OFFICE OF SPECIAL MASTERS
No. 90-2213V
(Filed: January 22, 1998)

JAMIE VINCUILLA, by his Mother and Next Friend, CATHERINE VINCUILLA,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

***Ronald Homer,* Boston, Massachusetts, appeared for petitioner.**

***Glenn A. Macleod**, Department of Justice, Washington, D.C.,*

appeared for respondent.

RULING ON MOTION TO DISMISS

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program ("the Program").[(1)] Respondent has filed a "Motion to Dismiss," arguing that petitioner's Program petition is barred by § 300aa-11 (a)(5) of the Vaccine Act. For the reasons set forth below, that motion is hereby denied.

I

STATUTORY BACKGROUND

Section 300aa-11 provides the general requirements for petitions under the Program. In particular, § 300aa-11(a) provides a complex set of rules applying to situations in which a would-be Program petitioner has filed a "civil action" in another court against a vaccine manufacturer or administrator, arising out of the same injury that is the subject of the Program petition. These rules provide that in some such situations, the existence of the civil action may bar the Program petition. The provision relevant here, § 300aa-11(a)(5), states as follows:

(A) A plaintiff who on the effective date of this subpart [October 1, 1988] 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 this part 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.

(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

As has been noted on previous occasions, the language of § 300aa-11(a)(5) is not a model of legislative draftsmanship. But the meaning of its provisions has been considered by the United States Court of Appeals for the Federal Circuit on several occasions. *See Amendola v. Secretary of HHS*, 989 F.2d 1180 (Fed. Cir. 1993); *Weddel v. Secretary of HHS*, 23 F.3d 388 (Fed. Cir. 1994); *Matos v. Secretary of HHS*, 35 F.3d 1549 (Fed. Cir. 1994); *Flowers v. Secretary of HHS*, 49 F.3d 1558 (Fed. Cir. 1995). The Federal Circuit has explained that the two paragraphs of § 300aa-11(a)(5) should be read in reverse, with paragraph (B) setting forth a general rule and paragraph (A) setting forth an exception to, or "escape hatch" from, that rule. *See, e.g., Amendola*, 989 F.2d at 1183, 1184; *Weddel*, 23 F.3d at 393; *Matos*, 35 F.3d at 1552. In particular, the decisions in *Amendola*, *Matos*, and *Weddel* interpret § 300aa-11(a)(5) in the context of situations such as the one in this case, in which a relevant civil action was *pending on October 1, 1988*. In such situations, a would-be Program petitioner *must* comply with the "escape hatch" provision of § 300aa-11(a)(5)(A), *prior* to filing his Program petition. In other words, within two years of October 1, 1988--or before the civil action goes to judgment "on the merits," whichever is sooner--the would-be Program petitioner must petition to have the civil action dismissed without prejudice. Only after that is accomplished, may a Program petition be effectively filed. *Amendola*, 989 F. 2d 1185; *Weddel*, 23 F.3d at 391-92; *Matos, supra*, 35 F.3d at 1552.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. General description of the civil action

In this case, Jamie Vincuilla alleges that he was injured by a DPT vaccination administered on September 9, 1983. On February 15, 1985, Jamie and his parents filed a civil action in the Massachusetts Superior Court against physician Heena Banker and the West Suburban Health Care Plan (hereinafter "W.S.H.C.P"). (Ex. 25; Ex. 26, item no. 1.[(2)]) The complaint alleged that Dr. Banker administered Jamie's vaccination on September 9, 1983, while in the employ of W.S.H.C.P. On April 2, 1985, the Vincuillas amended that complaint to include as an additional defendant the Commonwealth of Massachusetts, which manufactured the vaccine. (Ex. 22; Ex. 26, item no. 3.) Both complaints alleged that Jamie was injured by the DPT vaccination.

B. Efforts of Dr. Banker to have action dismissed as against her, through September 12, 1990

On May 13, 1988, Dr. Banker filed a motion seeking the dismissal of the suit as against her, arguing that

state law gave her immunity from suit because she administered the inoculation as part of a public health program. (Ex. 27A.) Judge Tuttle of the Superior Court filed an opinion on October 19, 1988, agreeing with Dr. Banker's arguments and ordering that summary judgment be granted in her favor. (Exs. 27B and 28.) For reasons that are unclear, however, judgment was *not* entered in compliance with that Order of the judge.[(3)] On December 13, 1988, then, Dr. Banker filed a motion for entry of separate and final judgment in compliance with the October 19 opinion of Judge Tuttle. (Ex. 27D.) This motion was denied, however, for reasons that again are unclear, by Judge Mulligan of the Superior Court on February 7, 1989. (Ex. 27D, p. 1.)

In 1990, Dr. Banker again made efforts to obtain a judgment in her favor. It appears that on February 27, 1990, yet another judge of the Superior Court, Judge Brady, concluded orally that Dr. Banker was entitled to judgment, and instructed the parties to attempt to agree upon the wording of a judgment. (Ex. 27F, p. 1, para. 3.) However, on July 6, 1990, Dr. Banker filed a motion indicating that the parties could not so agree, and asking again that the Court enter judgment. (Ex. 27F.) On September 12, 1990, another judge of the Superior Court, Judge Barbara Rouse, signed an order granting Dr. Banker's request and ordering that "final judgment" be entered in Dr. Banker's favor. (Ex. 27G.[(4)])

C. Additional actions in September of 1990 and thereafter

Meanwhile, in September of 1990, the Vincuillas faced an important decision point in their efforts to obtain compensation for Jamie's allegedly vaccine-related injury. Pursuant to § 300aa-11(a)(5), if they wished to pursue a *Program* claim on Jamie's behalf, they were required to act by October 1, 1990, to dismiss their civil action and file a Program petition. Their decision was to abandon the civil action and pursue the Program claim. Accordingly, they took action in two different ways.

First, with respect to their claim against Dr. Banker, in light of Judge Rouse's order signed on September 12, 1990, the Vincuillas obviously were in imminent danger of having judgment involuntarily entered against them. Their attorney, however, contacted Dr. Banker's counsel, advising that attorney of the Vincuillas' decision to pursue the Program option. (Ex. 29, para. 3.) As a result, on September 24, 1990, an assistant clerk of the Superior Court entered a document entitled "Judgment of Dismissal (Other Than When Issues Decided By Court or Jury)," stating that the suit was dismissed, as to Dr. Banker only, "without prejudice" and "without costs." (Ex. 27H.)

As to the other two defendants, the Vincuillas took a different action. A document was drawn up in which the Vincuillas and the two remaining defendants (W.S.H.C.P. and Massachusetts) stipulated to dismissal of the civil action without prejudice. (Ex. 27I.) This Stipulation was signed by counsel for each of the three parties, with the date of September 25, 1990, appearing above the signature lines. (*Id*. at 3.)

That Stipulation was in fact filed with the Superior Court, but the *date* upon which that filing was accomplished is the subject of dispute in this case. The stamp of the court clerk, on the face of the Stipulation, appears to indicate a filing date of October 11, 1990. (Ex. 27I, p. 1.) Another stamp, at the bottom of the stipulation, states "Judgment Entered on Docket: November 2, 1990." (*Id*.) Further, on the Court's docket sheet, it was originally recorded that the Stipulation was filed on October 11, 1990, and that judgment was entered on November 2, 1990. (Ex. 26, item no. 134.)

Petitioner contends, however, that in fact the Stipulation was taken to the Superior Court on September 27, 1990, and that a Superior Court judge, Judge Rouse, actually reviewed and approved the documents on that day. Petitioner's then-counsel, Michael R. Hugo, has filed an affidavit to that effect in this proceeding. (Hugo Aff. filed 10/25/95.)

In addition, petitioner has supplied documents indicating that in 1995, subsequent to the filing of the respondent's motion to dismiss this Program proceeding, the Vincuillas filed with the Superior Court an "Unopposed Motion to Correct the Docket Sheet." (Ex. 23.) In that motion filed with the Superior Court, the Vincuillas' then-counsel, Mr. Hugo, represented that the Stipulation had in fact been "presented to" the court on September 27, 1990, and that the court "approved" the stipulation on that date. The motion requested that the court "enter nunc pro tunc order to correct the record" and also "order that the docket sheet be corrected to reflect the fact that the Plaintiff's [sic] Stipulation was filed on September 27, 1990." According to another affidavit (see affidavit of John Flynn, filed 10/25/95), that motion was presented on May 3, 1995, to the same judge, Judge Rouse, who had originally approved the Stipulation in 1990. Apparently the judge did not sign any *nunc pro tunc* order or other document, but simply stated in open court on that day (May 3, 1995) "that she recalled the facts of their case and that she was going to allow" the motion to correct the docket sheet. (*Id*.)

Petitioner has also submitted a copy of the Superior Court docket sheet, upon which someone--presumably an employee of the clerk's office at the Superior Court--has crossed out the original judgment entry date of "Nov. 2," and typed in "Sept. 27 (as amended)."

III

DISCUSSION

As explained above, the meaning of § 300aa-11(a)(5) has been clarified by Federal Circuit precedent. *See, Amendola, Matos, Weddel,* and *Flowers, supra*. In particular, the decisions in *Amendola, Matos,* and *Weddel,* interpret § 300aa-11(a)(5) in the context of situations such as the one in this case, in which a relevant civil action was *pending on October 1, 1988*. In such situations, a would-be Program petitioner *must* comply with the "escape hatch" provisions of § 300aa-11(a)(5)(A), *prior* to filing his Program petition. In other words, within two years of October 1, 1988--or before the civil action goes to judgment "on the merits," whichever is sooner--the would-be Program petitioner must petition to have the civil action dismissed without prejudice. Only *after* that is accomplished, may a Program petition be effectively filed. *Amendola,* 989 F.2d at 1185; *Weddel,* 23 F.3d at 391-92; *Matos,* 35 F.3d at 1552.

In this case, the question is whether the Vincuillas complied adequately with the provisions of § 300aa-11(a)(5)(A) prior to the filing of the Program petition in this case on October 1, 1990. I conclude that they did, with respect to *both* their claim against Dr. Banker and their claim against the other defendants in the civil action. Because the procedures utilized varied between the claim against Dr. Banker and the claim against the other defendants, I will divide my discussion accordingly.

A. Claim against Dr. Banker

As to the suit against Dr. Banker, I conclude that the Vincuillas do, in fact, fall within the exception set forth at § 300aa-11(a)(5)(A), because they likely did, *in effect*, "petition to have such action dismissed without prejudice or costs." The affidavit of Mr. Hugo filed as Ex. 29 supports this finding, and even more important support is contained at Ex. 27H, the document that actually embodied the "Judgment of Dismissal."

From that document, I draw the inference that, consistent with Mr. Hugo's affidavit, the Vincuillas' desire that their suit be voluntarily dismissed, as well as Dr. Banker's assent to that request, had been communicated to the Superior Court in some fashion. The key language is the fact that the dismissal was "without prejudice" and "without costs," and was also labeled a dismissal "other than when issues decided by court or jury." (Ex. 27H.) That is, if the judgment had simply amounted to the granting of Dr. Banker's motion based upon the argument that she had immunity, as the respondent seems to argue, then

the dismissal would logically have been *with* prejudice, and certainly would have constituted dismissal *on an issue decided by the court*, rather than dismissal "other than when issues decided by court or jury." The way in which the judgment was worded makes it seem likely that sometime between September 12 and September 24, 1990, the Vincuillas' desire for *voluntary* dismissal *without prejudice* and *without costs* (note that this language tracks the language of § 300aa-11(a)(5)(A)), as well as Dr. Banker's assent to that arrangement,[(5)] was communicated to the court. And this communication to the court amounted, in effect, to a "petition," by the Vincuillas, "to have such action dismissed without prejudice or costs," as required by § 300aa-11(a)(5)(A).

Of course, it can be argued that this was a clumsy and unusual way of obtaining a voluntary dismissal. It would certainly have been much better, for purposes of creating a record with respect to § 300aa-11(a)(5)(A), for the Vincuillas to have filed their own *written petition* for voluntary dismissal with Superior Court. But that is irrelevant. The question before me is whether, *in substance*, the Vincuillas complied with the voluntary dismissal requirement of § 300aa-11(a)(5)(A), and I conclude that they did.

B. Claim against the other defendants

As to the civil action claim against the other two defendants, I conclude, once again, that the Vincuillas in fact complied with § 300aa-11(a)(5)(A). Respondent does not dispute that the "stipulation" contained at Ex. 27I was sufficient to constitute a "petition to have [the civil] action dismissed without prejudice or costs," as required by § 300aa-11(a)(5)(A). The key question, rather, is whether that petition was *timely-filed--i.e.*, filed prior to October 1, 1990. On that issue, of course, the fact that the stipulation was stamped by the Superior Court as filed on October 11, 1990, is strong evidence against the petitioner. But after considering all of the evidence, I find it "more probable than not" that the stipulation *was* in fact presented to Judge Rouse of the Superior Court in open court *on or about September 27, 1990*. I find the affidavit of Mr. Hugo in this regard to be credible, particularly in light of all the circumstances. That is, Mr. Hugo has appeared before me in Program proceedings in many cases, several of those occasions taking place *prior* to September of 1990, and based upon those appearances I have no doubt that he understood the basic requirement of § 300aa-11(a)(5)(A). The fact that the stipulation in question was filed at all also makes that clear. Certainly, then, I would expect that Mr. Hugo would not have failed to get that petition to the Superior Court *prior to October 1, 1990*, as required under § 300aa-11(a)(5)(A).

Moreover, another key piece of evidence on this issue is the Flynn affidavit (filed 10/25/95). That affidavit, which I find to be credible,[(6)] asserts that Judge Rouse of the Superior Court on May 3, 1995, *did remember* the time in 1990 when Mr. Hugo appeared before her to obtain approval of the Stipulation in question. Judge Rouse, based upon her own memory, concluded that the stipulation *had* in fact been presented to her on or about September 27, 1990. And the fact that Judge Rouse so concluded persuades me, too, that the stipulation was presented on or about September 27, 1990.[(7)]

Thus, as previously noted, I conclude that the stipulation was in fact presented to the Superior Court prior to October 1, 1990. Therefore, petitioner has made a successful showing under § 300aa-11(a)(5)(A), as to the other defendants, as well.

One more point should also be made. Respondent has argued that even if the stipulation was in fact *presented* to the Superior Court on September 27, 1990, nevertheless this Program petition must still be dismissed pursuant to subsection (B) of § 300aa-11(a)(5), because the judgment dismissing the action was not formally entered on the docket sheet until November 2, 1990. (*See* Motion to Dismiss filed on September 8, 1995, pp. 6-8.) Respondent seems to argue that subsections (A) and (B) of § 300aa-11(a)(5) provide two *separate* grounds for dismissing a Program petition, and that under subsection (B) a

Program petition can *never* be effectively filed if a civil action is still "pending" *on the date upon which the Program petition was filed*. I conclude that respondent is mistaken on both points.

First, it is now quite clear under the applicable Federal Circuit precedent that subsections (A) and (B) of § 300aa-11(a)(5) are *not* separate provisions providing independent grounds for disqualification of a Program petition. Rather, as explained above, under the applicable Federal Circuit precedent § 300aa-11 (a)(5) is to be read as a *single* provision with two parts, with paragraph (B) setting forth a general rule of dismissal, and paragraph (A) merely providing an *exception* to that rule. *See Amendola*, 989 F.2d at 1183, 1184; *Weddel*, 23 F.3d at 393; *Matos*, 35 F.3d at 1552.

Second, in light of the Federal Circuit's interpretation of § 300aa-11(a)(5), respondent is clearly wrong when she argues that even if a petitioner complied with subsection (A), her petition would still be dismissable under subsection (B) if the civil action in question was still "pending" on the day that the Program petition was filed. This argument disregards the fact that subsection (A) provides an *exception* to the general rule of subsection (B). That is, if a person met all the requirements of subsection (A), his case is *excepted* from the dismissal rule of subsection (B).

Indeed, respondent's argument also ignores the very language of subsection (A), which requires only that by October 1, 1990, a person "*petition* to have such action dismissed." There is no requirement that the court in question actually have *acted upon* the "petition" prior to October 1, 1990. The only requirement is that the person have "petitioned" the court for the dismissal. This distinction makes sense, of course, since a civil action litigant has control only as to when he *petitions--i.e., requests*--that his claim be dismissed; he has no control over how long it takes for a court *to act* on that motion.

In this case, I have concluded as a matter of fact that the stipulation in question was *presented* to Judge Rouse of the Superior Court prior to October 1, 1990. That is all that matters. Upon making that presentation, the Vincuillas had effectively "petitioned" the court to have their civil action dismissed without prejudice or costs. It does not matter, therefore, if the case is considered not to have actually been dismissed until November 2, 1990. The Vincuillas complied with the requirement of subsection (A) of § 300aa-11(a)(5), so therefore they are *excepted* from the dismissal rule of subsection (B).[(8)]

IV

CONCLUSION

For the reasons set forth above, respondent's motion to dismiss this case pursuant to § 300aa-11(a)(5) is hereby denied. Therefore, respondent shall have 45 days, from the date of this Ruling, in which to file an expert report if respondent seeks to oppose an "entitlement" ruling in this case.

George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*.

(1994 ed.). Hereinafter, all "§" references will be to 42 U.S.C. (1994 ed.).

2. The evidence relevant to this dismissal motion is chiefly contained in petitioner's exhibits numbered 22 through 30, filed in this Program proceeding at various times between March 24, 1995, and December 15, 1997. I note that Ex. 26, a copy of the docket sheet for the civil action in the Massachusetts Superior Court, contains an "item number" next to most entries; when I refer to Ex. 26, then, I will specify the "item no." to which I am referring.

3. On November 4, 1988, the Vincuillas filed a "Notice of Appeal" from the judge's October 19 decision (*see* Ex. 27C), but that Notice apparently was void and ineffective, since judgment had not been entered.

4. That order, signed September 12, 1990, seems to have been noted on the court's docket sheet on September 17, 1990. *See* Ex. 26, item no. 132A.

5. It seems likely that Dr. Banker assented to this form of dismissal, though she seemed to be on the verge of otherwise obtaining an *involuntary* dismissal, in order to ensure that no appeal was filed.

6. I find that affidavit to be credible for a number of reasons. First, I have no reason to believe that the affiant would lie about this matter. Second, it is consistent with the typewritten amendment of the Superior Court docket sheet on which the judgment date of Nov. 2, 1990, has been stricken and the words "Sept. 27, as amended" were added. (See Ex. 26, item no. 134.) I infer that Judge Rouse or someone on her staff caused the clerk's office to make that change on the docket sheet, after the proceedings of May 3, 1995, as described in the Flynn affidavit. (Further, I presume that Ex. 26 is a true copy of the docket sheet in question, both because I have no reason to believe that petitioner's counsel would submit a fraudulent exhibit, and also because if respondent's counsel had questioned the accuracy of that document, respondent's counsel easily could have checked the original Superior Court docket sheet to see whether an accurate copy had been filed.)

7. It is reasonable to wonder *why*, if the petition was in fact presented to Judge Rouse prior to October 1, 1990, it was stamped as "filed" with the date of October 11, 1990. (Ex. 27I, p. 1.) I cannot be sure on this point, of course, but it is significant that Judge Rouse herself was willing to conclude that the document was presented to her on September 27 despite that stamp. Further, my own review of the Superior Court record in this case indicates that during that general time period there may have been a routine time lag, as sometimes happens in busy trial courts, between the time that a document was presented to the court and the time when that document was stamped and/or recorded on the docket sheet. (For example, Judge Rouse signed an order on September 12, 1990 (Ex. 27G), but that order was recorded in the docket sheet on September 17, 1990 (Ex. 26, item no. 132A).)

8. It should also be noted that this case is *not* analogous to the situation in *Matos*, 35 F.3d 1549. In *Matos*, there was no question that the petitioner had *not* acted prior to October 1, 1990, in order to have his civil action dismissed, but still later he obtained from the state court an order purporting to dismiss his civil action *retroactively* as of a date prior to October 1, 1990. The Federal Circuit in *Matos* found the state court's purported retroactive order to be of no relevance; the petitioner's Program petition still was properly dismissed under § 300aa-11(a)(5), because he had *not in fact* acted prior to October 1, 1990, seeking dismissal.

Here, quite obviously, the situation is different. When the Vincuillas went back to Judge Rouse of the Superior Court in 1995, they were *not* asking her to retroactively dismiss their civil action. They were simply seeking her *confirmation* of their factual allegation that they had in fact *presented* the stipulation for voluntary dismissal to her *prior* to October 1, 1990. They were merely asking her, in effect, to

correct the Superior Court record, to make that record reflect the facts that *actually happened* in 1990. The result here, therefore, is not contrary to the ruling in *Matos*.