some of [the videotape] with" Mrs. Mogensen. Tr. at 68.

Mr. Mogensen estimated that "two to three months" elapsed between the time that he and Mrs. Mogensen learned about the Program from Dr. Ritter and the time that he and Mrs. Mogensen decided to pursue a claim. Tr. at 69; *see also* Tr. at 61. Then, Mr. Mogensen estimated that an additional "five to six months" elapsed between the time that the Mogensens decided to pursue a claim and the time that they met with an attorney. Tr. at 69; *see also* Tr. at 70. Mr. Mogensen indicated that during the five-to-six-month period between the time that the Mogensens decided to pursue a claim and the time that they met with an attorney, Mrs. Mogensen obtained a list of attorneys who handle Program cases from NVIC. Tr. at 63; *see also* Tr. at 18, 25. NVIC shipped a "Law Directory" and a publication on "Federal Comp[ensation]" to Mrs. Mogensen on December 19, 1995. Pet. ex. 12 at 2. Mrs. Mogensen recalled that "quite soon" after she received the list of attorneys from NVIC, she contacted Mr. Webb. Tr. at 26; *see also* Tr. at 63, 70. The Mogensens met with Mr. Webb on January 9, 1996. *See* Pet. ex. 11, ¶¶ 2-3. According to Mr. Mogensen, the Mogensens learned in their January 9, 1996 meeting with Mr. Webb that they "in fact, had missed the time in which to file to fit the statute of limitations." Tr. at 64; *see also* Tr. at 26.

The Mogensens filed eventually a petition on July 1, 1996, after Mr. Webb concluded that "the Secretary's failure to complete the Vaccine Information Materials in a timely manner" provided "a reasonable basis for [the Mogensens] to avoid the statute of limitations which would have otherwise barred their claim." Pet. ex. 11, ¶ 14.

Katie died on August 12, 1996. *See* Pet. ex. 13. According to a newspaper account of Katie's death, Katie suffered "a seizure in her family's wading pool." Pet. ex. 13 at 4.

## EQUITABLE TOLLING

The doctrine of equitable tolling "permits a court to forgive a late filing where compelling circumstances indicate that such a result would be equitable." *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21, 25 (1995). In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court announced clearly that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. However, the Court cautioned that "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." *Id.* at 96. Rather, in noting that "[f]ederal courts have typically extended equitable relief only sparingly," *id.*, the Court identified just two "situations" in which the Court has "allowed" equitable tolling: "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been induced or tricked by his adversary's misconduct into allowing the deadline to pass." *Id.* (citations omitted).

A judge of the United States Court of Federal Claims has expanded apparently the doctrine of equitable tolling in Program cases. *See Brice v. Secretary of HHS*, 36 Fed. Cl. 474 (1996). After reviewing the language of § 300aa-16(a)(2) and the legislative intent of the Act, the judge concluded that a special master may toll equitably "for at least some period of time" the statute of limitations, *id.* at 478, if a petitioner shows successfully that petitioner "did not know, and reasonably could not have known, that the vaccine recipient had suffered an injury compensable under the Vaccine Act." *Id.* at 481. *But see Goetz v. Secretary of HHS*, No. 99-0127V, slip op. at 5 (Fed. Cl. Nov. 4, 1999) ("The 'fact' on which a Vaccine Injury Table claim is based is the occurrence of an event recognizable as a sign of a vaccine injury by the medical profession at large, not the diagnosis that actually confirms such an injury in a specific case."). However, the judge distinguishes obviously knowledge of an injury and knowledge "of the underlying law that [gives] rise to [a] cause of action" based upon the injury. *Bouley v. Secretary of HHS*, 37 Fed. Cl. 227, 231 (1997). In *Bouley*, the judge reiterated the well-established rule that "[i]gnorance of the law is not a ground for tolling a statute of limitations." *Id.* at 231 (citing *New York and Cuba Mail S.S. Co. v. United States*, 145 Ct. Cl. 652, 658, 172 F. Supp. 684 (1959)).

The doctrine of equitable tolling does not "bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990). Rather, the doctrine operates to "give the [petitioner] extra time if he needs it." *Id.* However, in *Irwin*, the Supreme Court stressed that the Court has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." 498 U.S. at 96. Indeed, at least one federal court has admonished that "in a case of equitable tolling[,] the plaintiff must be continuously diligent and sue (if he is beyond the statutory period) as soon as it is practicable for him to do so." *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 853 (7th Cir. 1996).

"Statutes of limitations are not arbitrary obstacles to the vindication of just claims." *Cada*, 920 F.2d at 452-53. Rather, statutes of limitations "protect important social interests in certainty, accuracy, and repose." *Id.* at 453. Therefore, a special master should not give § 300aa-16(a)(2) "grudging application." *Id.* Thus, "it is appropriate" for the special master "to evaluate" the circumstances surrounding a petitioner's claim to equitable tolling "with rigor." *Brice v. Secretary of HHS*, 44 Fed. Cl. 673, 678 (1999).

## DISCUSSION

For purposes of this decision, the special master adopts the rationale expressed in *Brice*.[4] In addition, for purposes of this decision, the special master assumes that the Mogensens are entitled to have the statute of limitations "tolled for at least some period of time."[5] *Brice*, 36 Fed. Cl. at 478. Finally, for purposes of this decision, the special master determines generously that by no later than April 12, 1995--the approximate date of their conference with Dr. Ritter after Katie's surgery--the Mogensens knew certainly that Katie had sustained an injury that was compensable potentially under the Program.[6] Nevertheless, the Mogensens must demonstrate still that they pursued their legal rights

---

[4] The special master does not state now an opinion about the precedential value of *Brice*. Rather, the special master notes only that the United States Court of Appeals for the Federal Circuit has not had yet the opportunity to address whether § 300aa-16(a)(2) "contains an implied 'equitable tolling' exception." *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1462 (Fed. Cir. 1998) (citing *United States v. Brockamp*, 519 U.S. 347, 348-49 (1997)).

[5] The special master does not address substantively in this dismissal order a basis for applying equitable tolling in this case. However, the special master expresses serious doubt about the merits of the Mogensens' argument that the Secretary's delay in promulgating "a statement of the availability of the" Program, § 300aa-26 (c)(3), "justifies [the application of] equitable tolling." Brief in Support of Application to Equitably Toll Statute of Limitations (Pet. Brief), filed August 6, 1996, at 3. In the special master's view, Congress did not intend the statute of limitations contained in § 300aa-16(a)(2) to depend necessarily upon specific notice of the Program. When Congress enacted the Program, Congress created two distinct classes of petitioners: people who received a vaccine before the effective date of the Program (pre-Act cases) and people who received a vaccine after the effective date of the Program (post-Act cases). *See, e.g.*, § 300aa-11(a)(2)(A); § 300aa-11(a)(4); § 300aa-11(a)(6); § 300aa-15(a); § 300aa-15(b); § 300aa-16(a)(1); § 300aa-16(a)(2). In addition, when Congress enacted the Program, Congress directed the Secretary to develop "vaccine information materials for distribution by health care providers to the legal representatives of any child or to any other individual receiving a vaccine set forth in the Vaccine Injury Table." § 300aa-26(a). Congress provided a significant amount of time after the effective date of § 300aa-26 for the Secretary's action. Congress recognized surely that under the structure of the Act, a subclass of petitioners--comprised of people who received a vaccine after the effective date of the Program, but before the expiration of the period that Congress allotted in § 300aa-26 for the Secretary's action--would never benefit from notice of the Program as contemplated by § 300aa-26(c)(3). Nevertheless, Congress allowed the statute of limitations to accrue for that subclass of post-Act petitioners. Therefore, notice of the Program is not a component of the statute of limitations in § 300aa-16(a)(2). Thus, the well-established principle that "[i]gnorance of the law is not a ground for tolling a statute of limitations" is relevant. *Bouley*, 37 Fed. Cl. at 231 (citing *New York and Cuba Mail S.S. Co. v. United States*, 145 Ct. Cl. 652, 658, 172 F. Supp. 684 (1959)).

[6] The special master adopts the scenario that is most favorable to the Mogensens. Based (continued...)

with due diligence by filing their petition "within a reasonable time" after April 1995. *Cada*, 920 F.2d at 453.

The Mogensens diverge significantly in their recollections regarding the extent of information about the Program that Dr. Ritter presented at the April 1995 conference. Mrs. Mogensen thought that Dr. Ritter mentioned the statute of limitations for Program claims. Tr. at 27, 43. Mr. Mogensen asserted that Dr. Ritter did not address the statute of limitations for Program claims. Tr. at 61. However, the special master does not need to resolve the issue of fact because the Mogensens remembered clearly that Dr. Ritter believed "strongly" that Katie "was a candidate" for Program compensation. Tr. at 17; *see also* Tr. at 15, 27, 60-61. And, according to the Mogensens, Dr. Ritter instructed them "that it would be very important" for them to consult an attorney who "dealt with the compensation program." Tr. at 60; *see also* Tr. at 18, 43. Therefore, in April 1995, the Mogensens received "unmistakable direction" to seek legal advice. *Brice v. Secretary of HHS*, No. 95-0835V, 1998 WL 136562, at *2 (Fed. Cl. Spec. Mstr. Mar. 12, 1998).

The Mogensens acknowledge candidly that they did not retain immediately an attorney following their April 1995 conference with Dr. Ritter. But, the special master will not equate the Mogensens' failure to pursue a claim in April 1995 with the absence of due diligence. After all, the Mogensens were consumed obviously by the demands of Katie's proper recuperation from major surgery. Moreover, the Mogensens were waiting logically for material about the Program that Dr. Ritter promised to send to them.

However, the Mogensens account for little activity that the special master can characterize legitimately as due diligence in preserving legal rights between approximately mid-May 1995, when the Mogensens received an article on the Program from Dr. Ritter, and late December 1995, when Mrs. Mogensen contacted initially Mr. Webb. According to the Mogensens, they reviewed the article that Dr. Ritter provided. Yet, even though Mrs. Mogensen described the material as "hard to understand," Tr. at 24, and even though Mrs. Mogensen purchased a videotape from NVIC in June 1995, Pet. ex. 12 at 1, the Mogensens did not begin apparently a search for an attorney until Mrs. Mogensen ordered a directory of lawyers from NVIC months after Dr. Ritter urged them to pursue compensation. *See* Pet. ex. 12 at 2. The Mogensens offer only that they wanted to assure themselves that instituting a suit on Katie's behalf was an appropriate course of action before consulting a lawyer. The special master appreciates sincerely the Mogensens' admirable concern about filing a frivolous

---

[6](...continued)
upon the record, the special master could impute easily to the Mogensens knowledge in 1990 of the possible relationship between Katie's April 4, 1990 MMR immunization and Katie's seizures that should have prompted an investigation of their legal rights. The consent form that Mrs. Mogensen signed before Katie received her April 4, 1990 MMR immunization discusses clearly the risk of serious reactions, including "convulsions." Pet. ex. 2 at 8. Moreover, based upon the record, the special master could impute easily to the Mogensens knowledge in 1994 of the Program's existence that should have prompted an investigation of their legal rights. Material that Mrs. Mogensen received from NVIC contains several references to the "compensation system." Pet. ex. 1A at 2.

claim. Nevertheless, the special master concludes that the Mogensens' confessed hesitation--waiting six to seven months before exploring with an attorney the commencement of legal proceedings--prevents the special master from concluding that the Mogensens exercised due diligence in pursuit of their claim.

## CONCLUSION

The special master's ruling in this case is unavoidably harsh: The special master is constrained to find that he cannot allow the Mogensens' late filing.[7] Therefore, in the absence of a motion for review filed under RCFC Appendix J, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send the Mogensens' copy of this dismissal order by overnight delivery service.

John F. Edwards
Special Master

[7] Indeed, based upon an exhaustive assessment of the record as a whole, the special master would be inclined to decide the initial, critical factual issue in the Mogensens' favor by finding that it is more likely than not that Katie experienced a constellation of symptoms--later diagnosed as seizure activity--one week after her April 4, 1990 MMR immunization, as the Mogensens testified. The Mogensens were overwhelmingly honest, forthright and credible witnesses. Moreover, Dr. Bettis's and Dr. Tait's records are consonant with the Mogensens' recitation regarding the onset of Katie's condition. *(However, the special master notes that based upon the current record, other important medical issues affecting entitlement remain undeveloped.)* Thus, the special master welcomes review of this dismissal order. In the alternative, the Mogensens may wish to consider a private bill before Congress.