

**In the United States Court of Federal Claims**

**OFFICE OF SPECIAL MASTERS**

Filed: February 26, 2013

* * * * *		UNPUBLISHED
MOHAMED EDOO, and	*	
JULIET EDOO, parents of	*	No. 04-1795
JUSTIN EDOO, a minor,	*	
	*	
Petitioners,	*	Chief Special Master
	*	Campbell-Smith
v.	*	
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	Vaccine; Autism Spectrum
	*	Disorder (“ASD”); Dismissal for
	*	Lack of Subject Matter Jurisdiction;
Respondent	*	Pending Civil Action
	*	
* * * * *		

Walter Samuel Holland, Miami, FL, for petitioners,

Linda Sara Renzi, Washington, D.C., for respondent.

**DISMISSAL DECISION**<sup>1</sup>

On December 22, 2004, petitioners, Mohamed and Juliet Edoos, filed a short-form autism petition for vaccine compensation under the National Vaccine Injury

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims’s website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id.

Compensation Act (“Vaccine Act”)<sup>2</sup> on behalf of their minor son, Justin. Petitioners alleged that Justin developed autism as a result of vaccines he received.

On August 10, 2012, respondent filed a motion to dismiss this claim as untimely filed.<sup>3</sup> For the reasons discussed more fully below, respondent’s motion to dismiss is **GRANTED** without prejudice.

## **I. Background**

On March 28, 2002, petitioners filed a complaint in the Circuit Court of the Seventeenth Circuit in Broward County, Florida against nine defendants identified by petitioners to be “manufacturers, distributors or suppliers of thimerosal or products containing thimerosal” (“vaccine defendants”). Compl., at 4. Petitioners also named Dr. Federico J. Martinez and Florida Power & Light Company (“Florida Power”) as defendants. Id. at 5.

Petitioners asserted six causes of action against various of the defendants. As their first cause of action, petitioners asserted against all the named defendants, except Florida Power, a “strict liability” claim. Id. at 10. Petitioners claimed that defendants “opted to manufacture, distribute, offer for sale, supply, sell, market, warrant, re-brand, manufacture for others, package, advertise and/or administer . . . [their] products without attempting to protect [petitioners] from the high risk of injury resulting from exposure to the mercury intentionally added to the vaccines.” Id. at 12. Petitioners alleged that defendants’ actions caused “bodily injury . . . pain and suffering, disability, mental anguish, loss of capacity for enjoyment of life, medical and nursing care and treatment, and loss of ability to earn money.” Id. at 13.

Petitioners asserted a second cause of action against all defendants, except Florida Power, for “breach of implied warranty.” Petitioners alleged that the defendants “impliedly warranted that their mercury-containing products were safe for their intended use, but such products in actual fact created an unreasonable risk of bodily harm to

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<sup>2</sup> The National Vaccine Injury Compensation Act is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2006) (“Vaccine Act” or “Act”). All citations in this decision to individual sections of the Act are to 42 U.S.C. § 300aa.

<sup>3</sup> Respondent’s motion to dismiss also contained an objection to petitioners’ motion for interim attorneys’ fees and costs and petitioners’ counsel’s motion to withdraw as petitioners’ counsel. Because this claim is being dismissed, petitioners’ counsel’s motion to withdraw is moot and will not be addressed. A forthcoming ruling will address petitioners’ motion for interim attorneys’ fees and costs.

exposed infants, such as [petitioners' son],” and as a result, petitioners “suffered bodily injury, resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for enjoyment of life, expensive hospitalization, medical and nursing care, and treatment and loss of ability to earn money.” Id. at 14.

Petitioners asserted a third cause of action for “negligence in the manufacture, marketing, and/or sale of mercury-containing products” against all the defendants except Dr. Martinez and Florida Power. Id. at 15. Petitioners alleged that the defendants breached a duty of care owed to petitioners in that they “knew, or should have known, that . . . [their] products would cause serious injury to persons such as the . . . [petitioners' son]” and that their products “contributed to cause, and did proximately cause, the damages and injuries complained of by [petitioners' son].” Id. at 16.

Petitioners asserted a fourth cause of action against only Florida Power for “negligence in the release of mercury-containing emissions from the burning of fossil fuels.” Id. at 17. Petitioners later voluntarily dismissed Florida Power from their federal court action.

Petitioners asserted a fifth cause of action against all defendants, except Dr. Martinez, for “loss of child services, medical expenses, and negligent infliction of emotional distress.” Id. at 18. Petitioners alleged that, “[a]s a direct and proximate result of the injuries suffered by [petitioners' son], . . . [petitioners] have incurred, and continue to incur, considerable medical expenses for treatment of [their son's injuries] . . . [and] have suffered and will continue to suffer mental anguish, depression, anxiety, fear, worry, aggravation, loss of sleep and illness . . . [and] have also lost wages and/or the opportunity to earn wages due to the time spent in caring for [their son].” Id. at 18-19.

Petitioners asserted a sixth and final cause of action against all defendants for “intentional infliction of emotional distress.” Id. at 19. Petitioners alleged that, “[a]s a proximate and legal result of Defendants' negligent acts, omissions, carelessness, and intentional conduct . . . [petitioners] have been caused to suffer and will continue to suffer severe mental anguish, depression, anxiety, fear, worry, aggravation, loss of sleep and illness.” Id. at 20.

On May 17, 2002, the defendants removed petitioners' case to the United States District Court for the Southern District of Florida (“the federal district court”). See Notice of Removal to United States District Court, ECF Docket No. 36, #2. Petitioners filed an amended complaint on September 20, 2002, in which they alleged that “Defendants designed, manufactured, sold, and/or distributed the mercury-laden preservative thimerosal and/or vaccines containing thimerosal.” See Order, ECF Docket No. 36. Petitioners' complaint identified six causes of action against the defendants on Justin's behalf, including: (1) strict liability; (2) breach of implied warranty; (3) negligence; (4) fraud and misrepresentation; (5) civil battery; and (6) violation of

Florida's Deceptive and Unfair Trade Practices Act. Id. at 26-27. Petitioners also identified two causes of action against the defendants, asserted on their own behalf: (1) negligent infliction of emotional distress and (2) intentional infliction of emotional distress. Id. at 18-19.

On September 20, 2004, the district court issued an order to address "various motions to dismiss" made by some, but not all, of the vaccine defendants.<sup>4</sup> Order, ECF Docket No. 36, at 3. The vaccine defendants moved to dismiss petitioners' amended complaint on the ground the court "lack[ed] subject matter jurisdiction over [the] matter pursuant to the National Vaccine Injury Compensation Act." Id. They asserted that the Court of Federal Claims had exclusive subject matter jurisdiction over petitioners' vaccine-related claims. Id. Accordingly, the district court dismissed the claims petitioners brought on Justin's behalf against the vaccine defendants but stayed the claims petitioners asserted on their own behalf, "pending the outcome of the proceedings in the Vaccine Court." Id. at 27. The district court ordered the clerk of the court to "CLOSE this case until further order of the Court." Id. Accordingly, the clerk of the court administratively closed the case. Id.

On December 22, 2004, nearly four months later, petitioners filed their petition in the Court of Federal Claims alleging that Justin developed autism as a result of his receipt of thimerosal-containing vaccines. The vaccine claim was stayed pending the completion of the Omnibus Autism Proceeding.<sup>5</sup> See Autism General Order #1, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

After the completion of the Omnibus Autism Proceedings, respondent sought dismissal of this claim on the ground that the petition was filed more than 36 months "after the first symptom or manifestation of onset of Justin Edo's alleged vaccine-related injury." Mot. to Dismiss, at 1. Respondent asserted that, under section 300aa-16(a)(2), the claim was untimely filed. Id. Based on respondent's review of Justin's medical records, "Justin showed symptoms of his autism spectrum disorder ("ASD") as early as 1 ½ to 2 years of his age" and, "thus [the] petition should have been filed no later

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<sup>4</sup> The court distinguished between the defendants who were indisputably "vaccine manufacturers" as defined in the Act ("the vaccine defendants") and the defendants who "manufactured and/or distributed thimerosal, a component material of a vaccine" ("the thimerosal defendants"). Order, at 14.

<sup>5</sup> The Omnibus Autism Proceeding ("OAP") involved a large group of petitions alleging that certain childhood vaccinations cause or contribute to the development of a serious neurodevelopmental disorder known as "autism spectrum disorder" or "autism." For complete information concerning the OAP, please see <http://www.uscfc.uscourts.gov/omnibus-autism-proceeding>.

than April 26, 2002.” Id. at 2. But “this petition was not filed until December 22, 2004, more than 2 ½ years after the statute of limitations had expired.” Id. at 2-3.

On September 4, 2012, petitioners responded to the motion to dismiss, contending that they had filed their petition timely under section 300aa-11 of the Vaccine Act because they filed their vaccine claim within one year of the closing of their federal court action. Resp. to Mot. to Dismiss, at 1-2. Section 300aa-11 of the Act permits, in certain circumstances, the use of the filing date of an earlier filed civil action for statute of limitations purposes. Petitioners argue that under section 300aa-11, this court must consider March 28, 2002, as the date of filing the vaccine petition because that is the date on which petitioners filed their state court claim. Id. Petitioners reasoned that because the first symptoms of Justin’s ASD appeared in April of 1999, just less than thirty-six months prior to the filing of their state court claim, their petition must be considered timely filed. Id.

## **II. Discussion**

The Vaccine Act provides that:

no person may bring a civil action . . . against a vaccine administrator or manufacturer in a State or Federal Court for damages arising from a vaccine-related injury or death . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death . . .

§ 300aa-11(a)(2)(A). Section 300aa-16 of the statute addresses the period of time within which vaccine claims must be filed.

If a petitioner:

has a pending 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.

§ 300aa-11(a)(5)(B).

The threshold inquiry here is whether petitioners’ federal court proceeding constitutes a “civil action” brought by persons “qualified to file a petition for compensation under the Program” for “a vaccine-related injury.” § 300aa-11(a)(9). If so, the Court of Federal Claims had no subject matter jurisdiction over this petition when it was filed because the federal court action was still pending. See § 300aa-(a)(2)(A).

In September of 2004, the federal district court granted the vaccine defendants' motion to dismiss the causes of action petitioners brought on Justin's behalf, reasoning that the Court of Federal Claims had exclusive jurisdiction over those claims. See Order, at 13. But the district court stayed two causes of action which petitioners had brought on their own behalf, rather than representatively for Justin. The federal district court speciously reasoned that "there is nothing in the Vaccine Act that prohibits a person who is not an eligible petitioner under the Vaccine Act from seeking recovery of [vaccine-related] medical expenses in a forum other than the Vaccine Court." Id. at 18.

As the Vaccine Act instructs, claimants seeking Program compensation must file their petition within prescribed time limits, and cannot file vaccine petitions while similar claims are pending in another court. It is true that the Act does not cover particular aspects of the claims petitioners asserted on their own personal behalf. See § 300aa-11(a)(9). Eligibility for compensation under the Act is limited "only to a person who has sustained a vaccine-related injury or death and who is qualified to file a petition for compensation under the Program." Id. The Act further provides that such claim may be filed by a proper legal representative if the vaccinee is either a minor or incompetent. § 300aa-11(b)(1)(A).

The district court stayed the two causes of action petitioners asserted on their own behalf finding that the two claims were not "barred by the Vaccine Act." Order, at 18. However, among the damages petitioners sought were medical expenses incurred for Justin's vaccine-induced injuries.

As detailed in their cause of action for negligent infliction of emotional distress, petitioners sought compensation for Justin's medical treatment, among other damages. The Act explicitly provides that "medical or other remedial care" incurred by individuals "on behalf of the person who suffered . . . the vaccine-related injury for which the petitioner[s] seek[] compensation" is compensable under the Program. § 300aa-15(a)(1)(B)(i)-(iii). Allowing petitioners to recover such damages both from the Vaccine Program and in federal court would create an inappropriate windfall for petitioners by permitting a double recovery of the same damages. Accordingly, to the extent petitioners were seeking damages that are appropriately compensable under the Vaccine Program in a still pending civil action, petitioners were barred from filing their vaccine petition. § 300aa-11(a)(2)(A); see § 300aa-11(a)(5)(B).

Contemplated in the Vaccine Act is a remedy for petitioners who file a civil action prior to filing a vaccine claim:

If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with respect to the injury or death for which such civil action was brought, the date such dismissed action

was filed shall, for purposes of the limitations of actions prescribed by section 300aa-16 of this title, be considered the date the petition was filed if the petition was filed within one year of the date of dismissal of the civil action.

§ 300aa-11(a)(2)(B).

Thus, if petitioners file a civil suit prior to filing a claim under the Vaccine Act, as in this case, they may still file a vaccine claim, provided the civil action has been dismissed at the time of filing the vaccine petition. The Vaccine Act expressly permits petitioners to rely upon the filing date of an earlier asserted civil action as the filing date of the vaccine petition for purposes of the Vaccine Act's statute of limitations.

Here, petitioners do not dispute that they first filed a civil action for vaccine-related injuries in Florida state court, an action that was subsequently removed to the United States District Court for the Southern District of Florida.<sup>6</sup> What petitioners argue is that, under section 300-11(a)(2)(B), their petition was timely because they filed their vaccine petition within one year after the administrative closing of their federal court action.

Section 300aa-11(a)(2)(B) provides that, under certain circumstances, a petition may be considered timely filed if petitioners first filed a civil action in another court. That statutory provision requires, however, the dismissal of the civil action before the petition is filed. If the civil action is not dismissed first, the vaccine petition is barred under the Act.

Here, the district court administratively closed petitioners' case after dismissing the claims petitioners brought on Justin's behalf and staying the remaining two claims that petitioners brought on their own behalf. In one of the remaining causes of action before the federal district court, however, petitioners sought the recovery of damages that are covered under the Program. Before filing their vaccine petition here, petitioners must have dismissed those portions of their civil action for vaccine-related injuries that are

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<sup>6</sup> In their response to the motion to dismiss, petitioners only asserted their claim was timely filed under section 300aa-11(a)(2)(B), the statutory provision limiting suit against vaccine manufacturers in the absence of a filed vaccine petition. Petitioners did not address the issue of whether their petition was impermissibly filed under section 300aa-11(a)(5)(B), which prohibits the filing of a vaccine petition while a claim for vaccine-related injury is pending in another court, presumably because respondent did not address that issue either. The undersigned construes petitioners' failure to distinguish the claims they brought on their own behalf and those brought on Justin's behalf as implicitly acknowledging that the former constituted a prohibited "proceeding for compensation . . . for a vaccine-related injury." § 300aa-11(a)(1). See § 300aa-11(a)(2)(A).

compensable under the Vaccine Program to avoid a duplicative recovery. § 300aa-11(a)(2)(B). Petitioners failed to do so.

Petitioners assert that the district court's administrative closing of their case constitutes a dismissal under section 300aa-11(a)(2)(B) of the Vaccine Act. But, the case law instructs otherwise. "Administrative closings comprise a familiar . . . way in which courts remove cases from their active files without making any final adjudication . . . . [They are] used in various districts throughout the nation in order to shelve pending, but dormant, cases." Lehman v. Revolution Portfolio, LLC, 166 F.3d 389, 392 (1st Cir. 1999) (emphasis added). An administrative closing of a proceeding in federal court is tantamount to a stay. See Mire v. Full Spectrum Lending, Inc., 389 F.3d 163, 167 (5th Cir. 2004) (holding that a district court staying proceedings while administratively closing the case "is the functional equivalent of a stay, not a dismissal").

For purposes of section 300aa-11(a)(5)(B) of the statute, a stay does not constitute a dismissal, Carlson v. Sec'y of Health & Human Servs., 23 Cl. Ct. 788, 791 (1991), because "[t]he term 'pending' [in section 11(a)(5)(B)] means awaiting action, and any action that has not been formally dismissed is awaiting action." Hamilton v. Sec'y of Health & Human Servs., 28 Fed. Cl. 315, 318 (1993). Thus, because petitioners' federal court action was not formally dismissed until April 2012, it was still pending at the time of filing their December 2004 petition. This court lacked jurisdiction over the vaccine petition as initially filed because it was barred under section 300aa-11(a)(5)(B). Accordingly, this claim must be dismissed. Id.; cf. Johns-Manville Corp. v. United States, 855 F.2d 1556, 1567 (Fed. Cir. 1988) (holding that the Court of Federal Claims did not have jurisdiction over a stayed case still "pending" in federal district court, which is prohibited under 28 U.S.C. § 1500). Because petitioners impermissibly filed this claim while a civil action was still pending, the undersigned dismisses the petition and need not reach the issue of whether the petition was timely filed for statute of limitations purposes, as the parties dispute. See Flowers v. Sec'y of Health & Human Servs., 49 F.3d 1558, 1559 (Fed. Cir. 1995) (petitioner's claim for compensation under the Vaccine Act dismissed for lack of jurisdiction because the claim was filed while a civil action for the same alleged injury was pending); see also Aull v. Sec'y of Health & Human Servs., 462 F.3d 1338, 1344 (Fed. Cir. 2006).

### **III. Conclusion**

Respondent's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. The petition is hereby **DISMISSED WITHOUT PREJUDICE**.

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Chief Special Master