**OFFICE OF SPECIAL MASTERS**

**No. 90-3318V**

**(Filed: October 3, 1997)**

| | | |
|---|---|---|
| * * * * * * * * * * * * * * * * * * * * * * * * * * * * | | |
| JANA HESTON, by and through her natural mother and guardian/conservator, DARCY C. HESTON, | * | |
| Petitioner, | * | **TO BE PUBLISHED** |
| v. | * | |
| SECRETARY OF HEALTH AND HUMAN SERVICES, | * | |
| Respondent. | * | |
| * * * * * * * * * * * * * * * * * * * * * * * * * * * * | | |

William P. Ronan, Overland Park, Kansas, for petitioner.

Robert T. Murphy, Department of Justice, Washington, D.C., for respondent.

**DECISION (ATTORNEYS' FEES)**

**HASTINGS, Special Master.**

In this case under the National Vaccine Injury Compensation Program[(1)] (hereinafter "the Program"), an award for attorneys' fees and costs, incurred in the unsuccessful attempt to obtain Program compensation in this case, is being sought pursuant to § 300aa-15(e)(1). Respondent has not argued that an award is inappropriate, but has challenged the amount claimed in one respect. Further, a significant issue has arisen concerning whether I have discretion to order that the award be paid *directly to counsel*, rather than to the petitioner herself. I will discuss separately the various issues in this case in the following sections of this brief.

**I**

## ELIGIBILITY FOR AN AWARD

Pursuant to § 300aa-15(b) and (e)(1), the special master may make an award of attorneys' fees and costs even when, as in this case, the petitioner is not found to qualify for a substantive Program award, if the petition was filed in "good faith" and upon a "reasonable basis."

In this case, respondent does *not* dispute that there existed a "reasonable basis" for petitioner's claim for a Program award, and that the petition was filed in good faith. After my own review of the file, I conclude that the petition was filed in good faith, and also that there existed a reasonable basis for the filing of petitioner's claim. Further, although the respondent has not contested these conclusions, in light of the unusual circumstances of this case, I will set forth below the facts leading to those conclusions, along with the history of how the petition came to be dismissed despite the reasonable efforts of petitioner's counsel.

The petitioner, Darcy Heston, is the mother of the injured party, Jana Heston.[(2)] It is undisputed that Jana received a DPT (diphtheria, pertussis, tetanus) immunization on May 18, 1967, and soon thereafter (by June 3, 1967, at the latest) manifested a seizure disorder and an encephalopathy, two injuries listed as "Table Injuries" with respect to the DPT inoculation. (See § 300aa-14(a)(I)(B) and (D).) Further, the petitioner remembered that shortly after the inoculation on May 18, Jana manifested certain symptoms, including crying, lethargy, and reduced responsiveness. (See petitioner's affidavit filed with the petition.) On the basis of these facts and the allegations of petitioner, petitioner's counsel, Mr. Ronan, filed the Program petition on petitioner's behalf, in the hope that respondent's medical advisers would find the symptoms on the day of the inoculation to constitute the first symptoms of Jana's seizure disorder and/or encephalopathy, which would qualify Jana for a Program award. I conclude that, in light of the relatively close temporal connection between the inoculation on May 18 and the clear neurological problems that were manifested by June 3, coupled with the symptoms remembered by petitioner as having occurred immediately after the inoculation, this petition was filed in good faith and with a reasonable basis in fact.

Respondent's medical advisers, however, ultimately did not view Jana's case as petitioner had hoped. They did not find the post-inoculation symptoms described by petitioner to have been connected to Jana's seizure disorder or encephalopathy. Accordingly, respondent recommended that compensation be denied. (*See* Respondent's Report, filed Aug. 1, 1995.)

In light of respondent's position, a "Rule 5" status conference (*see* Rules of the United States Court of Federal Claims, Appendix J, Rule 5) was held on September 21, 1995. At that conference, I explained to Mr. Ronan that pursuant to § 300aa-13(a)(1), to gain an award, petitioner would have to demonstrate a connection between Jana's alleged initial post-inoculation symptoms and her subsequent neurological disorder, by supplying either medical records or medical opinion. (*See* my Order filed on September 22, 1995.) Mr. Ronan explained that no such medical records existed, and that efforts to find a medical expert who could provide an opinion supporting the case had already been made, but had been fruitless. He also noted that for a number of months he had been unable to get the petitioner to communicate with him. He stated that he would make one more effort to communicate with his client, and then would seek to either make an additional effort to gain an expert opinion or to have his client voluntarily dismiss the petition. Mr. Ronan explained, however, that if he was unable to contact the petitioner he would be unable to gain authorization for a voluntary dismissal, even if there were no prospect for expert assistance. I responded that in such circumstances, if petitioner failed either to supply an expert opinion or to voluntarily dismiss her case, I would be required to dismiss the petition for failure to prosecute the

case.

Following that "Rule 5 conference," I issued on September 22, 1995, an Order affording petitioner the additional 30 days that Mr. Ronan requested at the conference, in which to file an expert opinion or to explain why granting more time might result in such an expert opinion. Mr. Ronan attempted to contact the petitioner, but received no response. (See Ex. L attached to the Ronan Affidavit filed on July 19, 1996.) Therefore, no response was filed with the court on behalf of petitioner within the time allotted, and, accordingly, on December 5, 1995, I dismissed the petition.

Accordingly, in these unusual circumstances, I find that the dismissal of the petition for failure to prosecute did *not* reflect negatively on Mr. Ronan. Mr. Ronan was in a position where he could obtain from the petitioner neither her authority to voluntarily dismiss the case, nor her cooperation in attempting to prove the claim. He therefore had no other viable option but to stand by as I dismissed the case.

## II

## AMOUNT OF THE AWARD

I have inspected and considered all aspects of the claim, and find that the amount requested is reasonable and appropriate, except in one respect. The one controversial aspect of the claim[(3)] arises from the fact that Mr. Ronan seeks $150 per hour for his time in this case, but respondent argues that I should allow only $125 per hour.

### *A. Background case law*

The Supreme Court has set forth guidelines that apply to the calculation of attorneys' fees awarded by statute. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hensley v. Eckerhart*, 461

U.S. 424, 429-40 (1983).[(4)] Under that Court's adopted approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.[(5)]

The reasonable hourly rate is "the prevailing market rate in the relevant community" for similar services by lawyers of comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is "inherently difficult." *Id*. at 895 n.11. In light of this difficulty, the Court gave broad discretion to the courts to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id*. at 896 n.11. The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id*.

### *B. Resolution here*

In his affidavit filed on July 19, 1996, Mr. Ronan explains that in recent years, of his time billed at hourly rates, 60% has been billed at $125 per hour and 40% at $150 per hour. Further, I note that the tasks performed in this particular case do not seem to have necessitated the use of the full range of skills of an attorney charging $150 per hour. Under these circumstances, I find $125 per hour to be a reasonable rate of reimbursement for Mr. Ronan's services.

## III

## ISSUE OF TO WHOM PAYMENT SHALL BE MADE

### *A. Introduction*

The primary issue in this case concerns the check for the fees and costs in this case: Should it be made payable to petitioner's counsel, as that counsel requests, or jointly to that counsel and his client, as respondent requests?

The argument of petitioner's counsel on this point relies chiefly upon the practicalities of the situation. Counsel raises a very strong argument to the effect that this case presents a highly unusual situation, in which it would be fruitless and absurd to have the check be made payable jointly to the petitioner as well as counsel. First of all, it is clear that the funds in question as a practical matter are due to Mr. Ronan, not the petitioner. Most of the funds are compensation for his time spent on the case. The remainder are for cost expenditures that came out of Mr. Ronan's pocket, not the petitioner's. Therefore, there is no *practical* reason why the funds need to go through the petitioner as a conduit on their way to Mr. Ronan, the intended recipient.

Secondly, it seems clear that to make out the check jointly to the petitioner would make it extremely unlikely that Mr. Ronan would ever actually receive the funds due him. The fact is that the petitioner seems at this point to be completely uncooperative and unwilling to communicate with Mr. Ronan in any way. In this regard, the record shows that since early 1991, Mr. Ronan has made many efforts to gain cooperation and assistance from the petitioner in pursuing the claim, but has met with virtually no cooperation. (*See* particularly the Ronan Affidavit filed on July 19, 1996, along with the exhibits attached thereto.) On two occasions (May 31, 1994, and July 21, 1994), Mr. Ronan or his staff were able to gain telephone contact with petitioner, but the petitioner never otherwise cooperated. After July of 1994, the petitioner failed completely to respond to numerous communications by letter, including communications via "certified mail/return receipt requested," the receipts of which indicated that petitioner had in fact received the letters of Mr. Ronan. Petitioner failed even to provide Mr. Ronan with her correct telephone number, after communication via the phone numbers previously provided to Mr. Ronan's office no longer was successful after July 21, 1994.

In these circumstances, Mr. Ronan clearly had no option but to allow the petition to be involuntarily dismissed, as it was. And, more importantly to the issue here, these facts make it seem extremely unlikely that if a check for attorneys' fees and costs were made out jointly to the petitioner and Mr. Ronan, the petitioner would in fact endorse it so that Mr. Ronan could collect his rightful compensation and reimbursement for costs expended.

In the face of these very practical and compelling arguments of petitioner's counsel, respondent raises strictly a legal argument. Respondent argues that as a matter of law the statute in question does not permit "direct payment" to counsel of an award for fees and costs. Respondent points to the fact that where, as here, the case concerns a vaccination administered prior to October 1, 1988, the general provision for compensation to a Program petitioner states that--

[c]ompensation awarded under the Program to a *petitioner* under section 300aa-11 of this title for a vaccine-related injury or death * * * *may include* * * * an amount, not to exceed a combined total of

$30,000, for--(1) lost earnings * * * (2) pain and suffering * * *, and (3) *reasonable attorneys' fees and costs*.

§ 300aa-15(b) (emphasis added).[(6)] Respondent further notes that the section specifically applicable to attorneys' fees and costs contains the following language:

In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award *as part of such compensation* an amount to cover--(A) reasonable attorneys' fees, and (B) other costs, incurred in any proceeding on such petition.

§ 300aa-15(e)(1) (emphasis added). Respondent, thus, relies upon the fact that under the language of § 300aa-15(b), Program "compensation" is said to be awarded "to a petitioner," and that under § 300aa-15(e)(1), an award for fees and costs is said to be made "as part of such compensation." Accordingly, argues respondent, an award of fees and costs, as part of the compensation that under § 300aa-15(b) is to go " to the petitioner," must be made payable to the *petitioner*, not her counsel.

***B. Discussion***

Given the unusual facts of this case--*i.e.*, the apparent unwillingness of the petitioner even to communicate with her counsel--I find it clear that *if* I have *discretion* concerning whether to direct a check to the petitioner or to her counsel, there is no doubt in my mind that it would be proper in these circumstances to direct the check to counsel. The real question, rather, is whether I have such discretion. Petitioner's counsel argues that I do, the respondent that I do not. I have found no published precedent on this issue under the Program. I find this to be a close question, but in the final analysis, I conclude that I do have such discretion.

***1. The statutory language***

To be sure, at first glance the respondent's analysis of the statutory language itself does have some appeal. It is true that the general compensation provision of § 300aa-15(b) states that "compensation" is awarded "to a petitioner," and adds that such compensation "may include" an award of attorneys' fees and costs. One could, indeed, possibly infer from that language that all Program "compensation" must be directed to a "petitioner." On the other hand, however, there are other aspects of the statutory language that respondent ignores.

The main problem with respondent's analysis is that it relies basically upon the *general* compensation provision of § 300aa-15(b), rather than the *specific attorneys' fees* provision of § 300aa-15(e)(1). The former section, of course, does specifically state that compensation, in general, is to be "awarded to a petitioner." That much is hardly surprising--to whom else would Program compensation, in general, be directed? Importantly, however, *no* such "awarded * * * to a petitioner" language appears at the *specific attorneys' fees subsection*, § 300aa-15(e)(1). Rather, the first sentence of § 300aa-15(e)(1) simply states, in pertinent part, that "the special master or court shall also award * * * an amount to cover" attorneys' fees and costs. That sentence does *not* contain the phrase "to a petitioner;" it simply does not specify *to whom* the award shall be made. Moreover, it is the *second* sentence of § 300aa-15(e)(1) that is most specifically applicable here. That sentence states as follows:

If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis

for the claim for which the petitioner was brought.

§ 300aa-15(e)(1). This sentence, thus, is the specific provision authorizing an award of fees and costs where, as here, the injured party did *not* turn out to qualify for *general* Program compensation--*i.e.*, for what I will hereinafter term "compensatory damages" in order to distinguish it from an award for attorneys' fees and costs.[(7)] And this sentence, too, like the first sentence of § 300aa-15(e)(1), does not contain the "to a petitioner" language, nor otherwise specify *to whom* such an award is to be made. Given this lack of specific direction, one could infer that discretion was being left to the special master or judge as *to whom* to direct the award. And in this controversy concerning an award of attorneys' fees and costs, a strong argument can be made that the *specific* statutory attorneys' fees provision of § 300aa-15(e)(1) would seem to take precedence over the *general* compensation provision of § 300aa-15(b). See, *e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (*citing Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987)) ("[i]t is a commonplace of statutory construction that the specific governs the general").

Moreover, it is highly relevant here that a very similar semantic argument of respondent, based upon the confusing use of the word "compensation" in the Vaccine Act, was squarely rejected by the United States Court of Appeals for the Federal Circuit in *Saunders v. Secretary of HHS*, 25 F.3d 1031, 1035 n. 6 (Fed. Cir. 1994). The *Saunders* court held that Congress intended a *fundamental distinction* between an award of "compensatory damages" for a petitioner's injury or death, on the one hand, and an award for attorneys' fees and costs on the other. *Id*. at 1034-36 and n. 6. The existence of this fundamental distinction adds credence to the argument of petitioner's counsel here that the fact that under § 300aa-15 (b), Program general compensatory damages are to be awarded "to a petitioner" does *not* necessarily mean that the analytically distinct award for *attorneys' fees and costs* also must automatically also go only "to the petitioner."

In short, in my view the most important aspect of the statutory language is that in the *specific* provision, § 300aa-15(e)(1), neither of the two sentences states that a fees and costs award is to be made "to a petitioner," but instead each sentence leaves it unstated as *to whom* such an award should be directed. This circumstance suggests that the special master or judge making such an award has discretion as *to whom* to direct the award, as between the logical potential recipients--*i.e.*, the petitioner or the counsel. Indeed, in interpreting other parts of the statute governing the Program, the respondent has argued that similarly ambiguous statutory provisions imply that the special master has discretion. For example, § 300aa-15(f)(4) states that a special master may order that Program compensation funds be used to purchase an annuity. When petitioners have argued that this allows a special master only to order a *petitioner* to purchase an annuity, respondent has argued that the somewhat ambiguous language of that statutory subsection should be viewed as giving a special master *discretion* to order the *respondent* to purchase the annuity, where appropriate. See, *e.g.*, *Anghel v. Secretary of HHS*, No. 90-210V, 1991 WL 211867, at *33 (Cl. Ct. Spec. Mstr. Oct. 31, 1991). It seems to me that the same type of logic argues in favor of a construction of § 300aa-15(e)(1) that similarly affords the special master *discretion* in determining, according to the circumstances of the case, whether a fees and costs award should be made payable to the petitioner or to counsel or to both.

Finally, with regard to the statutory language, it is interesting that respondent concedes in this very case, as she has for years in Program cases, that a special master has discretion to order that an award for fees and costs be made payable *jointly* to a petitioner *and* counsel, rather than simply to the petitioner alone. But this position seems inconsistent with respondent's chief argument in this case, *i.e.*, her dependence upon the language of § 300aa-15(b) stating that compensation is awarded "to a petitioner." If respondent's theory is correct, why doesn't the "to a petitioner" language of § 300aa-15(b) *also* forbid making a fees award payable *jointly* to counsel along with a petitioner? Respondent does not explain this

inconsistency in her position.

***2. Case law under other federal fee-shifting provisions***

In addition to the Program statute, of course, there also exist a number of other federal statutes under which a party may be awarded, by the court, an amount for his attorneys' fees and costs in a lawsuit, to be paid by the government or another adversarial party to the suit. I have examined the case law under these statutes, to see if any assistance on the issue here can be gained. Of those statutes, a few have in fact generated precedent that is of at least some relevance. I will first summarize below those precedents, as well as certain related cases, and then analyze them for potential assistance here.

***a. Statutes in which the statutory language does not specify***

***to whom the award is to be made***

A few federal fee-shifting statutes contain language that, like the language of § 300aa-15(e)(1) at issue here, states only that an amount may be awarded for attorneys' fees and costs, but does not specify *to whom* such an award may be made. In all of the handful of court decisions that I have found interpreting such statutes, the courts have concluded that such awards either *must* be made payable, or at least *may* be made payable, directly to the attorney involved.

One example--of special relevance here, as will be seen--concerns the attorneys' fee award available under the Civil Service Retirement Act, which states that the Merit Systems Protection Board "may require payment by the agency involved of reasonable attorney fees incurred by an employee." 5 U.S.C. § 7701(g)(1) (1982). Courts construing that statute, most notably the United States Court of Appeals for the Federal Circuit, have held that the attorneys' fee award should be paid to the *attorney* involved, not the client. *Jensen v. Department of Transportation*, 858 F.2d 721, 722-23 (Fed. Cir. 1988); *Blessin v. Department of Navy*, 26 M.S.P.R. 615, 617 (M.S.P.B. 1985).

The same result was reached with respect to the fee-shifting provision of another federal statute, the Fair Labor Standards Act, which provides that "[t]he court * * * shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant * * *." 29 U.S.C. § 216(b) . In *Rodriguez v. Taylor*, 569 F.2d 1231, 1244 (3d Cir. 1977), the Third Circuit observed that this provision "mandate[s] awards to successful plaintiffs," but also held that "since the object of the fee awards is not to provide a windfall to individual plaintiffs, fee awards must *accrue to counsel*." *Id.* at 1245.

***b. Fees awards under "private Attorney General" doctrine***

In addition, a similar result has been reached by at least two federal courts under a general equitable principle, rather than a statute, that is used as a fee-shifting device in some cases. Under the so-called "private Attorney General" doctrine, when the outcome of a particular federal case has been found to have been of great benefit to the public interest, a federal court may shift some or all of the fees of the prevailing plaintiff to the defendant, in the general interest of encouraging such public-spirited litigation. (8) In *Wilderness Society v. Morton*, 495 F. 2d 1026 (D.C. Cir. 1974), rev'd on other grounds *sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), such an award of fees, to be paid by the defendant, was made by the court. The issue then, became whether the award should be paid to the plaintiffs in the action or to their counsel. The court decided that the award should be made directly to the *counsel*, since the basic purpose of the award was to encourage *attorneys* to participate in similar cases in the future. *Id.* at 1037.

Similarly, in *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1994), an attorneys' fee award was also made under the "private Attorney General" doctrine, and the court added that "of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant." *Id.* at 889. The "organization providing the services" was the American Civil Liberties Union, which had provided the legal representation. See also *Central R.R. and Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885), in which the Supreme Court directed that an attorneys' fees award, also made in a non-statutory setting, be paid directly to counsel.[(9)]

***c. Statutes in which the statutory language states that an***

***award shall be made "to the prevailing party," or uses***

***similar phrasing***

Other federal fee-shifting statutes, on the other hand, do contain language relevant to the issue of *to whom* the award is to be made. These statutes generally state that an award may be made "to the prevailing party" or "to the plaintiff," or that the court "may allow the prevailing party" an amount for his fees and costs. Thus, these statutes on their face indicate that the award is, at least nominally, made to the party, rather than to counsel. Based upon a strict interpretation of such language, a number of courts have interpreted these statutes to preclude any discretion by the court to make payment directly to counsel. At the same time, however, a number of other courts have concluded, even in the face of such statutory language, that an award may, or even should, be made directly to counsel. I will discuss both those groups of decisions, in turn.

***(i) Cases declining to award payments to attorneys***

As noted above, a number of courts have interpreted the specific language of federal fee-shifting statutes to preclude payment of an award directly to counsel. For example, one fee-shifting provision, which was enacted as part of the Equal Access to Justice Act (EAJA), contains a provision that "[a]n agency that conducts an adversary adjudication shall award, *to a prevailing party* other than the United States, fees and other expenses incurred by that party in connection with that proceeding * * *." 5 U.S.C. § 504(a)(1), emphasis added. Interpreting that statute, the United States Court of Appeals for the Federal Circuit declined to make an award directly to an attorney, stating that "under the language of the statute, the prevailing party, and not its attorney, is entitled to receive the fee award." *FDL Technologies v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992).

Similarly, another fee-shifting provision, also part of the EAJA,[(10)] states that "a court shall award *to a prevailing party* other than the United States fees and other expenses * * *." 28 U.S.C. § 2412(d)(1)(A), emphasis added. In commenting upon that provision, the Federal Circuit, as in *FDL Technologies*, concentrated on the specific phraseology of the Act: "As the statute requires, any fee award is made to the 'prevailing party,' not the attorney. Thus, [the prevailing party's] attorney could not directly claim or be entitled to the award. It had to be requested on behalf of the party." *Phillips v. GSA*, 924 F.2d 1577, 1582 (Fed. Cir. 1991). Other courts have indicated the same analysis in other cases arising under that same EAJA statute. *See Oguachuba v. INS*, 706 F.2d 93, 97 (2nd Cir. 1983); *United States v. McPeck*, 910 F.2d 509, 513 (8th Cir. 1990); *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1510-12 (11th Cir. 1988).[(11)]

Another decision indicating a similar analysis was *Smith v. South Side Loan Co.*, 567 F.2d 306 (5th Cir. 1978). That case involved the Truth in Lending Act, which states that "[a]ny creditor who fails to

comply with any requirement imposed under this part * * * with respect to any person is liable *to such person* in an amount equal to the sum of * * * the costs of the action, together with a reasonable attorney's fee * * *." 15 U.S.C. § 1640(a), emphasis added. In *Smith*, the court observed that under this statutory language making the creditors liable specifically "to such person" against whom the creditor's misconduct was directed, an attorneys' fee award "is the right of the party suing and not the attorney representing him." *Id.* at 307. A similar ruling under the Truth in Lending Act was reached in *Freeman v. B & B Associates*, 790 F.2d 145, 149 (D.C. Cir. 1986).

Finally, the statute of this sort that has generated the greatest number of published decisions is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The relevant portion of that Act states that:

In any action or proceeeding to enforce a provision of * * * [the civil rights statutes], the court, in its discretion, *may allow the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (Supp. IV 1980), emphasis added. Interpreting § 1988, a number of courts have indicated that because the statutory language specified that the court "may allow *the prevailing party*" (emphasis added) an amount for attorneys' fees, such an award therefore must go to the party, rather than counsel. *See, e.g., White v. New Hampshire Dept. of Employment Sec.*, 629 F.2d 697, 703 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Brown v. General Motors Corp.*, 722 F.2d 1009 (2nd Cir. 1983); *Jonas v. Stack*, 758 F.2d 567, 570 n.7 (11th Cir. 1985); *Collins v. Romer*, 962 F.2d 1508, 1516 (10th Cir. 1992); *see also Midnight Sessions Ltd. v. Philadelphia*, 755 F. Supp. 652, 662 (E.D. Pa. 1991); *Richards v. Reed*, 611 F.2d 545, 546 n.2 (5th Cir. 1980); *Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir. 1986).

***(ii) Cases authorizing payments directly to attorneys***

On the other hand, a number of federal court opinions have specifically approved the payment of attorneys' fees directly to the attorneys under these very same statutes. For example, with respect to the Truth in Lending Act, quoted above, a panel of the Fifth Circuit (in seeming conflict with the reasoning of another Fifth Circuit panel in *Smith v. South Side Loan*, *supra*) approved the payment of fees directly to counsel. In *Carr v. Blazer Fin. Servs.*, 598 F. 2d 1368 (5th Cir. 1979), that court stated that "the trial court * * * [has] discretion to develop an appropriate mechanism by which the attorney could be paid. The method chosen here, the direct payment of fees to plaintiff's attorney, does not constitute an abuse of discretion." *Id*. at 1370. (See also a similar indication in *Plant v. Blazer Fin. Servs., Inc.*, 598 F.2d 1357, 1366 (5th Cir. 1979), a case which was a companion to *Carr*.) Subsequently, the same result was reached under the Truth in Lending Act by the Eleventh Circuit, which stated that "we find that it is the attorney who is entitled to fee awards in a TILA case, not the client." *James v. Home Constr. Co. of Mobile*, 689 F.2d 1357, 1358 (11th Cir. 1982).

Similarly, decisions have authorized payment of awards directly to counsel under the Civil Rights Attorney's Fees Awards Act of 1976, also quoted above. *See Shadis v. Beal*, 692 F.2d 924 (3rd Cir. 1982); *Dennis v. Chang*, 611 F.2d 302, 1309 (9th Cir. 1980). In the latter case, the Ninth Circuit stated that while it recognized that the district court's original direction of the fees award to the *plaintiffs* was "consistent with the statutory language authorizing a fee award to the 'prevailing party,' nevertheless to avoid a windfall the award should be made *to the organization that provided the legal services*." *Id.* at 1309, emphasis added; *see also Regalado v. Johnson*, 79 F.R.D. 447, 451 (N.D. Ill. 1978) (suggesting that an attorneys' fee award under § 1988 is the right of counsel).[(12)]

Another decision in a similar vein involves an attorneys' fees provision of the Fair Housing Act (FHA), which stated that "[t]he court * * * may award *to the plaintiff* actual damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff." 42 U.S.C. § 3612(c), emphasis added. [(13)] In *Hairston v. R&R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975), the Seventh Circuit concluded that a fees award under the FHA should go "directly to the [legal aid] organization providing the [legal] services," rather than the plaintiff. Similarly, in two cases under the Equal Access to Justice Act, fees awards were directed to be made directly to the counsel involved. *Grand Boulevard Improvement Ass'n v. City of Chicago*, 553 F. Supp. 1154, 1169 (N.D. Ill. 1982); *Wedra v. Thomas*, 623 F. Supp. 272, 278 (S.D.N.Y. 1985). In the latter case, the court added that it would be "foolish, if not imprudent" to pay the award of attorney fees to the prison inmates who were the prevailing parties. *Id*.

In addition to these cases, it is also noteworthy that there even exists one court of appeals opinion that seems to come out simultaneously on *both* sides of the issue. That is, in *Turner v. Secretary of Air Force*, 944 F.2d 804 (11th Cir. 1991), the court was interpreting 42 U.S.C. § 200e-5(k), under which the court "may allow *the prevailing party*" (emphasis added) an attorneys' fees award. In *Turner*, the court first articulated the rule set forth in such cases as *FDL Technologies* and *Brown v. General Motors, supra--i.e.*, that the award is to be made to the prevailing party, not the party's counsel. *Id.* at 807-08. The court then added a footnote, however, stating as follows:

This does not mean that fees may *never* be distributed directly to the attorney for the prevailing party. In some circumstances, any other method of disbursing attorneys' fees would be impractical.

*Id.* at 808 n.4, emphasis in original.[(14)]

***(iii) Supreme Court decisions***

Two Supreme Court opinions, while not precisely on point, have perhaps added some weight to the conclusion reached by the group of decisions discussed in part III(B)(2)(B)(i) above--*i.e.*, those *declining* to award fees directly to counsel based upon the "prevailing party" statutory language. First, in *Evans v. Jeff D.*, 475 U.S. 717 (1986), civil rights plaintiffs had reached a settlement of their underlying claim in which they explicitly waived their right to attorneys' fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C., § 1988. The district court then denied a subsequent motion of plaintiffs' *counsel* for an award under that Act. The Supreme Court affirmed that ruling, rejecting the legal contention that a civil rights settlement waiving a fees award should never be approved. In so ruling, the court noted:

The language of the Act, as well as its legislative history, indicates that Congress bestowed on the "prevailing party" (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions. * * * Thus, * * * it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable * * *.

*Id*. at 730-32. In a later case, *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990), the Supreme Court ruled that § 1988 does not invalidate contingent fee contracts that would require a prevailing plaintiff to pay his attorney more than the amount that was awarded under § 1988. In so holding, the court stated that "[s]ection 1988 makes the *prevailing party* eligible for a discretionary award of attorney's fees. * * *. [I]t is the party, rather than the lawyer, who is so eligible * * *." *Id*. at 87, emphasis added.

***(iv) The Lewis decision***

Another recent decision relevant here is *United States v. Jerry M. Lewis Truck Parts*, 89 F.3d 574 (9th Cir. 1996), a thoughtful opinion in which the court attempted to reconcile the conflicting cases set forth

above. *Lewis* involved yet another federal fee-shifting statute, 31 U.S.C. § 3730(d)(1) of the False Claims Act, in which the statutory language, interpreted literally, seemed to give the prevailing *plaintiff*, rather than counsel, the right to an award for his attorneys' fees and costs.[(15)] The *Lewis* court directly confronted the conundrum raised by such fee-shifting statutes, in nominally awarding the right to obtain a fees award to the *prevailing party*, when in fact all agree that the person who should ultimately receive the amount awarded is the *attorney* who provided the legal services. The court concluded that while only the party has the "right" or "power" to *request* that a fees award be made under the statute, once that right or power is exercised--simply via a request that funds be awarded--a right to *receive* the funds is thereby created *in the attorney*, and the award should therefore be paid directly to the attorney.

***c. Analysis***

Obviously, the cases cited above take many different and confusing turns. Ironically, however, the precedent applicable to *this* case turns out, in my view, to be relatively clear. As I noted above, the fee-shifting statutes can be divided into those that specify *to whom* the award is made--typically, to the "prevailing party"--and those that do not so specify. And as to the latter statutes, the case law, though limited, seems to be *unanimous* in permitting (or even requiring) an award to be made *directly to the attorney*. See the cases set forth at p. 8, *supra*. And that lesson is particularly clear in the jurisprudence of the Federal Circuit, whose rulings are binding precedent in this court, in the form of the decisions in *Jensen* and *FDL Technologies*, *supra*. In *Jensen*, the Federal Circuit made it clear that when the fee-shifting provision does not contain restrictive language such as "to the prevailing party," it *is* appropriate for a court to make payment of a fees award directly to counsel. 858 F.2d at 722-23. And *FDL Technologies* reinforced the teaching of

*Jensen*, explaining that the difference in language between the two fee-shifting provisions at issue in the two cases--*i.e.*, the statute at issue in *FDL Technologies* contained "to the prevailing party" language, while the provison at issue in *Jensen* did not--compelled the different results in the two cases. *FDL Technologies*, 967 F. 2d at 1581.

Accordingly, the key question in this case becomes whether the statutory language at issue here is of the type at issue in *Jessen* or of the type at issue in *FDL Technologies*. And if one looks directly at the language of the statutory subsection *specifically* granting the authority to award amounts for attorneys' fees and costs, § 300aa-15(e)(1), the clear answer is that this is a *Jensen* type fee-shifting provision. That is, as detailed at pp. 6-7, *supra*, both of the pertinent sentences of § 300aa-15(e)(1) do *not* specify *to whom* such an award is to be made. Therefore, it is clear that if one looks at the language of § 300aa-15 (e)(1) as the relevant statutory language, then under the precedent of *Jensen* and *FDL Technologies*, it is perfectly appropriate to direct the award in this case directly to petitioner's counsel.

That, however, does not end the discussion. As explained above, respondent points not to the language of § 300aa-15(e)(1), but to the *general* compensation provision of § 300aa-15(b), which states broadly that Program compensation is to be awarded "to a petitioner." But I cannot agree with respondent that one should compare the *general* compensation provision of § 300aa-15(b) to the very specific *attorneys' fees* provisions at issue in *Jensen* and the similar cases. For example, in *Jensen*, the court looked to the specific language of 5 U.S.C. § 7701(g)(1), which is the *attorneys' fees provision* of the Civil Service Reform Act. 858 F. 2d at 723. It did not look to the language of the *general damages* provision of the Civil Service Reform Act. Analgously, in this case it makes sense to look to the language of the *specific attorneys' fees provision* of § 300aa-15(e)(1), rather than the general damages provision of § 300aa-15 (b).

Therefore, I conclude that applying the binding precedent of *Jensen* and *FDL Technologies* to this case

produces a clear-cut result. As those cases indicate, I must look to the actual language of the *specific attorneys' fees provision*, in this case § 300aa-15(e)(1). And because § 300aa-15(e)(1) does not contain a specification as *to whom* the award should go, under *Jensen* and *FDL Technologies* I have discretion to make an award payable directly to the counsel involved.[(16)]

***3. The Beck decision***

Respondent argues that one reason that a Program award of fees and costs should always be made to the petitioner rather than counsel is because the purpose of such an award is to "reimburse" a petitioner for "the liability * * * incurred" to his attorney for fees and costs. (*See* brief filed Nov. 18, 1996, p. 5.) But the concept of a Program petitioner's "liability" to his attorney, in my view, actually cuts *against* respondent's position in this case. The reason is simply that under the decision in *Beck by Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991), a Program petitioner in effect *has no "liability"* to his counsel for fees and costs incurred.

The *Beck* decision interpreted § 300aa-15(e)(3), which states that no attorney may charge any fee for services in connection with a Program case "which is in addition to any amount awarded" by the court under § 300aa-15(e)(1). In *Beck*, the Federal Circuit ruled that under § 300aa-15(e)(3) counsel in a Program proceeding may *not* seek from the petitioner *any* payments, for fees or even for reimbursement of costs advanced by the counsel, in addition to the fees and costs award granted by the court pursuant to § 300aa-15(e)(1). *Id.* at 1032-37. Therefore, as a practical matter, there simply exists no "liability" of a Program *petitioner* to his counsel. Rather, in effect, an attorney in a Program case can look only to the *court* for compensation. There is no effective "liability" for which a *petitioner* needs to be "reimbursed."

To the contrary, the fact that Congress saw fit to extinguish any liability of a petitioner to his counsel, and to instead direct counsel to seek payment *solely* from the Program pursuant to § 300aa-15(e)(1), is in my view strong support for the interpretation of the statute advanced by petitioner's counsel in this case. That is, by enacting § 300aa-15(e)(3), Congress fundamentally changed the nature of the attorney-client relationship, at least as far as the area of attorney compensation is concerned, from the ordinary attorney-client relationship in most types of legal proceedings. In most other contexts, a party and his counsel are free to enter into almost any kind of agreement concerning attorney compensation, and then it is that party's duty to satisfy such agreement. If the party is able to obtain funds from his legal adversary under a fee-shifting statute with which to pay his counsel, that is fine, but in any event it remains the *party's duty* to compensate his counsel. In the Program, in contrast, in effect the basic duty to compensate counsel is *shifted* from the petitioner to the *Program itself*. The petitioner's attorney is *forbidden* to collect directly from the petitioner, and instead must apply to this court for compensation pursuant to § 300aa-15(e)(1), and must accept whatever this court elects to award.

And the fact that this attorney-client payment relationship under the Program is so different from ordinary litigation is, in my view, extremely relevant to the controversy here at issue. That is, under § 300aa-15(e)(3) and *Beck*, the duty of *compensating* petitioners' attorneys under the Program really shifts from the petitioners to the court itself. Therefore, why should the special masters and judges not have the discretion to order payment directly to such counsel? To the contrary, when the statutory provisions at issue here are interpreted, as they should be, in light of § 300aa-15(e)(3) and the holding in *Beck*, there is additional reason to interpret them as conferring *discretion* upon the special masters to order payment directly to counsel in appropriate circumstances.

***4. "Appropriate venue" argument***

Respondent has also argued that this court is not "the appropriate venue" in which "to determine the appropriate distribution of any award for fees and costs between petitioner and her counsel." (*See* brief filed Nov. 18, 1996, p. 6.) Respondent seems to argue that all this court ought to do concerning an application under § 300aa-15(e)(1) is to determine the total amount due, and then to jointly award it to petitioner and counsel. If a petitioner and counsel wish to squabble about the proper distribution, this court need not be bothered, respondent suggests. Rather, an attorney could always sue his client in a local court--or a petitioner could sue his attorney--if the allocated funds were not distributed in an appropriate fashion.

This argument of respondent, first, seems rather callously indifferent to the practical problems sometimes faced by petitioners' counsel under the Program. Respondent would, for example, ignore the plight of an attorney in a situation like the one here, in which the attorney has performed work and is clearly due funds, but obviously has little hope of getting the petitioner to co-sign a check over to counsel. Respondent would leave such counsel with the burden of suing his own client in a local court to obtain a simple signature on a check, an exercise that obviously could be costly and time- consuming. Further, respondent's position would also result in an overall use of judicial resources that is wasteful, by requiring local courts to get into controversies that could easily have been resolved in this court by a special master that was already fully familiar with the

case. Such a court-shifting result would be especially ironic, since one reason for enactment of the Program was to *ease* the burden of vaccine-related tort suits on the state and federal courts of general jurisdiction.

Finally, this position of respondent also seems, as a matter of law, to take too narrow a view of the proper role of this court in supervising the allocation and distribution of Program fees and costs awards. Again, the decision in *Beck*, *supra*, is instructive. (And, again, the position of respondent here is ironic, for in *Beck* the respondent seems to have argued for an *expansive* view of this court's role in supervising the allocation and distribution of Program fees awards.[(17)]) In *Beck*, the petitioner's counsel argued--very much like respondent argues in this case--that a judge or special master of this court should merely determine the *total amount* of a Program fees and costs award, and then remove itself from the question of how that amount is ultimately *divided* between petitioner and counsel. Both this court and the Federal Circuit emphatically rejected that argument. The court of appeals emphasized that this court "was certainly authorized to specify how much compensation was to be paid *to whom*. * * *. Such a specification was * * * a necessary part of [the court's] duty *to allocate victim and attorney compensation* in the manner Congress intended." 924 F. 2d at 1036 (emphasis added). Thus, although the issue here is slightly different, the relevant teaching of *Beck* is that there is no reason why this court, in ruling upon a request for attorneys' fees and costs, should not fully utilize its powers and discretion in order to advance the Program's goals. It seems obvious to me that it will advance the Program's goals if Program petitioners have good access to counsel to assist them in pursuing their claims, and that taking measures such as my direction here, that the check be made payable to counsel, will encourage counsel to participate in Program proceedings. Therefore, it would seem that this aspect of the *Beck* decision would also argue in favor of interpreting the statute to authorize payment of fees and costs awards directly to counsel in appropriate cases.

***5. Respondent's cited case law***

Next, I note that in support of her position in this case, respondent has cited two unpublished orders of judges of this court. (*See* brief filed Nov. 18, 1996, pp. 3, 5.) In doing so, however, respondent has

violated Rule 52.1 of the Rules of this court, which unambiguously states that "[u]npublished opinions and orders of the court * * * *may not be cited by counsel* as authority" (emphasis added). The same rule also states that such unpublished documents "shall not be employed as authority by this court." Therefore, as a special master of this court, I will not myself cite these unpublished materials.[(18)]

***6. Anti-Assignment Act***

Respondent also has suggested, without explanation, that payment of a fees and costs award directly to counsel would violate the "Anti-Assignment Act, 31 U.S.C. § 3727." (*See* brief filed Dec. 23, 1996, p. 3.) I have examined that statutory citation, however, and find nothing that would contradict my legal conclusion here.

The cited statutory section, part of the Anti-Assignment Act, reads, in pertinent part, as follows:

(a) In this section, "assignment" means--

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim * * *.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. * * *

31 U.S.C. § 3727 (1994). Thus, the provision in essence means that when an individual has a claim against the United States, such claim may not be transferred to another until the validity and amount of the claim have been determined and a formal "warrant" for payment of the claim has been issued to the original claimant. Or, more precisely, the statute means that if such a transfer is purportedly made, the transferee *may not enforce the claim* against the United States. *See, e.g., Pittman v. United States*, 127 Ct. Cl. 173, 180, 116 F. Supp. 576, 580 (1953).

I cannot agree that this provision is relevant to the issue here. An example of what the Anti-Assigment Act was intended to prevent is provided in *Kearney v. United States*, 152 Ct. Cl. 202, 285 F.2d 797 (1961). In that case, attorneys brought an action against the United States arising out of a claim that their former clients, the Dollars, had against the government. The attorneys claimed, in effect, that the Dollars had previously transferred to the attorneys a partial interest in their claim against the government. The Court of Claims rejected the suit, holding that "a contract between an attorney and a client which gives the attorney an interest in the client's claim against the Government is exactly what the anti-assignment statute forbids." 285 F. 2d at 800. A situation analgous to *Kearney*, therefore, would occur if a person allegedly injured by a vaccination, who had not yet filed a Program claim on account of the injury, attempted to transfer to someone else the right to collect a Program award of compensatory damages for the injury. Such an assignment would clearly seem to violate the Anti-Assignment Act.

In my view, the situation here is quite different. Petitioner's counsel is not asserting any interest in his client's right to *compensatory damages* under the Program. (Indeed, the petitioner's case was dismissed for failure to demonstrate entitlement to any such compensatory damages.) In contrast to *Kearney*, counsel is not attempting to enforce against the United States an agreement reached between himself and his client. Rather, counsel here is simply seeking fulfillment of a *separate provision* of the Program statute, § 300aa-15(e)(1), which explicitly makes the United States liable--but doesn't specify *to whom* the government is liable--for attorneys' fees and costs.

In short, in arguing that the Anti-Assignment Act applies here, the respondent is essentially "begging the

question" concerning the issue here. That is, logically, for the Anti-Assignment Act to come into play here, one must first *assume* that the right to an award for attorneys' fees is always that of the petitioner, and never that of the counsel. But that is the very issue to be decided in this case.

As a final note concerning the Anti-Assignment Act, I note that another case in which that Act was at issue is also of some relevance here. In *Schwartz v. United States*, 16 Cl. Ct. 182 (1989), this court ruled that the Anti-Assignment Act prohibited an attorney from advancing against the United States a claim that the attorney's former client had against the Bureau of Indian Affairs. As relevant here, however, the court *explicitly contrasted* the result that it reached in *Schwartz* with the result that was reached in *Jensen v. Dept. of Transportation*, discussed above at p. 8, in which the Federal Circuit ruled that an *attorneys' fees award* in a Civil Service Retirement Act case *could* be made directly to the attorney, rather than the plaintiff. In other words, the *Schwartz* opinion indicated the view of that judge that the Anti-Assignment Act would *not* apply to the type of situation here, involving an *application for attorneys' fees* under a fee-shifting statute at the conclusion of litigation.

***7. Issue of costs borne by petitioners themselves***

One other consideration is worthy of a brief discussion. One potential problem with the practice of directing payment of a Program attorneys' fees and costs award directly to an attorney would be the possibility that the attorney might have neglected in the application to claim any costs that the *petitioners themselves* had expended on the case. Safeguards to prevent such a mistake, however, exist.

First, on July 24, 1995, the Chief Special Master issued General Order No. 9 of the Office of Special Masters. This document directed that with respect to *all* fees and costs applications in Program cases (regardless of what form of payment of the award is requested), a statement *signed by the petitioners themselves* is to be included, stating whether the petitioners incurred any costs themselves. This safeguard assures, therefore, in all Program cases, that a petitioner's own incurred costs will not be inadvertently missed.

Second, I note that in this case, petitioner's counsel could not supply such a statement, since his client has declined to communicate with him. However, I gave the petitioner in this case a chance to directly notify this court of any costs that she had borne, by my "Notice" to her dated July 25, 1997. Petitioner, despite apparently receiving this Notice (as indicated by the certified mail return slip contained in the Clerk's file of this case), did not respond.

Accordingly, I find that after taking measures such as requiring the "General Order No. 9" statement, and sending the Notice that I sent in this case, it may be proper in appropriate cases to direct payment of an attorneys' fees and costs award directly to counsel.[(19)]

***8. Summary and conclusion***

My experience under the Program indicates that, as one would hope, the type of circumstances that prompt me to direct payment of the award to counsel in this case are *not* terribly common in Program cases. In most Program cases, whether the petitioner obtains an award of compensatory damages or not, a communicative and cooperative relationship is maintained between petitioners and counsel. Therefore, in such cases, when an award for attorneys' fees and costs is made, it matters not to whom the check is made payable. Even if the check is made payable solely to the petitioners, or jointly to petitioners and counsel, the petitioners are quite willing to sign the check so that the funds intended for their counsel can be received by that counsel. Such a situation exists, happily, in the large majority of Program cases.

However, as with any rule, there are exceptions. Out of the several thousand cases processed under the Program during the last nine years, a number of problem situations have arisen in which attorneys who have delivered services and advanced costs on behalf of Program petitioners have been unable to receive the compensation intended for them under § 300aa-15(e)(1). As noted above, there exist no published opinions under the Program discussing this type of situation. But, based upon unpublished opinions and informal oral complaints of attorneys who have represented Program petitioners, it appears that on a substantial number of occasions fees and costs awards have been made, with checks payable solely or jointly to the petitioners, and the checks have ended up going uncashed, because a petitioner could not or would not cooperate. In some such instances, a petitioner simply cannot be found, and in other cases petitioners have simply refused to communicate with counsel or to sign the checks.[(20)] In some situations, the attorneys involved have simply allowed the checks to go uncashed, finding it too costly or too unpalatable to sue their former clients. In other cases, suits in local courts have in fact been filed. In some cases, special masters have acted as mediators between counsel and petitioners, attempting to coax petitioners into endorsing such checks. Indeed, I am informed that recently certain Program attorneys testified as to the seriousness of this problem before the National Vaccine Advisory Committee. (*See* 42 U.S.C. § 300aa-5.) It seems likely that the existence of this problem, if unresolved, could discourage attorneys from agreeing to represent Program petitioners.

The reaction of respondent to the existence of such unfortunate situations is that a special master should simply shrug and say that "that is the problem of the attorney or of some other court, not my problem." In my view, that would be an incorrect and unfortunate position for this court to take. For all the reasons stated above, it is my opinion that the language of § 300aa-15(e)(1), which does not specify *to whom* an award for attorneys' fees and costs is to be directed, affords the special masters of this court *discretion* to direct payment of an award to counsel, in appropriate circumstances. And I find that the circumstances of this case make it an appropriate one in which to direct payment of the award directly to counsel.

## IV

## SUMMARY AND CONCLUSION

The following amounts are allowed for attorneys' fees and costs:

Attorneys' fees (50.4 hours x $125/hour) $6,300.00

Costs 906.17

Total $7,206.17

Accordingly, my decision is that an award for fees and costs shall be made in the total amount of $7,206.17 pursuant to 42 U.S.C. § 300aa-15(e)(1). Further, the check for that amount is to be made

payable to directly to petitioner's counsel, Mr. Ronan. The Clerk of this court is hereby instructed to ensure that the judgment in this case comports with the direction of the previous sentence.

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, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. There seems to be some confusion whether the "petitioner" in this case is the injured party, Jana Heston, or her mother, Darcy Heston. A close reading of the petition, however, indicates that it was intended that Darcy Heston in fact be the "petitioner," as guardian/conservator for her mentally retarded daughter, Jana. Accordingly, I will refer to Darcy Heston as the "petitioner."

3. Respondent has argued that I should defer any resolution of the claim until petitioner signs a statement specifying any costs that she has incurred personally. But since petitioner has declined to communicate with her counsel, it is appropriate to waive that requirement in this case.

4. The Supreme Court has declared that "[t]he standards set forth in [the *Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley*, 461 U.S. at 433 n.7. Most recently, that Court in *Blanchard* v. *Bergeron*, 489 U.S. 87, 94, 109 S. Ct. 939, 945 (1989), reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

5. Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987) (remanded in part on other issue, 852 F. 2d 1292 (Fed. Cir. 1988)). However, the recent teaching of the courts has been that such adjustments are to be made only in the very exceptional case, on the basis of a specific and strong showing by the fee applicant. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F. 2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, counsel has not requested any such adjustment of the "lodestar" figure.

6. It may be noted that the corresponding provision for compensation in Program cases involving vaccines administered *after* October 1, 1988, § 300aa-15(a), contains very similar language, so that the analysis would not seem to be any different in a case involving a vaccine administered after that date.

7. See *Saunders v. Secretary of HHS*, 25 F.3d 1031, 1035 n. 6 (Fed. Cir. 1994).

8. The scope of the cases in which such non-statutory fee-shifting may take place was greatly restricted in the Supreme Court's *Alyeska* decision, cited above, but it remains an option in some cases.

9. Of course, in the latter three cases discussed above, the court-ordered fees awards were not made under a statute at all. But I have included these cases at this part of my discussion since they illustrate the same principle as the cases under the fee-shifting statutes--*i.e.*, the principle that when a fees award is to be made and the court is not constrained by statutory language such as "to the prevailing party," the courts have found no reason not to award fees directly to counsel, in appropriate cases.

10. 5 U.S.C. § 504 applies to administrative agency proceedings, while 28 U.S.C. § 2412 applies to

"civil actions" in federal courts. Both provisions have been cited as aspects of the EAJA.

11. I note also that an Arizona court of appeals construed a state statute based on the EAJA in the same fashion. *Alano Club 12, Inc. v. Hibbs,* 724 P.2d 47, 53 (Ariz. Ct. App. 1986).

12. See also a similar ruling pursuant to a separate attorneys' fees provision which was part of the Civil Rights Act of 1964, but which contained fee-shifting language identical to that of 42 U.S.C. § 1988. In *Miller v. Amusement Enterprises,* 426 F.2d 534, 539 (5th Cir. 1970), the court stated that under this provision "the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class."

13. This quotes § 3612(c) as it stood at the time of the *Hairston* decision. *See* Vol. 82, Statutes at Large, 90th Cong., 2d Sess. The statute has since been revised, with the attorneys' fees provision now appearing at § 3612 (p).

14. There are also a number of appellate court decisions in which attorneys have been allowed to bring *appeals* from district court decisions denying claims for attorneys' fees, *on their own behalf. See Lipscomb v. Wise,* 643 F.2d 319, 321 (5th Cir. 1981); *Dietrich Corp. v. King Resources Co.,* 596 F.2d 422 (10th Cir. 1979); *Preston v. United States,* 284 F. 2d 514 (9th Cir. 1960); *Angoff v. Goldfine,* 270 F.2d 185 (1st Cir. 1959).

15. That statutory section reads, in pertinent part: "*Any such person shall also receive* an amount of reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(1), emphasis added.

16. I also note that even if one were to consider the "to the petitioner" language of § 300aa-15(b) to be the controlling portion of the statute, I am not necessarily sure that it would therefore automatically follow that a Program fees award could *never* be made payable to an attorney. To be sure, the rulings in *FDL Technologies* and *Phillips, supra,* might seem on their face to put the Federal Circuit in the camp of courts ruling that under fee-shifting statutes authorizing an award "to a prevailing party" or with similar language, the award may *not* be paid to counsel. But that is not completely clear. *Phillips,* unlike this case, did not even involve a request that the award be made payable to counsel rather than the client. As to *FDL Technologies*, on the other hand, a footnote in that decision indicates that the court was heavily influenced by the peculiar concern that the prevailing party was in bankruptcy, so that an award directly to the attorney might be perceived as elevating the status of the attorney over other creditors of the bankrupt, in possible violation of the bankruptcy law. 967 F. 2d at 1580 n. 1. The same footnote also indicates that the *FDL* court may have reached a different ruling if the attorney and client there had something "other than an ordinary compensation arrangement" (*Id.*); and, as will be detailed in part III (B)(3) of this Decision, in Program cases the "compensation arrangement" between attorney and client is *by law* something far out of the ordinary.

Moreover, the vigorous dissent in *FDL Technologies* demonstrates that even within the Federal Circuit, some take the view that even under the "to the prevailing party" species of fee-shifting statute, in unusual circumstances awards *may* be made directly to counsel. *See* 858 F.2d at 1582-86. As as shown in the cases cited in that dissent and cited above at pp. 11-12, many courts have found it appropriate even under that type of statute to direct payment of the award directly to counsel, in appropriate circumstances. In my view, the Supreme Court opinions in *Evans v. Jeff D.* and *Venegas v. Mitchell, supra,* are not to the contrary. They hold only that under fee-shifting statutes like 42 U.S.C. § 1988, a plaintiff may in some circumstances elect to waive an award for her counsel; they certainly do *not* address the issue of whether, once an award is deemed appropriate in a case, it may, in the court's

discretion, be made payable directly to a party's counsel. Further, it may be that the recent new approach to this issue articulated in *Jerry M. Lewis Truck Parts, supra*, may find favor, persuading other courts to allow payment of fees awards directly to counsel in appropriate circumstances.

In short, even in the event that the "to the petitioner" language of § 300aa-15(b) is held to make the fee-shifting statute here analgous to those fee-shifting statutes containing the "to the prevailing party" language, I would still believe that strong consideration should be given to interpreting the statute here as giving the special masters *discretion* as to whom a particular award should be paid. This is especially true because the entire attorney-client compensation arrangement under the Program is distinctly different from that under any of the other fee-shifting statutes, as detailed above in part III(B)(3) of this Decision.

17. Similarly, the respondent's argument in this case also seems contrary not only to what respondent argued in *Beck*, but also to what respondent has argued in many other Program cases. For example, I note that in one currently ongoing controversy, respondent has argued vigorously that in a case where it is clear that the reasonable fees and costs exceed the $30,000 maximum available under § 300aa-15(b), the special master should determine the precise allocation of the $30,000 between the petitioners and a number of different counsel who had represented them. *See Whitecotton v. Secretary of HHS*, Fed. Cl. No. 90-692V, respondent's "Response" filed on Sept. 19, 1997, p. 3 ("the explicit language of the Act [gives this court] discretion in determining an appropriate allocation of the available award"); respondent's "Response" filed June 23, 1997, p. 3 ("It is within the Special Master's discretion * * * to divide [the $30,000] between petitioners and their attorneys.").

18. I do note, however, that both of the unpublished orders cited by respondent involved motions seeking *post-judgment relief*, which is not the case here. Moreover, while both orders did seem to indicate the general view that fee awards are to be made to petitioners, rather than counsel, neither order extensively discussed the judge's reasoning in that regard. Neither order indicated consideration of the factors discussed at parts III(B)(2) and (3) above, nor cited the *Jensen, Saunders*, or *Beck* opinions. Neither discussed the fact that the language of § 300aa-15(e)(1) does not specify *to whom* a fees award is to be made, nor did either order flatly rule out the possibility that a special master or judge may have *discretion* to direct payment of an award directly to counsel, in extraordinary circumstances of the type here. And one of those orders seemed to base its conclusion upon an interpretation of the Anti-Assignment Act, which I discuss at part III(B)(6) of this opinion. Finally, to the extent that my legal conclusion here is in conflict with the legal views expressed in those unpublished opinions, I simply respectfully disagree with those views, concerning this difficult and close legal question.

19. There is also the related possibility that in a particular case a petitioner may have forwarded some type of *fee retainer* to counsel, and is therefore due to have that amount returned once the attorney receives a Program award for attorneys' fees. (It is doubtful under § 300aa-15(e)(3), as interpreted in *Beck, supra*, whether the practice of soliciting such a retainer is legally permissible, but anecdotal evidence indicates that a few Program attorneys may have collected such retainers.) General Order No. 9 also accounts for this possibility, providing that the signed statement by the petitioner shall state whether the petitioner has provided any funds to the attorney. This provision, thus, adds to the safeguards ensuring that awarding fees awards directly to counsel in appropriate cases will *not* likely lead to any situations in which amounts due to a petitioner go to counsel instead.

20. Actually, the fact that a handful of petitioners might refuse to cooperate by signing a check over to counsel should not be too surprising. Program cases, most involving children with devastating disabilities, are often extremely emotionally-charged. My own impression is that many Program petitioners, whose cases clearly do not qualify for an award, nevertheless do believe passionately that their child's heartbreaking condition was vaccine-caused. It is not surprising that in the face of such

emotionally wrenching denials of their children's claims, a few disgruntled petitioners might take the attitude that "if my child gets no money, why should my attorney get money?" Of course, that type of emotional reaction by a petitioner is unfortunate, but it is understandable that it will happen in a few cases.