

On December 21, 2006, Jeanette O'Dell, acting pro se, filed a second Vaccine Act petition ["2006 petition"] on behalf of Trent. Both petitions were filed pursuant to Vaccine General Order #1,⁴ using "short-form" petitions for compensation.⁵ When the issue of duplicate filings came to light, an order concluding proceedings in the 2006 petition was issued. Order, filed May 12, 2009.⁶

Petitioners' original petition, like most others in the OAP, remained on hold until discovery in the OAP was concluded, causation hearings in the test cases were held, and entitlement decisions were issued. Petitioners were ordered to file some medical records during the period between the test case hearings and the final appellate action on the test case decisions. Petitioners complied with my order and filed Petitioners' Exhibits ["Pet. Exs."] 1-11 in 2009.

After the final test case appeal was decided, I ordered petitioners to inform the court if they wished to pursue their claim. Order, filed October 19, 2010. Petitioner Jeanette O'Dell responded with a letter indicating that she wished to continue to pursue the claim. I then ordered petitioners to file a statement identifying their theory concerning how Trent's vaccines had caused his autism spectrum disorder. Order, filed Nov. 8, 2010. The causation statement, filed November 19, 2010, referenced both theories considered and rejected in the test cases, but also indicated that Trent was genetically

filed all records in his possession by May 14, 2009, he was unsuccessful in finding another attorney to take petitioners' case, and they thereafter proceeded pro se.

⁴ The text of Autism General Order #1 can be found at <http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf> ["Autism Gen. Order #1"], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

⁵ By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B (HIB) vaccinations; or by some combination of the two.

Autism Gen.Order #1 at Ex. A, p. 2 (footnote omitted). This order created the Omnibus Autism Proceeding ["OAP"], in which all short-form petitions were placed. In effect, most actions on these petitions were stayed, pending the resolution of "test cases" subsequently designated by the Petitioners' Steering Committee ["PSC"], a group of attorneys representing the interests of all petitioners in the OAP. A more comprehensive discussion of the OAP and the PSC can be found at *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

⁶ The May 12, 2009 Order Concluding Proceedings for the 2006 petition indicates that I conducted a status conference on May 8, 2009, with petitioner, her attorney on the original petition, and counsel for respondent to discuss the two petitions filed pertaining to Trent's injuries. During the status conference, Ms. O'Dell orally requested that I dismiss her 2006 petition.

vulnerable to vaccines, based on his father's exposure to radiation and chemicals in Operation Desert Storm.

On January 7, 2011, respondent filed a motion to dismiss this case, asserting that the petition was not timely filed. I deferred ordering petitioners to respond, pending an en banc decision of the U.S. Court of Appeals for the Federal Circuit addressing the Vaccine Act's statute of limitations. See Order, filed Jan. 14, 2011. The Federal Circuit's decision was issued on August 5, 2011. See *Cloer v. Sec'y, HHS*, 654 F.3d 1322 (Fed. Cir. 2011). After the *Cloer* decision was issued, I afforded the parties the opportunity to file additional matters. Order, filed Aug. 19, 2011.

Ms. O'Dell responded with a letter filed on August 30, 2011, indicating that she had filed a claim in state court in 1999, and asking that the case "remain open based on the original filing date." Included with her letter were two documents, a 1999 order by a Fulton County, Georgia judge appointing a permanent process server for that state court, and an affidavit of service signed by the same process server in a case filed by petitioners in Fulton County, Georgia, state court. The case, No. 2002 VS 041485,⁷ was styled *Jeanette E. O'Dell and L. Howard O'Dell, II vs. Aventis Pasteur, Inc., et al.* The affidavit reflected service on the defendant Aventis Pasteur, Inc., on November 20, 2002.

Because a prior civil action could toll the statute of limitations pursuant to § 11(a)(2)(B),⁸ I ordered petitioners to file copies of the original complaint filed in state court, and copies of any action concerning dismissal of that complaint. Order, filed Sep. 2, 2011. Ms. O'Dell responded in a letter filed on September 15, 2011. She indicated that she was unable to locate copies of the original documents pertaining to her civil action and expressed uncertainty about the original date of filing.

On September 20, 2011, I filed two documents as Court Exhibits ["Court Exs."] I and II, which were obtained from an on-line docket search conducted to clarify the issues in this case. The state court action referenced by Ms. O'Dell was filed on November 18, 2002, and transferred to Gwinnett County, Georgia, state court in 2008. Court Ex. I. A search of the Gwinnett County State Court's docket indicates that the civil action was dismissed without prejudice on motion by plaintiffs' counsel on October 22, 2009. Court Ex. II.

⁷ This case number suggests that Ms. O'Dell was mistaken in indicating that the state court action was filed in 1999. Ms. O'Dell indicated that she was uncertain about the date of filing of the civil action in her September 15, 2011 submission.

⁸ This subsection indicates that if a civil action is filed in a case cognizable under the Vaccine Act without first filing a Vaccine Act petition, the date the civil action is filed may be used to toll, or stop the running, of the Vaccine Act's statute of limitations. Ms. O'Dell's various filings regarding the statute of limitations issue indicate her reliance on this statutory provision, but there are several problems with that reliance, discussed in more detail below.

On September 29, 2011, respondent filed a supplemental response to her motion to dismiss, addressing the impact of the prior civil action on this case, as well as the impact of the Federal Circuit's decision in *Cloer*. Petitioners have not filed a supplemental reply.

Two factors affect the continued viability of petitioners' claim. The first factor is when the first symptom or manifestation of onset of the alleged vaccine injury occurred. To be timely, the petition must have been filed within 36 months of that occurrence. See § 300aa-16(a)(1). The second factor is whether petitioners' 2002 civil suit affects the Vaccine Act claim for Trent's injuries. See §§ 11(a)(2), 11(a)(5)(B). Based on all the evidence filed up to this point, I conclude that the first symptom of the alleged vaccine injury occurred more than 36 months prior to the filing of the Vaccine Act petition, and thus that the petition was untimely filed. I also conclude that the first symptom of the alleged vaccine injury occurred more than 36 months prior to the filing of the civil action in state court. The reasons for these conclusions are addressed in Section III (A), below

I cannot determine from the information currently filed regarding the civil action in state court whether that civil action involved only damages claims on behalf of petitioners alone or whether it stated a claim for Trent's injuries as well. Thus, I am unable to rule that the petition was improperly filed (as respondent urges) or that I should apply the date of filing of the civil action to toll the running of the statute of limitations (as petitioners urge). The effects of the prior civil action on this case are addressed in Section III (B), below.

Petitioners have the burden to demonstrate that their case was properly and timely filed. Based on my analysis of the evidence in this case, petitioners have not met their burden, and thus petitioners are ordered to show cause why this case should not be dismissed. **Because the filed records are sparse and incomplete, I will afford petitioners the opportunity to file additional records regarding onset of Trent's symptoms and the initial diagnosis by Dr. Janus.** Nevertheless, in view of Ms. O'Dell's own assertions about the onset of Trent's injuries and the date of filing of the civil action, it appears that Trent's claim was either untimely or improperly filed, and the filing of these documents is unlikely to salvage this claim. **I also afford petitioners one final opportunity to file a copy of the complaint filed in Fulton County, Georgia state court.**⁹ However, I note that, for the reasons contained in Section III (B), the complaint is highly unlikely to aid petitioners in salvaging their Vaccine Act claim.

⁹ It appears from Court Ex. II that petitioners were represented by counsel in this state court action, as the dismissal of the case in Gwinnet County State Court was on motion by plaintiffs' attorney. Their attorney should be able to provide them with a copy of the original complaint.

II. Evidence Concerning Vaccinations, Symptoms, and Diagnosis.

The evidence filed to date in this case is scant, consisting of a few pages of medical records, a questionnaire petitioners completed for an attorney who never entered an appearance, and some test results, in addition to Court Ex. I and II.

The evidence establishes that Trent was born on October 3, 1996. Pet. Ex. 5, p. 1. He received a number of routine childhood immunizations between December 13, 1996 and January 20, 1998 (the date of the last recorded vaccination). Pet. Exs. 1, p. 1; 5, pp. 1-2. The filed medical records are otherwise very incomplete. See Pet. Ex. 5 (covering some records from 2000-2001); see *also* Pet. Ex. 10 (intake form for law firm, identifying treating physicians for whom no records have been filed).

One page pertaining to an autism spectrum disorder diagnosis was filed as Pet. Ex. 4. It is dated February 4, 2000, from the office of Dr. Linda Nathanson-Lippitt, at the Children's Habilitation Center, in Smyrna, GA. The record indicates that Trent was seen for "Guidance on helping develop normal communication, behavior, and diet" and reflects diagnoses of "Autism Spectrum disorder," "Obsessive/compulsive traits," and "Auditory processing dysfunction."

Based on Pet. Ex. 4, I can conclude that Trent must have exhibited sufficient autistic symptoms prior to February 4, 2000 to warrant an autism diagnosis.¹⁰ According to Pet. Ex. 10, Trent experienced language regression when he was 30 months old. Given his date of birth, he was 30 months old on April 3, 1999.

Ms. O'Dell's November 19, 2010 causation statement provides information regarding an even earlier date of onset. Ms. O'Dell stated that Trent had not developed any "usable language" by two years of age and was thereafter diagnosed by a neurologist as having autism. Trent was two years old on October 3, 1998. Ms. O'Dell also indicated that the MMR vaccination, which Trent received on January 20, 1998 (see Pet. Ex. 1), caused a reaction resulting in his autism. Causation Statement, filed Nov. 19, 2010. Additionally, Ms. O'Dell has stated she did not know Trent was autistic until he was three years old. Petitioners' Sept. 15, 2011 and Sept. 27, 2011 submissions.

The weight of the evidence indicates that Trent was diagnosed with autism sometime between two and three years of age, or between October 1998 and October 1999, given his date of birth of October 3, 1996.

¹⁰ It is unlikely that this record represents Trent's initial diagnosis of autism. According to Pet. Ex. 10 at 4, Trent saw a neurologist identified as "Dr. Janus" who diagnosed him with autism or pervasive developmental disorder, but the document does not indicate when the diagnosis was made.

III. Arguments and Analysis.

Respondent asserts that not only is this claim untimely filed, but that the petition itself is a nullity because it was filed while a civil action was pending. Petitioners' arguments are less clear, but it appears that Ms. O'Dell relies on the date of filing of the civil action to argue that Trent's claim was timely filed. Alternatively, she makes equitable arguments to urge me to permit the Vaccine Act petition to continue.

Based on the evidence filed, I conclude that Trent's claim was untimely. Because the evidence is sparse, I am affording petitioners the option to file additional evidence, but note that in view of the diagnosis contained in Pet. Ex. 4, any new evidence is unlikely to change my conclusion.

As to the reliance placed by both parties on the civil action, the evidence currently filed is inadequate to allow me to draw the conclusions urged. Respondent's claim that the civil action renders this petition improperly filed rests on an unproven assumption—that the civil action involved a claim for Trent's own injuries, rather than merely one for his parents' loss of consortium. Petitioners' reliance on the civil action suffers from the same evidentiary lack, but also from a more fundamental flaw. Regardless of the relief sought in the civil action, petitioners are caught up in a legal "Catch 22."¹¹ In order to use the date the civil action was filed to toll the statute of limitations, the civil action must have been one cognizable under the Vaccine Act. If it was, then the petition in this case was, as respondent contends, improperly filed because it was filed while a civil action was pending. Even if I could do as Ms. O'Dell urges and use the date of filing of the civil action as the date by which to measure timely filing of this Vaccine Act case, I would still conclude that this case was not timely filed.

Finally, with regard to petitioners' equitable arguments, equitable tolling does apply to Vaccine Act claims, but I conclude that it is not available under the circumstances of this case.

I address each of these issues in turn, below.

A. Untimely Filing.

1. The Statutory Requirements.

The Vaccine Act's statute of limitations provides in pertinent part that, in the case of:

a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation

¹¹ "Catch 22", the title of a 1961 book by Joseph Heller, has become a euphemism for being caught in an inextricable predicament or a "no-win" situation.

under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury. . . .”

§ 300aa-16(a)(2).

2. Interpreting the Statute of Limitations.

To determine if this case was timely filed, I must determine when the first symptom or manifestation of onset of the alleged vaccine injury occurred. Once that date is ascertained, I then compare it to the filing date of Trent’s petition to determine if the petition was filed within the Vaccine Act’s 36 month statute of limitations.

Because petitioners filed their petition on behalf of Trent on March 12, 2004, the first symptom or manifestation of onset of Trent’s autism cannot have occurred before March 12, 2001, in order for the petition to be considered timely. See *Markovich v. Sec’y, HHS*, 477 F.3d 1353, 1357 (Fed. Cir. 2007) (holding that “either a ‘symptom’ or a ‘manifestation of onset’ can trigger the running of the statute [of limitations], whichever is first”); *Cloer*, 654 F.3d at 1335 (holding that the “analysis and conclusion in *Markovich* is correct. The statute of limitations in the Vaccine Act begins to run on the date of occurrence of the first symptom or manifestation of onset.”).

The evidence establishes that Trent had a diagnosis of autism by February 4, 2000. In order for autism to be diagnosed, symptoms must precede the diagnosis.¹² This date of diagnosis renders the petition untimely by some 13 months. Additionally, Ms. O’Dell’s own statements reflect symptoms of autism occurred even earlier than February 2000. She has asserted that Trent had an unspecified reaction to his January, 1998 measles vaccination, leading her to attribute his autism in part to that vaccination. Causation Statement, filed Nov. 19, 2010. She has also alleged that he had language delay at age two (Trent turned two in October 1998) and was diagnosed with autism thereafter. According to Ms. O’Dell, Trent experienced a language regression at about 30 months of age. Thus, it is likely that Trent displayed symptoms of and was diagnosed with autism sometime between two and three years of age, or between October 1998 and October 1999, rendering this claim untimely by several years.

B. The Civil Action.

If a civil suit is filed in state or federal court without first filing a Vaccine Act petition and properly exiting the Program, the Vaccine Act requires that court to dismiss the suit. § 300aa–11(a)(2)(B). The Vaccine Act provides that “the date such dismissed action

¹² See *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044, at *36 - *39 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 706 (2009) and *Dwyer*, 2010 WL 892250, at *29 - *32 (noting diagnosis of autism requires observation of behavioral symptoms in three different domains).

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 the dismissal of the civil action.” § 300aa-11(a)(2)(B); see also *Lauder v. Sec’y, HHS*, No. 06-758 (Fed. Cl. Spec. Mstr. Apr. 9, 2007) (order vacating the filing date on Mr. Lauder’s second Program petition and substituting a filing date of January 1, 2005, the date his civil action was filed). If more than one year passes between the dismissal of a petitioner’s civil action and the filing of his petition, petitioner may not invoke the § 300aa-11(a)(2)(B) savings provision. *Flowers v. Sec’y, HHS*, 49 F.3d 1558, 1562 (Fed. Cir. 1995).

Based on the records filed to date, it is impossible to determine the nature of the relief sought in the civil action filed on November 18, 2002. There are two possibilities. First, the civil action might have asserted only a claim for Mr. and Ms. O’Dell’s loss of consortium, based on Trent’s alleged vaccine injury. Second, the civil action might have been one seeking relief, in whole or in part, for Trent’s own injuries.

I discuss each possibility, and the effects on the motion to dismiss, separately. In summary, however, petitioners are caught in a dilemma with regard to the civil suit. In order for them to rely on its date of filing, the suit must have been one cognizable under the Vaccine Act—one for Trent’s own injuries. But, if the suit were one for Trent’s injuries, the current Vaccine Act petition is improperly filed, because the civil suit was still pending when the petition was filed. Finally, even if I dismiss the instant petition based on the pendency of a civil action at the time the petition was filed, any new petition could not be timely. Petitioners cannot use the filing date of the civil action to toll the statute of limitations on any new petition because the civil action was dismissed in 2009, more than one year ago. Section 11(a)(2)(B) requires any new petition to be filed within one year of the dismissal of the civil action to use the filing date of the civil action in the manner that petitioners urge..

1. A Civil Suit for Loss of Consortium?

The style of the case suggests that the civil suit was one based solely on Ms. and Mr. O’Dell’s own injuries or loss of consortium. There is no indication in the style of the case that the suit was one filed in a representative capacity.

A claim seeking damages for Trent’s parents’ loss of consortium would not be barred by the Vaccine Act. The Vaccine Act does not authorize compensation for loss of consortium claims. See *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004); *Schafer v. American Cyanamid Co.*, 20 F.3d 1 (1st Cir. 1994). See also *Abbott v. Sec’y, HHS*, 19 F.3d 39, 1994 WL 32656 (Fed. Cir. 1994) (Table) (a parent’s recovery of civil damages for loss of consortium is a separate action from that available to her son’s estate under § 300aa-11(c)(1)(E)).

If the civil suit was only for Trent's parents' loss of consortium, then respondent's arguments that the Vaccine Act petition was improperly filed can be summarily rejected. The statute is plain:

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

§ 300aa-11(a)(5)(B). Because a civil suit for loss of consortium would not be cognizable under the Vaccine Act, it cannot be one for a "vaccine-related injury or death" as those terms are used in § 300aa-11(a)(2)(A). Thus, the pendency of this civil suit for Trent's parents' loss of consortium would not have barred the filing of the Vaccine Act petition for Trent's own injuries.

However, if the civil suit could not be brought under the Vaccine Act, the civil suit's filing date has no effect on the statute of limitations for the Vaccine Act claim. The "savings clause" permitting the use of the date of filing of the civil action as the tolling date for the statute of limitations would be inapplicable. The savings clause applies only to civil court filings that are barred by § 300aa-11(a)(2)(A), and a loss of consortium claim by the parents of a vaccinee is not so barred.

Stated differently, if the civil action only addressed Mr. and Ms. O'Dell's loss of consortium claim, and did not encompass a claim for Trent's injuries, it would not be barred by the Vaccine Act. But, if the civil action was not barred by the Act, it cannot affect the running of the Vaccine Act's statute of limitations. *Cf. Brown v. Sec'y, HHS*, 111 F.3d 145 (Fed. Cir. 1997) (petitioners may not avail themselves of the savings provision in § 300aa-11(a)(2)(B) because their previously filed suit was an administrative claim, not a civil complaint in state or federal court).

2. A Civil Suit for Trent's Own Injuries?

If the civil suit sought damages for Trent's own injuries, then respondent's argument that the petition in this case¹³ was improperly filed is meritorious. *Aull v. Sec'y, HHS*, 462 F.3d 1338, 1344 (Fed. Cir. 2006) (holding that the failure to dismiss a civil action involving a vaccine injury before filing a Vaccine Act petition required dismissal of the petition as improperly filed); *Flowers*, 49 F.3d at 1562. However, there is scant evidence that the civil suit involved Trent's own injuries, a requirement that respondent appears to have overlooked in her filings.

A very tenuous argument could be made, based on the parties in the civil suit, that it encompassed Trent's own injuries. Eli Lilly was one of the defendants in the civil action. Court Ex. II (listing of parties to the action). Eli Lilly manufactured thimerosal, a

¹³ The same analysis would apply to the 2006 petition, as it was filed while the civil action in Georgia state court was still pending.

mercury-based preservative found in childhood vaccines manufactured before 2002, but did not manufacture vaccines. Other civil suits filed against Eli Lilly¹⁴ have asserted that the thimerosal preservative was an adulterant, and not a vaccine component, in an effort to circumvent the Vaccine Act's requirement that all suits for a vaccine injury caused by a covered vaccine must be first brought under the Vaccine Injury Compensation Program and resolved in some manner before initiation of a civil action. See §§ 11(a)(2)(A); 21, 33(5) and (7). However, most courts that addressed the issue found that thimerosal was a vaccine component and thus suits alleging it caused a vaccine injury must first be filed under the Vaccine Act. Any civil suit seeking damages¹⁵ for a vaccinee for an injury allegedly caused by thimerosal-containing vaccines is one cognizable under the Vaccine Act, and must be dismissed by the state or federal court in which it is brought.

Ms. O'Dell seeks to use the date the civil suit was filed, November 18, 2002, as the operative date for determining if her Vaccine Act petition was timely filed. In so doing, she is at least implicitly arguing that the civil suit was one cognizable under the Vaccine Act – a claim for Trent's own injuries.

The savings provision of § 300aa-11(a)(2)(B) does permit the use of the date of filing of a civil action as the tolling date for the statute of limitations. However, § 300aa-11(a)(2)(B), by its own terms, must be read in conjunction with 300aa-11(a)(2)(A).¹⁶ Taken together, they require the following series of events: (1) the filing of a civil suit for an injury cognizable under the Vaccine Act; (2) dismissal of the civil suit because no Vaccine Act claim had been filed and resolved, and (3) the filing of a Vaccine Act petition within one year of the date of dismissal of the civil suit. Under these circumstances, petitioners who erroneously filed civil suits barred by the Vaccine Act may use the filing date of the civil suit, in place of the filing date of the vaccine petition, for purposes of determining if their vaccine claim was filed within the Vaccine Act's 36 month statute of limitations. *Cloer*, 654 F.3d at 1343.

¹⁴ See, e.g., *Liu v. Aventis Pasteur*, 219 F. Supp. 2d 762 (W.D. Tex 2002); *Laughter v. Aventis Pasteur*, 291 F. Supp. 2d 406 (M.D. N.C. 2003); *Benasco v. American Home Products, et al*, 2003 WL 2217470 (E.D. La 2003); *Murphy v. Aventis Pasteur*, 270 F.Supp 2d 1368 (N.D. Ga 2003). In 2002, then-Chief Special Master Golkiewicz also ruled that the Vaccine Act encompassed thimerosal claims. *Leroy v. Sec'y, HHS*, 2002 WL 31730680 (Fed. Cl. Spec. Mstr. Oct. 11, 2002).

¹⁵ The precise language of the Vaccine Act bars a “civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal Court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury. . . .” § 300aa-11(a)(2)(A). Once a Vaccine Act petition is filed, a petitioner may exit the Vaccine Program and file a civil suit only if (1) a judgment issues on the Vaccine Act petition, and the petitioner rejects the judgment and elects to file a civil action or (2) if the Vaccine Act petition is withdrawn because the special master or the court fails to act on the petition within the time periods specified in the Vaccine Act. See §§ 300aa-11(a)(2)(A), 300aa-21(a)-(b).

¹⁶ Section § 300aa-11(a)(2)(B) provides in pertinent part:

If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action (emphasis added).

The relief Ms. O'Dell seeks is unavailable, however, because both of the petitions in this case were brought before the civil action was dismissed. Even if she now dismissed this petition, she could not relate the filing of any subsequent Vaccine Act petition back to the date of filing of the civil suit, because more than one year has elapsed since the dismissal of the civil action.

Finally, even using the November 18, 2002 date of filing of the civil action, it is likely that this claim is untimely. At the time the civil action was filed, Trent was over six years old. Given Ms. O'Dell's own statements in court filings and exhibits that Trent had no usable speech by age two and speech regression by 30 months of age, the first symptom of his autism occurred well over 36 months before the date the civil action was filed.

C. Equitable Tolling.

In *Cloer*, the Federal Circuit held that equitable tolling of the statute of limitations is permitted in Vaccine Act cases. However, the court declined to equate equitable tolling with a discovery rule.¹⁷ *Cloer*, 654 F.3d. at 1345. Instead, the court discussed the applicability of equitable tolling in cases involving fraud or duress (citing to *Bailey v. Glover*, 88 U.S. 342, 349-50 (1874)), "extraordinary circumstances" adversely affecting an otherwise diligent litigant (citing to *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)), and cases of timely filing of a procedurally defective claim (citing to *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

Although likely not exhaustive, these examples provide no basis to apply equitable tolling under the circumstances of this case. There is no evidence of fraud, duress, or extraordinary circumstances here. Petitioners' Vaccine Act claim was filed long after the Vaccine Act's 36 month statute of limitations had expired. Their state court action cannot assist them in overcoming this defect. Either it rendered their Vaccine Act petition improperly filed (filed while a civil suit was pending) or it involved claims for injuries other than those sustained by Trent, and thus has no effect on the statute of limitations here.

IV. Conclusion.

For the reasons set forth above, **petitioners are ordered to show cause why this case should not be dismissed. Additional arguments based on the state court civil action will not be considered unless petitioners file a complete copy of the original civil complaint. Additional arguments based on the statute of limitations itself must be accompanied by evidence, including but not limited to Trent's pediatric records from birth through the date of his initial autism diagnosis. Petitioners shall file any additional documents and medical records with the court**

¹⁷ A discovery rule would start the running of the 36 month statute of limitations from when a petitioner knew or had a reason to know that a vaccine caused the vaccine-related injury.

by Tuesday, December 20, 2011. Failure to file by this date will result in the dismissal of this claim for untimely filing.

Any questions regarding this order may be directed to my law clerk, Adriana Teitel, at (202) 357 – 6363.

IT IS SO ORDERED.

Denise K. Vowell
Special Master